LAW
and
THE SOCIAL SCIENCES

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THE SOCIAL SCIENCES

edited by
Leon Lipson and Stanton Wheeler

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CONTRIBUTORS

Richard L. Abel
University of California, Los Angeles
Shari Seidman Diamond
University of Illinois, Chicago
Phoebe C. Ellsworth
Stanford University
Marc Galanter
University of Wisconsin, Madison
Julius G. Getman
Yale University
Jack P. Gibbs
Vanderbilt University
Jeffrey L. Jowell
University of London
Edmund W. Kitch
University of Virginia
Leon Lipson
Yale University
Stewart Macaulay
University of Wisconsin, Madison
David R. Mayhew
Yale University
Sally Falk Moore
Harvard University
Austin D. Sarat
Amherst College
Richard D. Schwartz
Syracuse University
Stanton Wheeler
Yale University

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INTRODUCTION

Leon Lipson and Stanton Wheeler
Yale University

The Committee on Law and Social Science, appointed in 1974 by the Social Science Research Council, became convinced that the time was at hand for an assessment of research in law and the social sciences.[1] Although the volume is in a formal sense a committee product, in a larger (and we think truer) sense it is the product of a generation of scholars—mostly social scientists and law professors—who believe that the perspectives, data, and methods of the social sciences are essential to a better understanding of the law.

This introduction has three main purposes:

1. to orient the reader to the history of the relationship between law and the social sciences in the United States as organized enterprises, objects of study, academic disciplines, means of social action, and forms of social intervention;
2. to explain the approaches taken by the contributors in this volume, giving a brief notion of the contents of the chapters in the volume and their connections with one another; and
3. to report and hazard some conjectures on some of the principal trends in the law-and-social-science field that may be inferred from the various chapters in the volume.

[1]The members of the committee were Phoebe C. Ellsworth and Lawrence M. Friedman, both of Stanford University; Marc Galanter, University of Wisconsin; Leon Lipson, Yale University (chairman); Sally Falk Moore, Harvard University; Nelson W. Polsby and Philip Selznick, both of the University of California, Berkeley; and Stanton Wheeler, Yale University. David L. Sills served as staff to the committee.

BACKGROUND

The wellsprings of the modern law-and-social-science movement—as its members came to think of it—may be found in two related ideas that were already in evidence by the turn of the twentieth century among some social scientists and academic lawyers.

The first was the growing perception that law is a social phenomenon and that legal doctrine and legal actors are integral parts of the social landscape. Because they are a part of social life, legal phenomena both stimulate changes in other social institutions and are affected by social changes and pressures occurring elsewhere in the society. The law also serves to codify social relations, to make them more explicit, and to impart structure to them. If legal events and actors are thus interwoven with the society, understanding legal phenomena requires examining them not in isolation but in relation to the surrounding social world.

This observation sounds so obvious in the late twentieth century that one wonders how it could ever have seemed otherwise. It is useful, then, to recall the position taken by Christopher Columbus Langdell, professor and dean at Harvard Law School, roughly a century ago. Langdell located the science of law among the other activities of a great university, justified the university as the proper place for the training of lawyers, and had a vision of the subject matter that made the recommended intellectual activity appropriate:

> [It] was indispensable to establish at least two things: first that law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a university will best consult its own dignity in declining to teach it. . . . If . . . there are other and better means of teaching and learning law than printed books . . . it must be confessed that such means cannot be provided by a university. But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have traveled the same road beforehand,—then a university and a university alone, can furnish every possible facility for teaching and learning law. . . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the Museum of Natural History is to the zoologist, all that the botanical garden is to the botanist.

If all the materials for the science of law lay in "printed books," then there would be no need to inquire into other ongoing behavior—of judges, courts, lawyers, juries, or other legal actors—no need, in other words, for the kinds of studies and analyses carried out by participants in the law-and-society movement. And if one used those legal materials primarily to discern legal principles, the capacity of legal life to reflect the nature of the society in which it was located would have remained hidden from view. It was just this capacity that was brilliantly illustrated by Emile Durkheim in his imaginative use of the ratio of civil to penal law in a society as an index of changes in social solidarity.

The second idea underlying the law-and-social-science movement was that legal institutions not only are embedded in social life, but also can be improved by drawing upon the organized wisdom of social experience. Here the pragmatic and the scientific combine to provide a new way of assessing legal doctrine and legal practice. In its less technical

form, this view is reflected in the assertion, made by Oliver Wendell Holmes in the 1890s, that the life of law has not been logic but experience. Its most prominent early example among legal materials is the famous "Brandeis Brief" of 1908, which examined dozens of reports of the actual working conditions and experiences of women in factories in a successful effort to help the state of Oregon justify its protective labor legislation in court. The principle that courts, advocates, and scholars should look beyond the cases and the case doctrine to real-life circumstances became one of the cornerstones of the development of legal realism later in the twentieth century.

Later still, a more precise method of organizing certain legal-social experience was worked out for the study of the effect that the enactment of rules by a legislature, or the pronouncement of doctrine and decision by a court, or the promulgation of administrative regulations would have on the behavior of persons and institutions. These "legal impact studies" took on increasing intricacy and formality as policy-makers and scholars learned the importance of attending to desired and undesired effects, to unintended or unforeseen consequences, and to changes that occur as relevant conditions change over the lifetime of a rule.

In its more technical and scientific form, the application of behavioral science to law had equally ardent advocates and detractors. In retrospect, it seems fair to say that many of the advocates were less than fully appreciative of the difficulties encountered in attempting to do relevant and significant social research on legal issues, and thus often claimed more than they could deliver. Manifestoes were eloquent; methodologies, ambitious; results, modest. The advocates often encountered a stridently defensive group of legal academics who were all too ready to pounce on the frailties with professionally specialized acumen as a basis for dismissing the enterprise. Early in the twentieth century, a few American legal scholars built on the work of European social scientists, especially Durkheim and Weber; men like Holmes and Pound recognized the potential of the social sciences for contributing to legal analysis. The rise and decline of legal realism in the United States during the 1920s and 1930s has been well documented and has left some substantive monuments such as the work of Karl N. Llewellyn and E. Adamson Hoebel in legal anthropology. By the end of World War II, the law, science, and policy tradition had had its beginnings at Yale in the collaboration of Harold D. Lasswell and Myres S. McDougal.

The enterprise of law and social science that is reflected in these pages is an outgrowth of the enormous expansion of the social and behavioral sciences that took place in the 1950s and afterward in the United States, building on wartime and postwar research and training. That general movement brought new funding for social research through the establishment of the National Institute of Mental Health and the social-science division of the National Science Foundation. It was also marked by a period in which private philanthropy, most notably the Ford Foundation, made significant grants for large-scale social research (the most prominent result in law-and-society work being the jury studies made by Harry Kalven, Jr., Hans Zeisel, and their colleagues).

The application of behavioral science to law was made easier by three other trends that emerged during this period. First, after World War II major works of European social theory were translated and published in English for the first time, so that the works of Weber, Durkheim, and others became more easily accessible to the American scholarly community. The rebirth of interest in European theory had a second effect: American social scientists moved away from the strong rule-skepticism characterized by the period

of legal realism to entertain at least the idea that the study of law could deal with the role of legal principle and legal reasoning in the behavior of legal actors—without becoming in itself an entirely normative enterprise. The result is that many of the studies that have emerged more recently have a joint focus that attends to rules and their interpretation, as well as to the more concrete behaviors of legal actors.

Finally, the singular case of the American caste system and the major Supreme Court decision concerning it, *Brown* v. *Board of Education of Topeka* (1954), highlighted the role, dubious as it was for many, of the social sciences as potential influences on legal policy. Perhaps even more important, the *Brown* case and its aftermath provided a visible, powerful instance of the impact of law on society and in that way stimulated research on law.

Taken together, these developments created a fertile ground for the institutionalization of interdisciplinary work in law and the behavioral sciences. Although the particulars of the developments differed by discipline in ways far too detailed to be recited here, it seems fair to say that something like a "law-and-society" movement was generated during the 1950s and that it grew so much in the 1960s and 1970s that there is by now a large body of findings, propositions, and conjectures worth analyzing in an assessment volume.

There are many signs of the field's institutionalization. There has been a consistent flow of funding specifically for work in law and social science since at least the late 1950s, when the Social Science Research Council—with support from the Ford Foundation—began to give postdoctoral grants for research on American governmental and legal processes. This program ultimately became a responsibility of a new Council Committee on Governmental and Legal Processes (1964–72). In the early 1960s, the Russell Sage Foundation began to devote a major portion of its resources to the law-and-society field. Beginning in the early 1960s and continuing for over a decade, Russell Sage funding provided the principal resources for training and research in law and the social sciences. The funding took three interrelated forms. (1) It provided substantial support to those institutions willing to commit themselves to interdisciplinary programs in law and the social sciences. The first programs were established at the University of California, Berkeley; at the University of Wisconsin; at Northwestern University; and at the University of Denver. Later programs of varying degrees of intensity and duration were established at Yale, Harvard, Stanford, and the University of Pennsylvania. The funding enabled the development of interdisciplinary courses and seminars and support for faculty members and graduate students committed to the enterprise. (2) The Russell Sage Foundation established a fellowship program for a select group of scholars to pursue interdisciplinary training, often at universities that were receiving institutional support. The training, often for two-year periods, enabled the scholars to develop the background that would facilitate a career commitment to interdisciplinary work. (3) The Russell Sage Foundation provided funding for major pieces of sociological research and often published the results of that research. This three-pronged support provided by Russell Sage—for institutions, for individual training, and for research—gave momentum to the law-and-social-science enterprise.

Of special importance in the United States was the development of a new program in law and social science at the National Science Foundation (NSF). The NSF had been funding basic research in the social sciences for many years, but it had never developed a specific program to support research in law and social science. In 1972, such a program

was initiated, along the lines of other NSF programs: the screening and selection of research proposals through a system of peer review and the award of research grants to successful applicants. Although the total budget is small (around $1 million a year), it provides a basis for the continuity of research and of research interests. Those receiving awards include anthropologists, economists, political scientists, psychologists, and sociologists, along with those trained primarily in law. Other patterns of support have been institutionalized in a number of European countries: for example, at various Max Planck institutes in Germany and at the Centre for Socio-Legal Studies at Oxford.

The growth of the enterprise is also reflected in the birth of associations and journals devoted specifically to interdisciplinary concerns. In the United States, the Law and Society Association represents a large portion of this interest. The association's annual meetings are attended by lawyers as well as by social scientists. The *Law & Society Review*, the official organ of the association, has been in existence for over fifteen years. A strategically important role was played also in the late 1960s and early 1970s by the Council on Law-Related Studies under the leadership of David F. Cavers, who before moving from Duke to Harvard had been active in founding *Law & Contemporary Problems*.

By the end of the 1970s, many university departments in faculties of arts and sciences had provided recognized home bases for social-science students of law: the sociology of law in departments of sociology, the psychology of law in psychology departments, and so forth. The picture in law schools was different. The law-and-society enterprise once stood pretty much on its own in the law school world; but by now legal history, like law-and-economics, has emerged as a separate program, with its own cast of characters, its own field of application, and its own doctrine. Legal philosophy has had a more diffuse impact in law schools, while the perspective called critical legal theory has gained many adherents. As a consequence of these developments, what was once thought of as the law-and-society enterprise—economics apart—is fighting for space among all the others. The behavioral sciences have remained relatively stable except for beachheads here and there, while the others have grown faster.

THE PLAN OF THIS BOOK

This is at bottom a volume of assessment: it is not a collection of speculative essays and not a set of reports on fresh research. It is designed with attention to three dyads, which in turn are interlocked.

First, the authors of the chapters are about evenly divided between contributors trained and working primarily in law, and those trained and working primarily in one of the social sciences. (One chapter and the introduction are written jointly by different pairs of authors of two different orientations.) Each contributor, however, is conversant with work and problems across the range of relevant disciplines; several of them are formally or informally trained in both law and a social science; most of them hold academic appointments in "well-mixed" faculties or schools; and most are engaged in training and supervising students who attend law schools as well as students who study in faculties of arts and sciences.

Second, the scope of each chapter was fixed not by its supposed disciplinary boundaries but by the importance or interest of the subject and the work done on it, although it will be obvious to the reader that in some cases the topic leans toward one "-ology" more than it does to others.

Third, each chapter contains, in slightly different ratios, both an exposition of the author's point of view and a survey of the pertinent literature—to which, in most cases, the author of the chapter has been a substantial contributor. It ought not to be hard for the reader to make the relevant distinctions.

It would be impossible to summarize the information and opinions presented in the substantive chapters without compressing an already condensed text to an indigestible consistency. We limit ourselves here to some illustrative highlights of their message, reserving the next section for more abstract themes that cut across many of the contributions.

• It has been a commonplace of critics at least since the time of Tocqueville that law spreads to cover ever-more aspects of American life while (or because?) other dimensions of organization such as religion, tradition, community, and fraternity give ground under various current pressures. Sometimes the critics have disagreed, or doubted whether the tendency toward legalization has generally worked for or against equality, for or against participation, for or against justice.

One concomitant of the law's success was that theories about law tended until rather recently to be developed within the legal profession and thus to have a high normative component, no matter whether the theorist's attitude was positive or negative. Social scientists have been exhorted by (academic) lawyers since the 1920s to pay more attention to the law; but the same jurists who thought they welcomed the attention cherished the arcane and thus sometimes forbidding accouterments of the guild. Most law firms probably would have resisted scholarly scrutiny of their part of the legal profession as intrusive, unethical, and irrelevant. In commenting on a proposal that large law firms be studied by legal scholars, an illustrious lawyer once told an illustrious university president, "Let them study the provision of legal services to the poor!" It was not until the 1970s that many academic lawyers accepted as good form the activity of studying law teaching and practice as an enterprise not less respectable than poets writing poems about the writing of poetry or playwrights writing plays about actors or writers. As attention thus came to be focused on the legal profession in the law schools, in part as a result of the interests of scholars engaged in what they termed critical legal theory, observation and analysis were devoted to the possible role of the organization of law school training and lawyering in preserving established hierarchies.

For this reason among others, in the first half of the century the sociology of the legal profession was not a very prominent part of the sociology of the professions: the economics of legal institutions, of lawsuits, and of law firms was not a very favored subject among economists; the anthropology of law did not attract many anthropologists, at least in the field of the law of "advanced" societies; political scientists had and seemed to prefer their own ways of analyzing the state and constitutions.

• One role played by social scientists persisted and has even grown in importance, throughout the changes in the relationship of theoretical perspectives: that of practical applications to the solution of legal problems.

Whatever the views about the wisdom of social science applications in the desegregation arena, it is by now only one of an enormously varied number of applications of social science in trial and appellate courts as well as in legislative and administrative settings. Behavioral-science arguments and evidence have been prominent in many issues concerning evidence and testimony such as the reliability of eyewitness testimony, in cases of race or sex discrimination, in death penalty litigation, in the issues surrounding the

location of nuclear energy plants, in questions of jury size and composition, in cases involving natural disasters, as well as in such earlier applications as economic analysis in connection with patent and copyright claims. In some of these areas, the social-science component is neither auxiliary nor ancillary; rather, it lies at the core of the legal claim and the evidence in its behalf. Thus, it is being institutionalized, to some extent, in legal practice, in funding, and in interdisciplinary journals.

Academic lawyers doing "empirical" work may work with or study under social scientists for information and method; the apparent precision of statistical arrays and operations, deceptively implying the possibility of transforming quantity into quality, may have impressed some lawyers or convinced them that judges and juries would be impressed, despite the admonitions of statisticians and social scientists. Law schools sometimes add social scientists to their teaching faculties, encourage law-trained faculty members to add social science training to their skills, and even permit students to take courses elsewhere in the university from lesser breeds.

Social scientists, meanwhile—especially in the recent past—sometimes take advantage of these needs to promote access to legal materials and lawyers for research agendas of their own. Off to one side, the historians have been digging into legal materials, turning up with their spades the messy counterexamples that the past obtrudes on law professors' generalizations.

• Social scientists, trying to blend immanent and external perspectives in looking at law, have recently turned to the settlement of disputes as an object of analysis. Dispute settlement has promised to reward the efforts of anthropologists, historians, communitarians, devotees of critical legal theory, and reformers. Descriptively, the focus on dispute settlement offers a hope of measuring the amount and intensity of certain kinds of claim making and claim adjusting, and thus of getting a handle on litigiousness that goes beyond the observation (itself problematic) of formal litigation. Normatively, it appealed to interests—not always held in common—in cheapness, community, informality, efficiency, and perhaps also in reducing the power and income of lawyers. For some, the very idea of a plurality of dispute-settling institutions, autonomous with regard to the state, would help to retard the growth of Leviathan. Books and articles sported the theme of law without lawyers, law without sanctions, and justice without law. Some of the studies found that some extrajudicial procedures such as commercial arbitration caught on and became established to the extent that they limited or adapted features of the regular legal system. Others suggested that deep and persistent features of American societal development pressed the polity toward a centralizing legal system which, though it might sacrifice some virtues, would help to avert greater vices; to use the language of game theory, this view defended law as a "minimaximizer." At another level of theorizing, some scholars have warned that the focus on dispute settlement should not be taken to imply that the practice of law is limited to representation of clients in disputes.

• One contributor works outside the United States (Jowell), and foreign experience is indirectly reflected in several of the other chapters. Enough is reported to disclose the affirmative and negative forms of the institutional fallacy: that is, the error of supposing that two institutions bearing the same name must serve the same function in two societies, and the error of supposing that a given function cannot be performed in a second society if it lacks an institution by which that function is performed in the first. Unexpected parallels attest the presence of similar difficulties, although not necessarily of comprehensive "convergence": for example, in their domestic businesses, American

entrepreneurs and Soviet managers alike often fail to pursue breach-of-contract remedies, theoretically available, because they wish despite the breach to have continuing relationships with the other parties. In one polity, the profit-and-loss statement seems to suffer, in the short run; in the other, the complaint is made that the Plan is distorted by the forbearance of the putative plaintiff; but the businessmen in both polities may well know what they are doing.

• For a profession that prides itself on distrusting large generalizations, the law operates on the basis of implicit tenets whose power is great while they last, although their life may be short. It is true that philosophers of law were not held in great esteem in the United States in the period between the decline of the prestige of Germanic scholarship (about the time of World War I) and the rise of liberal rationalist generalists in the early 1970s. Yet the generalizing enterprise continued under other banners with faint devices on them: rationalizing, harmonizing, promoting uniformity, restating, celebrating the substantive virtues exercised obliquely by procedural nicety, and exalting reverence for constitutions and constitutionalism. More recently, the virtues of economic analysis of legal dynamics have been acclaimed, and the acclamation in turn criticized; some efforts have been made to apply to the law methods used in, or at least reported from, linguistic philosophy, structuralism, and literary criticism; Marxism and other sometimes-critical theories have been brought to bear on the ideological and economic aspects of law work in a contest where the participants recriminate with mutual charges of mystification. Time was when the social sciences found reflection in legal literature chiefly in the form of methodological manifestoes. Now that social science research in law has ramified and deepened, we may be entering a period of declamatory empire building, not by the partisans of law and social science but by advocates of more traditional legal scholarship.

CROSS-CUTTING THEMES AND TRENDS

Although the chapters of the book are focused on various substantive areas and lean primarily on different disciplines, they share several partially overlapping preoccupations. These cross-cutting themes and trends may point in the direction of future research and action.

Power The chapters on integration and conflict, on private government, on varieties of legal order, on participation, and some of the others refer to instances of continuing tension between private and public ordering of behavior; between diffused and concentrated power; between power in its formal, modern legitimation through the political process and power in its economic and social modes, made partly convertible with other modes through law as well as other processes. Certain activities of all or part of the public are regulated by contractlike arrangements between government and subsets of the people, a development that observers called, with some alarm, the *Kammerstaat* (roughly, corporate state) when they noticed it a generation ago in central Europe. Several chapters—for example, on administration and on private government—deal with the conflicting values of keeping or making public officials accountable and allowing them the discretion without which they cannot do all of their work. In the chapters on deterrence, social science in the courts, and normative issues one can see the contemporary version of venerable arguments over the causes of violation and evasion of the law and, even more problematic, the causes of compliance. The chapters on economic

analysis, private government, and varieties of legal order, among others, sketch informal mechanisms for coping and finagling, or (to change the metaphor) social lubricants of the creaky joints in the formal machinery.

Design and Function These themes are counterpointed against the themes of power. Lawyers are supposed to be specially competent to invent, facilitate, and obstruct connections among purposes, policies, rules, and forms; almost all the chapters give instances of success and failure therein. Accountability versus discretion, mentioned above, is paralleled here by the tension between uniformity of administration and responsiveness to small variation. The neatness of hierarchical organization is counterposed to the flexibility of bargaining and negotiation. In the system in which individuals enter the legal profession, accidents of design and function—which may not be quite accidental—have produced a curious matching stratification of students, law schools, occupational roles, and intellectual perspectives.

Symbolic Several observers of American law have noticed the conflict between the mystique of legal formality, routine, and language and the pressure for explicitness and candor on the part of courts, legislatures, administrators, and other figures in authority. Sociologists, social psychologists, cultural anthropologists, and social critics have looked at law as ritual, drama, theater, morality play. Students of language and of the legal profession, especially the legal historians, have drawn attention to the changing waves of emphasis between the (inseparable) expressive and instrumental uses of law. Those who wonder at our secular devotion to constitutionalism have linked it both to the historical need for cultural integration and to the philosophical dispute over the immanence of obligation, a connection that leads to the questions about the sources of compliance mentioned above under the theme of power.

Costs This theme is not an economist's monopoly. In less explicitly pecuniary terms and in other vocabularies, several of the contributors to this volume have taken up the problems of externalities, transaction costs, secondary effects—usually undesired and unplanned—of legal intervention, problematic primary effects (legal impact studies), and occasional secondary gains. The legal system, when measured by most ordinary criteria, seems so obviously inefficient to many that the second-degree revisionists, criticizing the critics and suggesting that the legal system serves to direct resources to their most efficient use by some appropriate standard, feel impelled to meet the charge of paradox.

Institutional Although the vast literature on legal education is not fully reviewed, some suggestions are made here and there about the duality of law school training and research as partly professional and partly academic. Studies of the interaction between the legal profession and the public raise questions of the degree of penetration of the legal system into lay *mores* and of the degree to which lawyers and jurists have and discharge an ethical obligation to reach the public in disseminating the legal culture. That the legal profession has grown much more attractive, and a little more accessible, as a subject of academic study by social scientists from various disciplines is itself a significant fact of recent legal history.

Dynamic Lawyers in common-law jurisdictions have long been comfortable, and some have been adept, in analyzing adjudication as a means by which doctrine could be progressively cleansed. In some branches of the law, especially those touched more insistently by history and historians, they have thought about changes over time in the presuppositions of jurisprudence. Now, thanks to the increasing intervention of social scientists or social science in legal research, lawyers' attention is being drawn also to social change; to changes in institutions; to the modification of language over legally relevant intervals of time (control of language through education, caste monopoly of legal vocabulary and professional diction, changes in connotations and currency of terms, changes in style of legal language). The events of administration, legislation, and negotiation are coming more and more to be seen as ordered in a flow, a process of interactive approximation to an end sometimes willed but more often speculatively inferred. Lawyers already have rich informal experience in the workings of organization; now they are being introduced to the more systematic discussions among organization theorists, especially the analysts of bureaucracy, concerning the ways in which organizations not only persist (although the original purposes may obsolesce) but even develop new and invigorating objectives, to which in turn they must be adapted. All of these changes take place at rates which themselves may change; students of law and society have to keep an eye on the primary curve as well as on its derivatives.

Like most collective efforts, the book is less comprehensive and less unified than we should have liked. Some omission was early and deliberate: for example, we decided not to cover the vast field of the administration and substantive doctrine of criminal law (apart from the chapter on deterrence) because so much recent compendia and assessment had been published that more would be only marginally useful. Volumes that themselves consist of secondary evaluation are relatively neglected. The committee regrets that arrangements made for other contributions by scholars from outside the United States did not bear fruit. All the contributors feel that more could well have been said on the details of the practice of law, on the application of economic theories and methods to a wider variety of legal issues, on the language of the law, and on other important subjects that we have ignored or compressed. For all that, we are convinced that the volume gives ample testimony to the vitality of sociolegal research as it has been practiced over the last quarter of a century.

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1

LEGAL SYSTEMS OF THE WORLD

An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources

Sally Falk Moore
Harvard University

INTRODUCTION

All airports of the world look alike. But the political and legal systems of the countries in which they stand have not been similarly amenable to slick homogenization. Nor are they likely to become fully standardized in any foreseeable future, uniform codes notwithstanding.

The fact of legal/cultural heterogeneity, and the consequent possibility of comparison, is a basic resource for research in the social sciences. The intention of this chapter is to encourage more adventure into this field by facilitating entry. It examines some scholarly classifications of legal systems, together with the theoretical assumptions that lie behind them. Because of the author's biases the typologies and theories that touch on anthropological concerns will be commented on more extensively than others. But the more general aim is to compile a brief bibliographical essay that can be used as an introductory guide to existing classifications, comparisons, and descriptions of the legal systems of the world.[1] My intention is to serve as a Baedeker for those who want a glimpse of the territory that could be traveled, offering hints about some places that are scenic even when glimpsed from the library, and warning about others where the academic waters are not always potable.

What are the assumptions that underlie global attempts to compare or to classify? Is there law in all societies? Can legal systems be compared as wholes? Is it possible to

[1] This essay was completed in the Spring of 1979. It has been partially updated (in 1984) but time constraints made it impossible to rereview systematically the literature outside the field of anthropology.

compare the social order of a group of hunters and gatherers with law in an industrial society? To what end? What is the purpose of broad comparative studies of legal ideas and practices?

Anthropologists, who have been in the comparison business for a long time, argue that at the very least comparisons unsettle ethnocentric preconceptions of what is natural. A knowledge of other societies makes ours look as constructed as theirs. A dose of comparison also brings to light some constants in the human condition, suggesting the limits of the likely and the boundaries of the possible.

The present objective is much more limited: to make available, even to the timid, a means of entering the vast and jumbled literature on the range of world systems and to point out some issues that have arisen in description and typologizing. Far from being confined to one discipline, the literature includes works by lawyers, historians, political scientists, economists, sociologists, and anthropologists. The very different provenances of the descriptive and analytic work have produced great variety in the treatment of the subject matter. The literature on "other" legal systems includes "problem-oriented" analytic work shaped by the concerns of the social sciences as well as descriptive materials that could easily be the subject matter or raw material of such analysis. The variety of approaches is intimidating, to say nothing of the number of pertinent works. There are no means of being both brief and comprehensive in the face of such a literature. The existence of useful bibliographies and summaries will be noted here to facilitate the task of compression.

The materials in this essay are arranged roughly according to the socio-logic of scale. The largest sociolegal arena, the world, is addressed first, and lesser units follow in descending order of social complexity and cultural heterogeneity. Starting with the international and multinational order, the essay proceeds down the scale of organization to nations that are internally plural in culture and law, next takes up certain legal systems of nation-states academically conceived of as unitary, and closes the review of "types" and "levels" with small-scale societies and "primitive" legal arrangements. This is followed by a final section describing several relatively recent synthesizing works that use comparative materials. Three mount arguments about the direction of legal change but tend to ignore the international and the plural dimensions, with all their conflictual implications. The last emphasizes the deep differences of cultural perspective that lie behind legal traditions in the world today and warns against any easy assumptions about potential consensus.

The term "legal system" is used loosely here, and with some misgivings. "System" is not meant to convey any necessary mechanical or logical consistency or coherence (see discussion in Moore 1978b, "Introduction"). For English speakers, the most familiar referent of "legal system" is that complex aggregation of ideas, practices, principles, institutions, and rules (and ways of making and unmaking them) commonly referred to as "law" in modern American-Anglo-European culture. And by analogic extension the terms "law" and "legal system" are also used (here and in the literature) to refer to ideas and practices in other societies when in function or in form they have some characteristics in common with what is thought of as law, or the domain of the legal in the West.

At first glance, analogic comparisons of this kind seem straightforward enough. But hidden in them are vexing problems of comparability. For example, if a functional definition of law works well for "other" societies, what about applying the same logic to

the West itself? Though in the West law is attached to government, in fact, many lawlike functions are performed by "private" organizations. Variations in the division of labor between public government and "private" organizations in the mixed economies of the world and the official absence of the private sector in some socialist countries are only two examples of the many complications arising from cross-cultural definitions that start from Western and formal legal biases. There are many others. One means of overcoming some of these analytical problems is to leave doctrinal definitions aside and to examine the social facts with particular processes clearly in mind. One can ask, for example, to what degree the social fields within the boundaries of any particular nation or region or other entity are operating semi-autonomously, whatever the official definition of the relationship to government and law (Moore 1978b). This gets at the process, the workings, at what is actually operative in the way of superordinate directed control, and reveals what elements of autonomy are retained, and where formal law fits into the picture.

But the literature reviewed here is not itself organized in terms of such questions. What comes into view instead are three major paradigms used for wide-ranging comparisons and classification. One emphasizes the multicultural-plural dimension. A second is strongly centered on comparing the Euro-Anglo institutions and relegates "other" systems to a residual category. The third is fundamentally evolutionary in approach.

The multicultural-plural model is obviously appropriate to international law, to law in nations that were formerly colonial possessions, as well as to the law of certain other multiethnic polities. But the issues raised by the analysis of situations of legal pluralism are not merely polite matters of doctrinal conflict of laws. They impinge on serious political tensions. The U.N. Charter gives peoples the right to self-determination. But in practice, what does that mean? Both in the world as a whole and in nation-states with internally diverse legal systems there are dangerous and volatile questions involved in determining whose legal system shall govern particular situations and considering whether diverse systems can continue side by side. No less stirring are the connected issues of whether certain human and political rights should be universally recognized or to what extent particular groups of persons should have the right to determine the nature of the social order in which they live.

Scholars musing on the future of law in the Western democracies would be shortsighted to ignore the controversies over plural law that preoccupy many of the other countries of the world. Those issues may well spill their explosives into our gardens. Indeed, some related problems are already close to home. The themes of legal pluralism versus universalism and legal diversity versus uniformity, and the questions raised by the dominance of one legal system over another, or the way law differentiates among populations, are everywhere politically controversial in the extreme.

In contrast to the emphasis on diversity and potential conflict in the "legal pluralism" approach, both the Euro-Anglo-centered classification and the evolutionary one tend to treat each legal system as if it were a culturally and politically unitary entity. What I have called the Euro-Anglo-centered form of classification of legal systems is much less political and much more technical in its concerns than the plural one. It embodies the Western lawyers' perspective, which used to make its big distinction between civil-law systems and common-law systems, between systems derived from the Roman law tradition, with its emphasis on codification, and those founded on the common-law tradition of Britain, with its ideological emphasis on the courts and the judiciary. Both of these

traditions—civil and common law—have spread throughout the world thanks to the effects of colonial administration, warfare, and economic expansion. Usually added to this basic pair are various other categories: a category for socialist/communist systems, a category for legal systems founded on religion, such as Islamic law, Hindu law, and the like; and a miscellaneous residual "other" category for the indigenous legal systems of those many parts of the world that have not been associated with recently significant political forces.

While the Euro-Anglo-centered classification reflects the scholarly and regional biases of its users, it is not an evolutionary scheme. Humility and internationalism have overcome earlier tendencies in such a direction. The Euro-Anglo-centered scheme has the peculiarity of being founded on the supposed *source* of law in each system. Yet, on close inspection, there are serious questions about the appropriateness of giving such prominence to origins rather than to current sociological reality. The Euro-Anglo-centered classification is not analytically inspiring, but it is an important traditional ordering of material. It comes out of a long heritage of comparative legal scholarship in the West, which has gradually become geographically more comprehensive but not much more focused on social theory.

The third paradigm for broad comparison, the evolutionary, is surely the most fundamental as part of the intellectual heritage of the nineteenth century. (For a brief, lively set of lectures on the background of the subject, see Stein 1980.) Though social evolution has been much argued about since, the nineteenth-century assumptions of Sir Henry Maine, Lewis Henry Morgan, Karl Marx, and Friedrich Engels and, in the early twentieth century, the works of Emile Durkheim and Max Weber still strongly affect the shape of much large-scale comparison in law, whether the new writings are cast to agree or disagree. Questions about the coercive role of the state, about "communitarian" society, about power, privilege, and stratification, and about the rights of the individual were the meat and potatoes of the evolutionists a hundred years ago. In the 1960s there was a powerful revival of these concerns, which is still evident in the literature. Ideas about legal evolution have, for some, become a way of commenting on present politics. In addressing the evolutionary perspective, this essay dwells particularly on classical themes that divide anthropologists in their assessments of "primitive law" and in their approaches to legal ethnography. That section concludes with a synopsis of some of the writings of Roberto M. Unger, Donald Black, Philippe Nonet and Philip Selznick, and Clifford Geertz, all of whom use comparative materials to interpret modern law in very broad terms and to guess at its future.

Are global comparisons really possible? Does any individual have the competence to embrace this vast subject? The very idea is humbling. The quantity of information is monstrous, the amount of detail overwhelming, the linguistic problems considerable. Understandably, those bold few who have tried global comparison, at least nominally, have all used drastic taxonomic measures to reduce the glut of information to manageable proportions. Some of their works are organized around a preconceived and tightly argued thesis. The comparative material then figures essentially as confirming illustration. The alternative is a kind of encyclopedic compendium. The first method, however interesting, has no objectivity. The second, however painstaking, has no analytic force. What follows offers some samples of each approach, along with some other studies and bibliographies (largely limited to those in English) through which the great range of variety of legal systems may be discerned and some current theoretical directions pointed out.

MULTICULTURAL ARENAS AND PLURAL LEGAL SYSTEMS

Some Comparative Approaches to International Law

Karl Llewellyn used to speak of law-government in one breath, virtually as if it were one word—and indeed, for many practical, modern, mundane purposes, this association between law and government is in every way justified (Twining 1973). But it is also obvious that not all the phenomena related to law and not all that are lawlike have their source in government. Recognition of this fact is one of the most prominent characteristics of recent social-science approaches to law. Even in the presence of government the functioning of law depends heavily on nongovernmental economic, social, and political factors.

Anthropologists have long known that some societies operate without government but nevertheless have social order, political organization, and lawlike institutions. In the simplest societies, there is no overarching corporate organization that encompasses and governs the member units (see, for example, Middleton and Tait 1958; Smith 1974). In such acephalous societies, links between member units and systems of common norms are maintained in ways independent of any centralized authoritative organization.

Hierarchical systems, from chiefdoms to modern nations, add "vertical" structures of authority to their many internal "horizontal" interlinkages. By contrast, the modern international arena—a field to which laws pertain and the locus of major political events and the site of enormous international and transnational organizational activity—is, of course, not held together by any world government. There is no corporation of the world, no nation of humankind, though there are international and transnational corporate groups. To the extent that the international field is a political arena without government, it has some formal resemblance to primitive multigroup arenas—a parallel Michael Barkun has noted in his *Law Without Sanctions* (1968). I must admit some reservations about the utility of this analogy.

In *Law Without Sanctions* Barkun approvingly quotes the anthropologist E. A. Hoebel (1954): "International law, so-called, is but primitive law on the world level" (Barkun 1968, p. 32). Hoebel's position derived from his view that the principal progressive characteristic in the evolution of law is the gradual change from primitive "private" enforcement of norms by "interested" parties acting in their own cause to enforcement of norms by impartial "public" authorities. In the modern world, Hoebel predicted, world government would be the culmination of this process, the next evolutionary step. To a great extent he identified the growth of law and order with the growth of centralized government.

This potential for the future development of world government, however, is not the focus of Barkun's argument. The parallel Barkun emphasizes is that, in the absence of central authority, there can nevertheless be structural stability in a system of relations among politically independent social units. In Barkun's view, the point of interest is the process by which this stability is produced among autonomous entities. He contends that the balanced opposition of clusters of military allies operates to maintain the structure both in primitive segmentary lineage systems and in international relations. He also contends that in both contexts, the idea of "jural community" is important and that it is marked by "shared procedures" and "shared perceptual categories" (p. 84).

Barkun used E. E. Evans-Pritchard's description of the pastoral Nuer of the Sudan as the "type" of the segmentary lineage system (Evans-Pritchard 1940). Barkun—the

political scientist committed to systems theory—may have taken too literally an abstraction by Evans-Pritchard—the anthropologist—of the ideal way the segmentary lineage was supposed to work. Barkun uses the idealized version of the Nuer system to stress the point that, in international relations as in such stateless societies, "[p]reservation of systemic stability is due to some form of self-regulation rather than to a clearly constituted superior authority" (p. 32). It is the multicentric, horizontal structure of the two "systems" represented by the Nuer and modern international law—the putative balances involved and their effects—that Barkun finds striking.

A peculiar distortion is embedded in the logically beautiful but historically improbable assumption that balanced opposition was the basis of peace in segmentary systems, even if that idea expresses the native ideological conception of the system rather than Evans-Pritchard's invention. First, such systems are ethnographically known to have been characterized by chronic small-scale fighting. A well-known article argues that segmentary lineages are a convenient political form par excellence for predatory expansion (Sahlins 1961). Furthermore, a balanced opposition is by no means the only way to maintain temporary stability in multicentric systems. An imbalance produced by clear advantage, even if temporary, on one side can also keep the peace so long as the weaker side and its allies do not feel powerful enough to challenge the stronger. Redressing imbalances, it can be argued, is as likely to engender new fighting as to produce peace (see Meggitt 1977 on warfare in New Guinea).

The containment of conflict to small-scale fights in segmentary systems may be related much more closely to the simple economy and rudimentary technology of these societies than to organizational features. Barkun has taken a particular view of the cold war—the suspension of large-scale hostilities because of equal power and equal dread—as a durable systemic balance and made it applicable to certain acephalous primitive systems. But the analogy may be false, both because segmentary systems probably did not, in fact, operate as they have sometimes been thought to and because, to whatever extent the localism of small-scale fighting is an analogous result in tribal and modern conditions, it probably arises from other causes.

Nor should there be confusion between systemic continuity and peace. There are many political systems in which the structure has a good deal of durability but in which violent conflict is endemic (Black-Michaud 1975). The type of patterned relationship, and the way it is perceived, may remain largely the same, while the dominant persons or groups may shift from time to time as the result of conflict. This situation has been as true of segmentary lineage systems, in which control over land or water by particular segments changed after armed clashes, as it has been of chronic princely rebellions in certain forms of kingdom. The same obtains in the modern world for many nation-states with unstable governments. Systemic continuity and peace can be quite different.

Nor are law and warfare absolute opposites that cannot exist in the same social field, Bohannan to the contrary (Bohannan 1967). Law—or lawlike phenomena, depending on how law is defined—can have a place in social arenas in which self-serving force is intermittently used. Not only may certain laws operate at levels of organization other than the level at which fighting force is regularly deployed (for example, fighting may go on *between* villages even while orderly forms of inheritance are peacefully adhered to *within* villages) but law may also operate in the relations between fighting units during peaceful interludes between fights.

Stressing common culture and consensus in both international and acephalous sys-

tems, Barkun contends that "noncoercive consensus-based supports may be the key to understanding horizontal legal systems in which physical sanctions are, for the most part, structurally impracticable" (p. 65). But were physical sanctions impractical for the bellicose Nuer? And what about war in international relations? Barkun's catchy title, *Law Without Sanctions*, may be an exaggeration of the more peaceful aspects of intermittently conflictual relations, in which those who use force tend to see it as a sanction, while those against whom it is used see the action as wrong. Barkun, like Paul Bohannan (1967), seems to see law and warfare as unmixed opposites, total alternatives as ways of resolving conflicts. But in these unstable multimember arenas, the two are surely part of a single process. The ongoing sorting and resorting of relations takes place in the context of alternating stages of orderly contacts and bursts of violence. The common and competing economic interests—and technological levels—in these social fields would seem to have at least as much to do with the nature of these relations as do the balances of military alliances and the "jural community" of "shared procedures" and "shared categories," to which Barkun gives his principal attention.

The advantage of the systems approach adopted by Barkun—that it abstracts structure from the particulars of context—is also its weakness. In making the structural analogy between primitive acephalous societies and the international arena, the different particulars of milieu that are omitted are, in the end, probably more important for analysis than is the bare systemic likeness. The utility of Barkun's broad comparative perspective is precisely that it raises such questions.

Barkun is obviously committed to continuing comparisons and to the endeavor to account for cultural factors. In 1968, the year *Law Without Sanctions* was published, Barkun was coordinator of a conference at Syracuse University at which Adda B. Bozeman gave a paper, later to grow into a book entitled *The Future of Law in a Multi-Cultural World* (1971). The book's purpose is

> to consider the various meanings carried by law in the actual and normative political systems of the West, the Islamic Middle East, Africa south of Sahara, Indianized Asia and China; with a view to determining whether there are actually any significant points of accord that might justify undifferentiated cross-cultural references to "law" and so be fit to provide a secure foundation for the organization of relations between these realms. [p. 34]

In Bozeman's analysis, "meanings" include practices as well as ideological referents. Though there is talk of "cross-cultural references," Bozeman's conception of meaning emphasizes political action rather than political rhetoric. Her conclusions about the international scope of common elements are far less sanguine than Barkun's. In her argument, the formal definition of states as comparable units in international law is at odds with the political realities. Central governments in much of the non-Western world are inherently unstable from both internal and external causes (pp. 165, 166, 181, 182). Internally, the character of these central governments is determined "mainly by the ambitions, talents and fortunes of a few leading individuals and the close supporters they can organize," thus producing regimes that are "pragmatic and unstable . . . veering everywhere to arbitrary, even despotic rule, and therefore stimulating counterorganizations" that result in "factionalism and intrigue, . . . coups d'état, assassinations, revolutions, and liberation movements directed against 'established' governments" (pp. 165–66). Interventions from outside national boundaries are equally destabilizing, since "real,

internationally relevant political power is no longer represented uniformly by officially functioning governments" because it also emanates from "ideologically conceived international parties, mobile military political units, and other dissimilated power centers" that operate "across state boundaries and under the surface of existing governments" (p. 182). Because formal legal concepts do not correspond to these realities, "old distinctions between aggression and defense, civil war and foreign war, and the status of belligerents and that of neutrality are . . . fast becoming blurred if not defunct, leaving vast regions in the throes of chronic strife, guerrilla warfare, insurgency, or counterinsurgency . . . the modern world is being shaped decisively by war" (pp. 183–84). Thus, comparisons lead Bozeman to conclude that what, in a special political sense, she calls the "multicultural" world is too diverse (the character of its diversity being political) to provide a secure foundation for a common international legal order. She has since carried the thesis further and argues that for reasons of cultural difference Western theories and typologies are not adequate to an analysis of conflict and its management in Africa (Bozeman 1976). One may not be comfortable with her approach to Africa, or to politics, yet recognize that the cultural differences are there, and are important.

Bozeman's deeply pessimistic predictions may turn out to be correct. But if they do, there still will be a question of whether the multiplicity of understandings about law were what produced the result. Is there less hope now for international law than there was at some other time in history? Does analytic emphasis on divergent values take too little account of the realities of the world economy? What does the inescapability of worldwide economic interdependence imply for the future of international law? Is the underlying conflictual issue one of multiple legal cultures or one of clashing interests?

What is clear enough is that "the legal" is a domain to be understood neither by itself nor in terms of its official explanations. This holds within social fields that are putatively fully regulated, such as nation-states; and is all the more dramatically apparent in the international arena, where even the claimed domain of the legal is only a small part of the operation of the whole.

A Social-Science Bibliography

A useful, though now somewhat dated, bibliography lists work done in the social sciences related to international law. The two-volume work was published for the American Society of International Law (Gould and Barkun 1970, 1972). The first volume, *International Law and the Social Sciences,* is a discursive, textbooklike essay; the second, *Social Science Literature: A Bibliography for International Law,* is an annotated bibliography. Harold Lasswell, in his introduction to the expository volume, hailed it as "a study that stands somewhere between an innovating treatise and a textbook" (p. xv). The authors describe their own expository volume as follows:

> International Law and the Social Sciences dealt with a representative sample of the more important literature. . . . It undertook to set the sample in a framework of social science concepts that give promise for future developments of international legal studies in harmony with the main currents of social science thought. Conversely, it endeavored to show how social science research itself could take better account of the legal dimension of international relations. [1972, p. 1]

Their conception of the techniques to be used is not far to seek. Surveying the topic of "the utility of social science methods," they see fit to touch on the following: the

comparative method; mathematical techniques; factor analysis; communication research; and laboratory experiments, including simulation and gaming. But, as might have been expected given their particular point of view, the authors explain that "[g]eneral systems theory provides, we think, the most promising approach to date for integrating more specialized studies into a general theory" (1972, p. 26).

One may disagree, yet find the scope of the bibliographical volume of interest. The balance and coverage will not satisfy everyone, but much in it continues to be useful. The systems perspective is now applied to the world. It has come to be the mainspring of an important school of thought in the social sciences which considers national states so embroiled in world economy that they can no longer be thought of as independent entities, their legal self-definition to the contrary (Hopkins and Wallerstein 1982).

Legal Pluralism, Cultural Pluralism, and Legal Transplants

The plurality of legal systems in the international arena has a counterpart within many nations. The prospects for plural societies are a key concern in the social sciences (Maybury-Lewis 1984). The world certainly looks as if cultural and political diversity are here to stay. Thus, theoretical studies of legal pluralism and the working accommodation of heterogeneity within larger political systems have much to offer those interested in international relations. *Legal Pluralism* is the title of a major book on the subject by M. B. Hooker (1975), who uses the term to refer to circumstances "in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries" (p. 1). In many countries the residue of conquest and colonization has left many racial, cultural, or ethnic groups within the same polity bound by different laws, or affected differently by the same laws. Hooker writes extensively on the impact of colonial government and colonial law. His excellent 78-page bibliography includes J. S. Furnivall on Burma and Netherlands India; J. Duncan Derrett, Bernard S. Cohn, and Marc Galanter on India; G. J. Massell on Soviet Central Asia; A. N. Allott and E. Cotran on Africa; J. N. D. Anderson on Islamic Law; Jerome A. Cohen on contemporary China; and lists hundreds of others.

In many colonies a transplanted metropolitan legal system was not intended to replace all indigenous laws, many of which continued to be in effect. Though the empires and colonies are no more, their complex multiple legal legacy lingers on. Yet it is not only in newly independent countries that distinct laws apply to culturally distinct populations; such differences also exist in some countries long independent and legally autonomous. There is also the obverse situation, in which attempts to homogenize and "modernize" a national legal system by promulgating national laws to apply to the population at large tend, in reality, to produce resistance in the culturally diverse subordinate populations. In this regard, the Soviet Union has had continuing troubles with its Central Asian republics. Hooker's work tries to address all these matters, giving useful references to relevant statutes and to other legal materials as well as to the scholarly literature.

A related issue, the worldwide ethnic revival, frequently has its politicolegal dimensions, and as such it appears in the legal and social-science literature. On the international plane, the ethnic revival may manifest itself as a demand to be allowed to exercise the right to self-determination (for a recent work that reviews some of the issues and literature on self-determination, see Ofuatey-Kodjoe 1977). Within nation-states, the ethnic revival may result in demands for constitutional recognition and specific forms of

political autonomy or representation. This is often manifested in appeals to national courts to enforce "customary" rules. As a matter of political philosophy and legal policy, the ethnic-rights issue is closely related to questions about the limits of freedom and tolerance (see Bennett 1978). To what extent is it proper for a legal system to be used to impose a way of life on people? In what circumstances and in the service of what ends is such a policy justified? Or, to put it the other way around, to what extent should populations inside a nation-state have the right to follow a way of life of their own choosing, because of tradition, out of religious conviction, or for some other reason? The answers to these questions are far from clear. It is enough to note that those writers who seek to distinguish legally plural societies (in the ethnocultural sense) from others are constructing an analytic type that bears on major questions of policy and practice of our day.

Where the emphasis is on social-science approaches, several productive attempts to clarify the theoretical issues can be found in *Pluralism in Africa* (Kuper and Smith 1969), a set of symposium papers, including important theoretical contributions by the editors. The concerns of the symposium addressed the general consequences of cultural and ethnic diversity in African states, which often involve legal questions. Outrage over the case of South Africa lies in the background of any discussion of pluralism in Africa. Kuper and Smith's theoretical taxonomy obviously has that disturbing empirical referent. But the questions raised by the taxonomy are of much more general relevance. Smith's analytic framework takes account of three dimensions in a polity: the cultural, the social, and the politicolegal. Three questions are asked: are there culturally distinct populations within the polity? (Criteria are provided for measuring cultural distinctiveness.) To what extent do the boundaries of the corporate groups (the formally organized units) in the society correspond to the boundaries of the cultural-ethnic divisions? And are all the cultural-ethnic categories or groups (and/or their members) incorporated into the polity as a whole in a legally equivalent manner? Considering these questions, as applied to various multicultural nations in the contemporary world, Smith has constructed three categories of pluralism in society: (1) in which there is *cultural pluralism* only (institutional diversity without collective social segregation); (2) in which there is *social pluralism* (cultural diversity plus cultural collectivities organized as distinct communities and/or systems of social action as corporate divisions); and (3) the condition of *structural pluralism* (cultural diversity plus distinct social collectivities corresponding to cultural divisions, plus differential political incorporation of these collectivities into the whole common society).

Structural pluralism legally prescribes collective differences of status and of relation to the public domain and, obviously, encompasses the case of South Africa. There can, of course, be de facto ethnocultural inequality in the presence of legal equivalence, and there are many variant forms of the three general types. Instead of types, Leo Kuper proposes dimensions of pluralism that may be found in various degrees and combinations (p. 475). Kuper's variables come closer to accommodating the complexity of reality, while Smith's types tend to reduce that complexity to synthetic units the mind can retain and reflect on.

It is interesting to consider the differences between the Kuper-Smith points of departure and Hooker's legal approach. Kuper and Smith start from the defining situation of cultural diversity within a nation before examining the range of social and political concomitants of that diversity in a series of instances. Hooker starts with a situation in which a whole legal system has been transplanted and ends up by talking about the

remarkable persistence of cultural—hence, legal—diversity, despite transplants intended to produce unified legal systems.

In each case, Hooker briefly reviews the historical sequences attendant upon the introduction of the imported legal order; sketches the outlines of the indigenous legal system; gives a valuable introduction to the major statutes and cases under the introduced system; and tries to fill in the definitions, perceptions, and perspectives in each setting. He attempts to cover a vast territory, including: (1) British colonial law and written systems of religious jurisprudence (Hindu, Burmese, Islamic); (2) British colonial law and customary law (African, Malay, Chinese); (3) French colonial law; (4) Dutch colonial law (Indonesia); (5) English law in the White Dominions and in the United States (the legal status of indigenous peoples); (6) the voluntary adoption of Western laws (Turkey, Thailand, Ethiopia); (7) legal pluralism in the Soviet Union. Since Hooker skims this vast material in a mere 600 pages, the sections are quite compressed, but each presents a very clear and useful introduction. The bibliography is extensive and invaluable. It is a pity that Hooker does not seem to have known about the work of Kuper and Smith in time to comment on its framework and perhaps even to incorporate some of its organization into his own approach. Scattered through the descriptive parts of Hooker's book are a number of very interesting interpretations and comments by the author, who has achieved much more than a simple compilation. His preface gives the key to his interest.

> The fact is that, despite political and economic pressures, pluralism has shown an amazing vitality as a working system. It may well be that it—and not some imposed unity—should be the proper goal of a national legal system. Indeed, even within developed nations themselves, there are signs that a plurality of law is no longer regarded with quite the abhorrence common a decade ago. [1975, p. vii]

The far-reaching political implications of such views do raise the question of whether legal pluralism is a stage in a historical process, operating in the direction of unification, or whether the current political salience of cultural separatism will endure, and with it its legal concomitants. The future of legal pluralism in new nations is discussed briefly by Laura Nader and Harry Todd in their editorial introduction to *The Disputing Process: Law in Ten Societies* (1978). Many of the articles in the book, all by Nader's students, concern the choice of a "remedy agent" in situations of dispute. The exercise of choice involves recognition of the substantial differences between the internal legal system of the ethnic group being studied by the anthropologist and the national legal system, strong preferences often being shown by disputants for their indigenous mode of handling things. Nader and Todd argue that there is a case against legal homogenization. They see the homogenization of law as a form of domination, a way of consolidating "power positions." "In a stratified society the ruling elite have much to gain by invoking homogeneity, since it is their culture, or that to which they have adapted, which sets the standard for homogenization" (p. 33). Even accepting the underlying sympathetic intention of this statement "the notion that homogeneity, the state, success and progress, all go hand in hand" should not go unquestioned. There remain serious problems with identifying cultural heterogeneity and legal pluralism with a "better deal for the powerless" (p. 33).

South Africa offers an excellent example of the use of pluralism to enhance stratification. Caste systems represent another form of legal pluralism founded on hierarchy. Hardening ethnic boundaries with the help of plural legal systems does not necessarily benefit those so segregated. "Enclaving" can be a form of exclusion.

Neither legal heterogeneity nor legal homogeneity can be regarded in the abstract as oppressive or benign. The evaluation depends both on the political uses to which the policies are put and on the historical circumstances. Questions of domination and subordination—mixed as they are with regionalism, localism, and pressure for ethnic autonomy—generate considerable heat in the multicultural nations of the world. The headlines of the West not only concern the Kurds and the Baluch but also the bombs of the Basques, the activities of the Scottish separatists, and the burnings of English summer cottages in Wales. These issues will not soon subside. (For some interesting work on the politics of ethnicity and retribalization in modern contexts, see Cohen 1969, 1974a, 1974b.) From the perspective of an approach to law that uses the disciplines of social science, there are ample reasons to identify legal pluralism as a major "type" and to examine the general and special characteristics of the great range of instances in which it has occurred. Hooker's is the major book in the field to date, but the growing recognition of the importance of the topic of legal pluralism is evident. For example, the old *Journal of African Law Studies* has broadened its scope and has been renamed the *Journal of Legal Pluralism.* Edited by Professor John Griffiths of the law faculty of the University of Groningen in the Netherlands, it provides ongoing papers on the subject.

Leo Pospisil (1971) and Lawrence Friedman (1975) employ a much broader conception of the topic, which extends the definition of legal pluralism to include much more than ethnocultural differences. Pospisil thinks of law as always situated in society at a multiplicity of organizational—hence, "legal"—levels. In a somewhat different statement of the matter, Friedman mentions "the existence of distinct legal systems or cultures within a single political community" (p. 196). He identifies three major types—cultural pluralism, political pluralism, and socioeconomic pluralism—subdividing each into two subtypes—"hierarchical" and "horizontal." Thus cultural pluralism is divided into hierarchical colonial systems and horizontal multicultural types. In the latter, the laws of the several ethnic groups in the polity apply to particular cultural communities, without any implication of superiority of one system over another. Political pluralism includes hierarchical legal systems (such as the relation between federal and state governments in the United States) and horizontal federalism (such as the relation of the individual states of the United States to each other). Socioeconomic pluralism includes distinct legal systems for different status groups and de facto distinctions made in the legal system as it is applied to rich and poor (pp. 196–99). Friedman applies the term "pluralism" so broadly that it requires substantial subspecification to clarify each "kind." There can be no argument about words and taxonomy, since each writer can create particular definitions; but readers should be aware that *legal pluralism* does not have the same meaning for everyone.

Quite apart from the question of ethnic separatism, instances in which a whole or partial legal system is transferred from one setting to another can, at the very least, provide social science with a "quasi-experiment" in which one variable is held constant while others change. Alan Watson (1974) argues that subsequent divergences reveal a great deal about the nature of legal development and that the study of comparative law should be confined to "Legal History concerned with relationships between systems" (p. 6). His *Legal Transplants,* which makes the case for a rigorous approach to legal development based on historical evidence, is sharply critical of the use of general evolutionary models to fill in the gaps or to provide interpretations. One can share his preference for hard evidence without finding congenial his limiting definition of comparative law as an academic discipline. Certainly "legal transplants" are a major feature of legal systems

around the world, and the study of subsequent developments from the point of view of social science could be extremely fruitful.

In the early days of independence in the Third World, it appeared that studies in "law and development" would provide some important data. The first wave of excitement was overly optimistic and often sociologically naïve (for bibliography and critical comment, see the assessments of law and development studies by Trubek and Galanter 1974; Merryman 1977; Burg 1977). Work in this field was markedly ethnocentric. The unthinking assumption that American models would work anywhere was not infrequently shared by some officials in the receiving countries. John H. Merryman (1977) notes that "[t]he mainstream law and development movement, dominated by the American legal style, was bound to fail and has failed." He offers reasons for this circumstance.

> [I]n third world law and development programs the American actor has neither a reliable "feel" for the local situation nor an explicit theory of law and social change on which to base his proposals. His only recourse is to project what is familiar to him onto the foreign context. [p. 480]

> These characteristics: unfamiliarity with the target culture and society (including its legal system), innocence of theory, artificially privileged access to power, and relative immunity to consequences, have been typical of many law and development proposals and programs for the third world. [p. 481]

Robert B. Seidman (1978) sees the failure of investigations into law and development as a problem of Marxist paradox—"How to use an authoritarian legal order to forge a participatory society?" (p. 470). For those who neither share Seidman's certainties nor have an exaggerated faith in the capacity of laws and legal institutions by themselves to create new societies, much can undoubtedly still be learned from the experience of the developing countries. Legal pluralism, in the sense of both "transplant" and "ethnic separatism," is a significant part of the story, though by no means the whole.

In the social sciences, some major revisions of theory are likely to result once the importance of legal pluralism is more generally acknowledged. For one, evolutionary paradigms of law must be elaborated to take legal pluralism sufficiently into account. At present they usually ignore it as a "type," a "stage," or even a factor, though historically it is a pervasive phenomenon. At best, legal-cultural pluralism seems to be treated as a phase that precedes uniformity—an end that, as noted earlier, is by no means always attained or even desired. Multicultural and multinational legal arenas seem to be here to stay. Second, social science will have to readdress the question whether law is culture-specific, and/or which laws are involved when and for whom. This inquiry is closely connected with the still deeper issue of the forms and conditions by which law can be innovative.

A somewhat gloomy aspect of this question has been addressed in *The Imposition of Law,* edited by S. B. Burman and B. E. Harrell-Bond (1979). The essays deal both with culturally plural and with relatively homogeneous settings. Gamely acknowledging that their title may be misleading, the editors clarify their position by adopting the perspective of one of their contributors, R. L. Kidder, who sees the focus on imposition as the wrong question (p. 296), the right questions being those concerning the "social distance between the lawmakers and governed" and "the layers of intervening organizational complexity." These, he contends, "may be used as a measure of how external a legal system is

to the community on which it is enforced" (p. 5). Vilhelm Aubert's contribution makes a similar theoretical argument (pp. 27–43).

Two substantive papers in this lively collection show some of its methodological variety. One, by Leopold Pospisil, titled "Legally Induced Culture Change in New Guinea," relates a sequence of transformations in the Kapauku system that flowed from particular colonial policies. He stresses the differences between the indigenous normative system of the Kapauku and incompatible Dutch and Indonesian rules to which the Kapauku had to adapt (pp. 127–45). In contrast, Richard Abel, in "Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa," deals with an entirely different kind of evidence and interprets it by means of a quite different method (pp. 167–200). Abel's evidence consists of aggregate statistics concerning court use. He tries to explain shifts in the figures by using a generalized model of "tribal," as opposed to "modern," society, with concomitant generalized litigant motives and litigant perceptions. Abel uses his models to develop a series of propositions, which he puts forward as hypothetical explanations of variations in the figures. His carefully constructed, lawyerly brief rationalizes a closed body of data in terms of explicit a priori models and assumptions. The conclusions can only be as sound as the very general assumptions, and there may be some alternative explanations, but the clarity and ingenuity of the argument are well worth consideration.

Whatever their differences of data and method, Pospisil's and Abel's papers have in common a focus on historical materials, on change over the years. The interest in legal history rather than in static legal cultures seems to be a powerful trend in comparative work (see, for example, the analysis of the history of crime in Sydney, London, Stockholm, and Calcutta in Gurr, Grabowsky, and Hula 1977). The papers in the collection edited by Burman and Harrell-Bond show that the situation that produces a perceived instance of "imposed" law is most colorful and clear where cultural contrasts between the dominant and the dominated act like labeled radioactive tracers in the body of the receiving culture. It is apparent from the theoretical content of the growing literature on multicultural systems that this is being treated not as a narrow or exotic topic but as one that will eventually have implications for the interpretation of change everywhere.

ANGLO-EURO-CENTERED WORKS AND THE "OTHERS"

National, Religious, and Ethnic Legal Systems

A good deal of the introductory literature on "whole" legal systems that is comparative in intention perforce treats particular legal systems as coherent entities. Some works go even further, to group the historically related systems of several polities into "legal families." In part, no doubt, this practice serves to facilitate the nearly impossible problem of description and compression. But in part, such organization also expresses an idea about the importance of cultural connection, "stylistic" coherence, and historical provenance. A good example is furnished in René David's *Les Grands Systèmes de Droit Contemporain*, translated and adapted by David and J. E. C. Brierley as *Major Legal Systems in the World Today* (1978). David and Brierley are very clear about their basis of organization.

> What, then, are the major contemporary legal families found in the world today? There would appear to be three at least which occupy an uncontested place of

> prominence: the Romano-Germanic family, the Common law family, and the family of Socialist law. . . . There are other systems. [p. 21]

Their categorization into European, Anglo-American, and Socialist is evident in the allocation of space. Out of the book's 584 pages, 420 are devoted to the three listed "families." All the "other systems" are compressed into the very short compass of 100 pages. In a section entitled "Other Conceptions of Law and the Social Order," David and Brierley include a chapter on Moslem law; one on the law of India; and another on the laws of the Far East, including China and Japan. The book closes with a chapter on the laws of Africa and Malagasy.

Another summary of the legal systems of the world (also produced under David's editorship) is found in the *International Encyclopedia of Comparative Law*, volume 2, *The Legal Systems of the World, Their Comparison and Unification* (1975). This treatment is more extensive and organized along slightly different lines. Many of the other major figures who appear and reappear in the bibliography of current works of comparison are involved here as well—Konrad Zweigert, Arthur T. von Mehren, E. Cotran, Charles Szladits, J. Duncan Derrett, Tony Weir, G. Sawer, Hessel E. Yntema, and others. The first chapter is titled "The Different Conceptions of Law" and includes Western, Socialist, Moslem, Hindu, Far Eastern (China and Japan), and African models, each article written by a different contributor. Chapter 2, "The Structure and Division of Law," addresses essentially the same array of legal "families" and countries. David contributes chapter 5, "The International Unification of Private Law." Chapters 3 and 4, not yet published, will be titled, respectively, "The Sources of Law" and "Comparative Law." Each contribution ends with a short bibliography of important works. In the introductory book, David and Brierley comment on their basic method of classification into "families."

> This grouping of laws into families, thereby establishing a limited number of types, simplifies the presentation and facilitates an understanding of the world's contemporary laws. There is not, however, agreement as to which element should be considered in setting up these groups, and therefore, what different families should be recognized. [1978, p. 20]

The statement ends with a justification of the authors' choices and criteria. "One cannot aspire to mathematical exactitude in the social sciences"; the conventional comparativist idea of a legal "family" overcomes the inconveniences raised by dealing with the law as the separate systems of many nation-states. It also copes with the historical connections among legal systems, and hence the affinities of content and "style." David's purpose is clearly to make easily accessible a body of information nonspecialists are unlikely to be able to assemble.

The concept of legal families presents a classical solution to a difficult problem of presentation and simplification. But by its own definition, the concept glosses over the great differences that often exist in the actual workings of systems that, for historical reasons, have a formal likeness. A gentle critical comment has emphasized the fact that the classification into legal families, while a convenience to the synthesizing writer, is not an explanatory concept.

> The classical typology explains very little *except* the formal sources of those traits selected as "basic." But the traits are singled out as basic traits precisely because they make a scheme of classification possible. If we know what "family" a country

> belongs to, what else do we know about the society? Can we predict anything about its politics, society or economy? Its level of development? [Friedman 1975, p. 202]

In view of the general success of David and Brierley's volume in achieving its introductory purpose, it is perhaps ungrateful to object when in the section on Africa south of the Sahara, the authors note that in these parts of Africa "[o]bedience to custom was generally spontaneous, since it was thought that one was obliged to live as one's ancestors had; the fear of supernatural powers and of group opinion were most often sufficient to assure a respect for the traditional ways of life" (p. 505). This statement repeats, at least by implication, something very firmly embedded in the legal literature about "customary" law—the idea that, more than in other systems, it was obeyed without need for enforcement. There is also an implication that conformity in more complex societies is produced through different processes.

Similar assertions can be found elsewhere in the anthropological literature, all of them misleading in two ways. One, they simply postulate some obvious greater "spontaneity" of obedience and greater conformity in less complex societies than in more complex ones. There is little hard evidence to support such a quantitative statement about incidence. Two, they deliberately ignore such techniques of enforcement as exist in these societies; although these methods are often quite different from those of modern governments, they may nevertheless have effective coercive force. These questions are relevant to more than "customary" law; they bear on the sociological understanding of order and disorder in complex societies, the relationships, incentives, and pressures involved. Nowhere is social order or disorder adequately explained by reference to the strength or weakness of "tradition."

J. Duncan Derrett attacks an analogous and common causal explanation in his editor's preface to *An Introduction to Legal Systems* (1968). Derrett makes his critical point about religion as a basis of law, since his book includes articles on Jewish law, Islamic law, and Hindu law. He writes, "One must avoid the error of supposing that any true law is based on religion or philosophy as such. . . . What is exacted in the name of religion is usually required for other purposes than the religious" (p. viii). He goes on to mention "the rules against usury in Jewish and Islamic law, or the rule in Islamic law that a gift is not completed without a transfer of possession," noting that the conventional idea that these are "derived from religion" dies hard, even if one knows that these rules are due "in the first place to a primitive view of the need for reciprocity in a compact society, and, in the second place, to somewhat primitive canons of evidence" (p. ix). Further, "religion is not a true source of law, but, at most, part of the conceptual framework within which a legal system and legal propositions take their place" (p. xix). Attributing specific legal ideas to types of social relations and the information systems associated with them, Derrett allows no significant causal place to the religious and ideological framework within which these legal ideas are set.

There is substantial evidence to support this view for some matters, and the rules Derrett cites are of that kind. The rules about usury and about the transfer of property are found in many small-scale societies in association with a wide variety of religions. Correlations of this sort or their absence are an excellent advertisement for wide comparisons. But there are other issues to which the particulars of religion and ideology are pertinent. Derrett's generalization seems too broad.

The work Derrett has edited has a scope different from that of the volume by David and Brierley and can be used as a complementary resource. In addition to articles on Jewish, Islamic, and Hindu law, there are chapters on the laws of Rome, China, Africa, and England. "The systems of jurisprudence chosen for treatment in this book were chosen because they are 'historic' " (p. xiii). The strong orientation of David and Brierley's book, on the other hand, is modern and current, though the authors do address the historical roots of the "legal families" they describe. Derrett's anthology, the work of a number of authors with varied interests, has a much less integrated perspective. Pleading strongly for wider comparative knowledge, Derrett offers his book as a contribution in that direction. "One may wonder whether now a man can call himself educated who, having studied, for example, English law for three years goes into the world as a 'lawyer' and has never heard of other systems of law" (p. xiii).

Another nominally global attempt to cover the world's legal systems translated into English—*An Introduction to Comparative Law*: volume 1, *The Framework*, and volume 2, *The Institutions of Private Law* (Zweigert and Kötz 1977)—in fact gives even less space to the "other" legal systems than do David and Brierley. Almost the entire first volume is devoted to the Romanist, Germanic, Anglo-American, and Socialist legal families. A review of this "important contribution to legal scholarship" points out that, although it is entitled "An Introduction . . . the work's remarkable qualities can be fully appreciated only by one with considerable comparative learning" (von Mehren 1979, p. 349). While he has some reservations about the institutions chosen by the authors as typifying particular systems, von Mehren assures his readers that "[t]he book is of great value, not to the neophyte alone, but also to the comparatist and to the student of domestic law who seeks a deeper understanding of the areas of substantive law discussed" (p. 349). Thus, though David and Brierley's *Major Legal Systems*, Derrett's *Introduction to Legal Systems*, and Zweigert and Kötz's *Introduction to Comparative Law* are not "social science" books, all embody a strong sense of the significance of sociocultural differences and their importance to a broad understanding of all law.

Even undergraduate students are now provided with materials to foster a taste for comparisons. Henry W. Ehrmann's *Comparative Legal Cultures* (1976) is a brief textbook intended to entice students into comparative studies. If the lively comparative interest currently manifested by these publications (and by the many editions through which David's book has gone, including a recent paperback version) develops further, one hopes that other works will appear in which more attention is given to social context, balancing the material on doctrine and institutions. It is noteworthy that one of the declared purposes of these introductions is to make accessible and easily understandable materials that were once the monopoly of the specialist. The same is true of the great proliferation of noncomparative books, all of them introductions to the law of one or another group. A few examples are John H. Merryman on civil law (1969), von der Sprenkel on Manchu China (1962), John A. Crook on Rome and Roman law (1967), A. R. W. Harrison on the law of Athens (1968, 1971), N. J. Coulson on Islamic law (1964), Joseph Schacht on Islamic law (1964), and von Mehren on Japan (1963). These are only a few illustrations of a vast literature of this kind. Anyone interested in new books and articles in English in this field would do well to have a look at Charles Szladits's *A Bibliography on Foreign and Comparative Law* (1975 to date), an ongoing project that is well arranged, easy to use, and sensibly annotated.

Studies written by legal scholars tend to discuss complex societies with written legal

traditions. Anthropologists have tended to avoid these materials, although that attitude may well change. Monographs on the law of lesser-known peoples also abound. A bibliography of some of these works, "The Ethnography of Law: A Bibliographic Survey," was assembled by Laura Nader, Klaus F. Koch, and B. Cox (1966). An even more ambitious bibliographical project, *Introduction Bibliographique à l'Histoire du Droit et à l'Ethnologie Juridique,* under the editorship of John Gilissen, was started in 1963; several volumes have appeared.

Assembling a roster of the legal systems of the world virtually requires a worldwide ethnographic bibliography, a formidable list. As a general rule, the more exotic the society, the more likely it is that its law will be presented as part of a general sociocultural description and that the level of detail will be unsatisfactory. Legal anthropologists account for some notable exceptions to this rule. Lawyers interested in quick access to bibliographic material from anthropology in English that can supply ethnographic examples for comparative purposes will find two resources particularly useful. The *Annual Review of Anthropology,* edited by Bernard Siegel, regularly publishes summary articles reviewing current literature on specialized subjects. Two articles on law and anthropology have been published thus far by Moore (1970) and Jane F. Collier (1975). But many other articles in the *Annual Review* volumes are relevant to law and would be of interest to comparativists; they include articles on kinship, economics, and politics.

The second resource—or rather, pair of resources—are the Human Relations Area Files and the *Ethnographic Atlas,* both brainchildren of G. P. Murdock. Though the files are published in New Haven (dating from the time when Murdock was at Yale), they are subscribed to by a number of major libraries throughout the United States, where replicas are housed. The collection consists of file cards organized according to subject, on which items of information are reproduced verbatim (with attribution) from hundreds of ethnographies. Thus, if one were interested in discovering what forms of land tenure were associated with particular kinds of agriculture, it would be possible to gain a quick overview of the subject by consulting the files, which also provide an initial ethnographic bibliography. Even though it is always necessary to go beyond the files themselves to complete any piece of research, the files are an excellent place to start.

A simpler and more accessible resource is the *Ethnographic Atlas* published in the journal *Ethnology* (edited and published by the University of Pittsburgh since shortly after the time of Professor Murdock's move from Yale to Pittsburgh). Readers are also referred to G. P. Murdock's "Ethnographic Atlas: A Summary" (1967a; see also 1967b; Naroll 1970, 1973). The *Ethnographic Atlas* puts in coded form the key "diagnostic" features of a large sample of societies and cultures, supplying the bibliographical references from which the information was drawn. Thus it is possible to see at a glance the preponderant social forms and the cultural settings in which they occur. Again, since context is essential to interpretation, it is always necessary to go back to the sources, but the *Atlas* can provide an initial guide both to sources and to the worldwide distribution of certain basic characteristics and types. Though law was not one of the central interests of the classifiers, there are nevertheless ways of using these materials for purposes of comparative law.

A recent notable and monumental project that examines particular problems comparatively rather than looking at whole systems suggests by its very existence that things are stirring in the woods and that important new materials are being collected. This enormous, multivolume series, *Access to Justice,* under the general editorship of Mauro Cappelletti and Bryant Garth (1978–79), is a continuation of earlier comparative work on

civil litigation and on legal aid (see Cappelletti and Tallon 1973; Cappelletti, Gordley, and Johnson, Jr. 1975). The first volume of *Access to Justice* (in two books) contains twenty-three national reports on the cost of justice and national approaches to problems of access. These are responses to a detailed questionnaire central to the project. The work also includes a general report on the major barriers to effective access and the various reforms that have been attempted. Volume 2, also in two books, is entitled *Promising Reforms and Institutions.* Among other subjects, it gives much attention to the current lively interest in conciliation and mediation as an alternative means of resolving disputes. Volume 3, *Emerging Perspectives and Issues,* assembles a miscellany of papers on a wide variety of topics, most concerning British and American developments, but including one paper on India and one on Africa. The fourth volume, *The Anthropological Perspective,* consists of a rather random collection of descriptive ethnographic articles on disputes in a few villages and small communities in Fiji, Mexico, Tonga, Iran, and Utah and is not comprehensive. The editor's introduction is needlessly mechanical, missing what might have been an opportunity to draw together the general theoretical implications suggested by the volume's title. The scale of the entire *Access to Justice* project is astounding. Few will read the many volumes from start to finish, but there is much that is of interest in each, and the commitment of all those involved both to comparison and to reform is unflagging. It is very much to the credit of the editors that they have tried to reach beyond Anglo-Euro-centered perspectives, even though their attempts to do so are somewhat scattered and uneven.

Given the range of works, the increasing accessibility of an abundant literature on the great variety of legal systems of the world should give rise to further bold and wide-ranging comparative work in the social sciences and in law. A few bibliographic ports of entry have been sketched very briefly to encourage novices on both sides to cross into unfamiliar territory. If enough people make the journey, the nature of the literature itself may well be changed by new questions.

GRAND LEGAL COMPARISONS IN AN EVOLUTIONARY MODE

Classical Themes That Separate Anthropologists

One Person's Custom Is Another Person's Law Persons reflecting on the evolution of law from its beginnings to the present usually are using such grand overviews to make comments about our own day. The form may be an inquiry into temporal and typological extremes expressed in dualities: then and now, their kind of world and our kind of world, small-scale society and large-scale society; or it may take the shape of a series of types presented on an ascending scale: simple to complex, small-scale to large-scale, and the like. However much these may look like unbiased academic inquiries, such investigations are usually shaped by one of two strong attitudes. Either the writer is trying to demonstrate the extent to which modern legal systems are an improvement over past ways of doing things, or the writer is saying that social life used to be more fair, just, and equitable and is asking when and why things went wrong.

Scholars engaged in social-evolutionary writings today are more likely to focus on how the world came to its present sad condition than they are to celebrate, in one nineteenth-century manner, humankind's remarkable progress. Current evolutionary comment is

more likely to be informed by the other nineteenth-century style. The gloomier questions addressed by Marx and Engels often prevail. (See Greenberg and Anderson 1981 on recent Marxisant books on law.) There is little rationalist sunshine. Many continue to idealize the intimate communal world of the past. It is as if the conception of a vanished community were necessary to constitute a convincing critique of the present. For some, all hierarchy and all inequality are evil. The benign conception of government embodied in Hoebel's chapter (1954) about evolutionary growth of law is in sharp contrast with Donald Black's more recent dark vision of the state (1976). A related issue integral to Black's book that blooms academic season after season is one that also occupied the classical social evolutionists: the possibility of a future order without government. Is the story of the growth of law the story of the development of the state? If it is, should the state be interpreted as the bringer of order and peace or as an instrument of oppression?

Like their nineteenth-century forebears, some neo-evolutionist and Marxist anthropologists claim that "primitives" (living in that generic primitive community found only in theoretical writings) have no law. These scholars acknowledge that such societies have order and normative rules. But their lexicon regards as "customs" those rules of stateless societies that carry obligations or prohibitions or constitute enablements. For persons of this doctrinal persuasion there are only two great categories—customary rules and laws of the state. There is also often the intimation that custom is internalized and adhered to voluntarily, while law is imposed, enforced, and oppressive.

For some of these neo-evolutionists, the growth of class inequality and coercion is the major element in human history, all else being subsidiary and distracting. A relatively recent example of this view is represented by Elman R. Service's attempt to redo parts of Lewis Henry Morgan's *Ancient Society* (Service 1975; in a similar vein, see also Fried 1967 and S. Diamond 1971). These writers have had considerable influence in one sector of anthropology and epitomize a view of primitive order that has wide currency outside the field. They take the position that all nonegalitarian orders are ultimately maintained by force and that the main lines of political evolution have been from egalitarian societies without coercive institutions to stratified coercive state systems (Service 1975, pp. 86, 291; Fried 1967, pp. 14–20, 145, 235; S. Diamond 1971, p. 47). Law is perceived as an adjunct of the state and the state as a collection of institutions used to maintain a class structure (Fried 1967, pp. 20, 235). Just as this school emphasizes the authoritative element and inequality in state systems, it stresses the consensual element and equality in prestate systems.

In one section of his book, Service advances the general thesis that in primitive societies custom is effectively internalized by all but deviants and is constantly reinforced by the community through the double inducements of mutual support and good fellowship (1975, p. 83). In this situation exchange and affection are effective substitutes for coercion. But elsewhere in his book Service writes, "It is very common in primitive society that a delinquent's own group will plot to do away with him if all other means fail to control him" (p. 54). Does compliance exist to avert "being done away with" or otherwise punished, or is it to obtain reciprocal favors, love, and esteem? How is one to know? Since both elements are present in all social systems, simple or complex, how is the ethnographer to decide whether the carrot or the stick is operative in a given situation, let alone in that abstraction, the society "taken as a whole"? These neo-evolutionists tend to stress the carrot in prestate systems and the stick in state societies. I would argue that both are universal properties of group social life, which appear in very

different forms in different settings. The difference in form is critical, not trivial. But to put the issue as if it were a matter of the simple presence or absence of inequality and hierarchically imposed coercive force is to distort the data egregiously. I agree instead with Eric Wolf (1981, p. 55) when he says, "In contrast to others . . . who tend to see societies built up in the kin-ordered mode as egalitarian, I argue instead that they are replete with real inequalities and plagued by resulting tensions."

The most fundamental inequality in social life, omnipresent in prestate societies as in modern ones, is the asymmetry of power between the individual and the group. The Durkheimian vision of early law, enlarging on this point, imagined that the group would always descend in outrage on any individual who broke the rules, this "criminal" law being the original form of law (1964). The asymmetry between individual and group is undeniably a potentially coercive dimension of group life. But such an analysis disregards one point of major importance in understanding the "law" in many prestate systems—that often subgroups and factions in such societies have competing or conflicting loyalties and interests, and individuals can and do mobilize them in their cause. Knowledge of the way such opposing alignments operate and their importance to law is one of the principal advances in understanding that have developed in social anthropology since the great classical writers on legal evolution began puzzling over "primitives."

Information about such conflicts contributed to legal studies an awareness that disputes in prestate societies are often settled by means that make no claim to being instances of the "application" of rules. Disputes are often pursued and settlements arrived at for political ends. A study of the Shavante Indians of the Brazilian interior notes:

> Among the Shavante . . . all legal "cases" are political issues in the sense that they can only be heard in the men's council, where their resolution depends largely on the relative strengths of the factions. A dispute which does not become a factional matter is not technically a dispute at all. It has a status similar to that of a disagreement which has not been taken to court. [Maybury-Lewis 1974, p. 179]

Norms may be alluded to in such proceedings, and they certainly form part of the cultural background, but such dispute settlement is not the occasion for "norm enforcement" in the modern Western sense. Comaroff and Roberts have addressed the subtle place of rules in one such African system in great detail (1981). There is growing attention to the negotiability of rule and position as fundamental to some social systems (Rosen 1984).

Philip H. Gulliver introduced the first extensive field material on dispute settlements through such processes of "political" contention. The phenomenon, first described in *Social Control in an African Society* (1963), was developed further in *Neighbors and Networks* (1971) and in a number of articles. In the 1963 work, his initial extended statement on the subject, Gulliver tried to distinguish between two major types of dispute settlement. In the *judicial* type, the outcome was determined by third-party, rule-governed decision. In the *political* type, with which his work is largely concerned, the outcome, arrived at through negotiations, was determined by the relative power of the parties and their backers. Gulliver (1979) eventually revised some of his initial definitional categories and expanded the scope of his approach, perhaps partly in response to Moore's critique (1970). Gulliver's original perspectives were instrumental in organizing a subsequent conference of the Association of Social Anthropologists on the relative

importance of norms and politics or "power" in dispute settlement in a variety of societies. This conference resulted in a published collection of papers (Hamnett 1977). The theme of the varying place of norms in legal dispute and discourse was further developed by Comaroff and Roberts (1981).

It could be argued that evolutionary and typological issues are implicit in these discussions. Has there been in the course of history a movement from systems predominantly given to managing disputes through "political" means to systems predominantly committed to adjudication? Has there been an overall tendency to move away from situational negotiability in the direction of rule standardization? And do any present-day societies epitomize these types? Although these issues could be said to be implicit in the intellectual tradition that lies behind these anthropological works, neither Gulliver's books, nor the papers in Hamnett's *Social Anthropology and Law,* nor Comaroff's and Rosen's legal/ethnographic writings are directly occupied with large-scale evolutionary comparison. Comparative issues are of necessity library problems, and anthropologists are predominantly field workers. With a few notable exceptions, anthropologists interested in law tended to write ethnographies and to address questions about one people at a time, since that is the normal task of field work. (For other examples in the last decade of single-locality, essentially noncomparative legal ethnography, see Engel 1978 on a provincial Thai court, Starr 1978 on disputes in a Turkish village, Snyder 1981 on legal change in southwestern Senegal, Benda-Beckmann 1979 on the durability of concepts of property in West Sumatra, Moser 1982 on rural Taiwan, Gordon and Meggitt 1985 on the highlands of New Guinea, and Moore 1986 on an African system of "customary" law.)

A good deal of field work is focused on the open-ended exploration of defined problems. Comparative analysis may come afterward; but the stage of comparison is often not reached at all. Laura Nader has sought to overcome this deficiency by trying to persuade her students to concentrate on common problems as they study law in the field in different societies (Nader and Todd 1978). Although comparative in intention, the volume of their papers she edited makes only more evident the seriousness of the problem of comparability. When materials are collected by many different persons with different interests, working in different societies, the results are not comfortably equivalent. No wonder, then, that large-scale comparisons of whole legal systems are seldom attempted.

There has been a recent effort to fill that gap. Katherine S. Newman (1983) has published a revised version of her doctoral dissertation in which she compared legal institutions across more than 60 preindustrial societies. Newman characterizes her interpretation as Marxian or materialist. But, in fact, for all its Marxist nomenclature, the analysis has much in common with G. P. Murdock's correlational studies undertaken in the 1940s and 1950s and with earlier work (Hobhouse, Wheeler, and Ginsberg 1915; Diamond 1971; Murdock 1967a and 1967b). The project is typological rather than historical, and by implication evolutionary. Newman groups "preindustrial societies into seven basic categories according to the level of their forces of production: (1) hunting and gathering, (2) fishing, (3) pastoral, (4) incipient agriculture, (5) extensive agriculture, (6) intensive dry agriculture, and (7) intensive wet agriculture" (p. 111). She then works out a typology of correlated political and legal institutions. There are no great surprises here, factual or theoretical, for those who know the literature. For example, few would doubt that in general "the greater the degree of development of the forces of production, the greater the degree of social stratification" (p. 123). These and other similarly well-established theses (and also, to do her justice, many refinements of them) are examined

by Newman as hypotheses. Cross-cultural sampling is used to "test" the hypotheses, in fact, to show the statistical demonstrability of the connections already postulated.

When Newman moves on to discuss the "functions" of legal disputes and legal rules, her thesis is that "legal behavior is oriented toward and straining to accomplish the containment of structurally generated conflict" (pp. 138ff.). Her discussion of the kinds of recurrent disputes and rules associated with particular modes of production is somewhat tautological, but she forges through her preconstructed types undaunted. That law is concerned with hierarchy and unequal access to resources and power wherever these exist is something less than a newly discovered fact and generally implied in the definition of law itself. There are many questions of definitional assumption involved here that could profit from more self-conscious examination. One can plausibly advance a more complex argument, that "law" necessarily is involved both in "structure" and in the "contradictions" in "structure." But everything depends on what is meant by those terms and what sort of dynamic is assumed to link the phenomena to which they allude. The comparative method Newman has used does not leave much space for the examination of such theoretical issues nor for inquiry into historical sequences.

Inherent in the enterprise of comparing whole societies in this wholesale way is a tendency to interpret societies as coherent, logically consistent entities. In any hands, the consequent heuristic simplification into types not only tends to produce ahistorical analyses, but also generates rather flattened synchronic ones. The "type" tends to become a static composite, a construction, removed from actual ethnographic instance. Newman struggles to avoid being misunderstood as simplifying in this way by making many specific allusions to snippets of ethnographies and by making innumerable theoretical disclaimers. Thus, she protests frequently to some unseen critics and says such things as, "This should not be taken to suggest that law has only economic functions; it clearly plays other roles as well. Nevertheless, I am arguing that the regulation of social relations of production is a crucial function of law" (p. 138). There is much more about modes of production in this book than there is about law. Inevitably, in the end, the vast project Newman has designed for herself is very selectively addressed.

In the last decades, two lawyers have also chosen to write on "primitive" law in an evolutionary mode—Simon Roberts (1979) and A. S. Diamond (1971). Diamond's book, a version, revised repeatedly, of earlier works, remains rather old-fashioned, formal, and legalistic. Roberts's approach, while more trendy and socioanthropological, covers a different territory. However, both, like Newman, proceed from a political–economy perspective, classifying "early" law in terms of the kind of society in which it is found, rather than proceeding from particular legal ideas or institutions.

Roberts's book is intended as a textbooklike introduction to the range of premodern societies and their modes of handling conflict. He writes in general terms about ways of maintaining social order and structural continuity before addressing mechanisms for handling conflict. These topics are followed by four brief chapters on nomadic societies, cultivators, stateless societies, and the state. Roberts concludes with chapters on fighting and talking and on rules and power before closing with a very brief discussion of some of the themes in the literature. Roberts eschews statistics and settles for clear prose. The focus throughout is on disputes and their settlement in a variety of political settings.

Roberts does not explicitly use the distinction between custom and law to separate prestate from state systems, but in avoiding the use of the word law when discussing prestate societies, he shows the extent to which his analysis is informed by neo-

evolutionary approaches. Giving primacy to bilateral or mediatory resolution of dispute in stateless societies, he concludes that, where such systems involve third-party intervention, the "mode of intervention is restricted" (p. 134). The statement certainly applies to those societies that are politically least complicated and least hierarchical, but it is a contestable generalization when applied to certain chiefdoms. The neo-evolutionist mode of analysis can be most effective when discussion deals with the extremes—the simplest acephalous systems and the fully developed state—but it is seldom subtle enough to account for intermediate types of centralized organization, such as chiefdoms and "segmentary states," tending to give them short shrift. Roberts shares with other neo-evolutionists the notion that, in the absence of a centralized state, "it may be highly misleading to see force as the ultimate incentive towards compliance with socially accepted rules"; like others, he characterizes the withdrawal of social contact and economic reciprocity as "quite the reverse of what we commonly understand as coercive force" (p. 27). He underestimates the effect of such measures. Roberts's limited definition of "coercive force" notwithstanding, it is clear that in most (all?) societies economic costs and penalties can be coercive and, in primitive economic conditions, may even have seriously threatening implications. Indeed, in what society is crude physical force the *principal* incentive toward compliance?

Roberts's book is subtitled "An Introduction to Legal Anthropology," but the author hastens to note on the first page of his preface: "Despite the sub-title, it must be said that this is not a book about law" (p. 9). His entire first chapter is devoted to answering his own question, "Why Not Law?" (pp. 17–29). He replies that to use the "legal model" drawn from our society to analyze others is inappropriate, and he goes on to define that legal model as one whose "point of departure" is a clearly defined corpus of legal rules, which "can provide little help in the study of these groups" (p. 26). Roberts goes even further when he says speculatively that we cannot "be sure that people in another culture will think and speak in terms of 'ought' propositions at all" (p. 26; see also p. 170). (One wonders how children in such imaginary societies might be enculturated?) Roberts has since clarified his position. In *Rules and Processes* (1981) he and the anthropologist John Comaroff have analyzed the complex relationship between norms and actual outcomes in disputes among the Tswana, with considerable attention to the rhetoric involved. Their analysis shows that the "normative repertoire" is clearly present in Tswana thought and speech, but that to understand its pertinence to social life is to go far beyond any simple list of rules.

For some time, there has been growing interest in comparing oral and written literature. Yet only a few of the important differences between oral and written law have been noted. Consequently, it is a matter of no small interest that in Roberts's earlier book (1979) he emphasizes the importance of talking in the resolution of dispute and that he and Comaroff stress the linguistic aspects of Tswana dispute in *Rules and Processes.* There is good reason to consider further the nature of spoken law (see, for example, the limited approach in S. Diamond 1971, pp. 39–48).

A short provocative book on literacy and thought has pertinence to these questions. In Jack Goody's *The Domestication of the Savage Mind* (1977), law is not discussed. Goody's oblique purpose is to show that much of the "grammar of culture" worked out by Claude Lévi-Strauss is a form of cognitive systematization superimposed by the literate anthropologist on the cultural materials of a nonliterate society. It is Goody's contention that the "structuralism" reflects literate habits of thought that do not exist in that form in the cultures analyzed by means of it.

The general discussion is suggestive for theories of law, since it clarifies the difference between applying intellectual capacities to written materials and applying them to living situations. Goody emphasizes three points. First, he notes that the critical analysis of ideas embodied in a corpus of written material is an activity quite different from consideration of ideas bound up in current events. Second, he stresses the cumulative nature of recorded material, opening the possibility of compiling lists and making inventories of information much larger than can be retained by an individual; writing gives permanence—or at least durability—to ideas and information that would be evanescent if carried in an oral tradition only, so that those materials themselves can be studied separately from events. He mentions the contribution of writing to the cumulative growth of knowledge, analysis, and perspective. Third, Goody points out that written materials can constitute a standardized "model for action" for the future, in everything from recipes to the rules and policy directives that make bureaucracies possible.

Inevitably this reflects on ethnography. Anthropologists, who come from a literate tradition, often study peoples living in an oral tradition. The anthropologist imposes a new organization on the gathered data and presents them in a form other than that in which they were observed or heard. This circumstance is as true of the ethnography of law as it is of ethnography in general. Such transformations are not only unavoidable; they are also the essence of analysis. But the systematic understanding the literate form and organization generate may produce a perspective that differs markedly from that of the nonliterate actors whose "legal" activity is analyzed.

Obviously, Simon Roberts is right, as was Paul Bohannan (1957) before him, in stating that nonliterate societies do not have "a clearly defined corpus of rules," if that is understood as the product of a literate tradition. The notion of "corpus" implies an exhaustive list. "Clear definition" requires subdefinition, distinctions, doctrinal commentary, records of case application, and the like. These procedures require writing and record-keeping. By this definition, nonliterate societies cannot have "a clearly defined corpus of rules." Nevertheless, it is not uncommon to find members of nonliterate societies making normative statements, and there are also observable regularities of practice. The challenge for the ethnographer is to find a way to describe these sufficiently processually and contextually so that they are not misunderstood by a literate audience. That is the method the Comaroff-Roberts book (1981) seeks to clarify. The current anthropological interest in this problem is in part a development of sociolinguistics, in part a reaction to the normative style of earlier ethnography, and also to some particularly unproductive examples of the "rule approach."

The work of A. S. Diamond along these lines represents an example of immense scholarly effort impaired by a lack of such sociological understanding. His *Primitive Law Past and Present* (1971) is a revised third edition of a book originally published in 1935. Diamond, having read a great deal in the thirty-odd years between the first and third editions, added much information (and not a little misinformation), but the basic framework remains unchanged in all editions (1935, 1951, 1971). From the start, his interest was in early codes, and his curiosity about the law of nonliterate peoples is a kind of adjunct to the focus on the earliest examples of lists of written laws and their successors. There is nothing ambiguous about his extended typology, based entirely on levels of material culture.

> There is only one time-scale, to call it so, that can be attempted, and that is the economic, using the word in its widest sense—the progression of development of

> visible, measurable, material culture. . . . Employing then such a time-scale, our purpose is to find the changes in the growing law that appear at every step in the scale. [1971, p. 4]

His systematic attempt to criticize Maine for relying exclusively on Indo-European materials aimed at going beyond Maine by using a statistical approach to cultural comparison. He did not have Lon Fuller's more experimental turn of mind, in which Maine's thoughts are not taken literally but are treated "as a kind of allegory" (Fuller 1968). Instead, Diamond was trying to reconstruct the evolution of law in a scientific manner through the quantification of cross-cultural variation. He used *The Material Culture and Social Institutions of the Simpler Peoples* (1915) as the typological and temporal framework for his stages of development. The authors—L. T. Hobhouse, G. C. Wheeler, and M. Ginsberg—made a major early attempt at statistical comparison by examining the ethnographic data on 600 societies, classifying them according to the sophistication of the mode of obtaining food, and trying to correlate elements of culture and organization with each type of stage. Diamond sought to fill in the legal dimension of each stage, and to "take up the enquiry where Maine left it" (1935, p. 1; see also pp. 346, 445).

Diamond's purpose was serious, and he worked very hard to achieve it. He arranged his ethnographic information according to a list of topics. Reading his books, it is not difficult to imagine the file cards and their headings. For example, his first chapter, on the lowest level of economic development, starts with a description of the way food gatherers made a living and of the kinds of social units in which they lived (1971, pp. 157–162). This account is peppered with unconnected examples drawn from a wide range of societies. Diamond proceeds by making general statements followed by exceptions or the range of variation. He then discusses the society according to whether it has political offices (p. 162), the nature of its kinship system—groups, who may marry whom, obligations of spouses and affines, divorce, and adoption (pp. 163–64)—the ownership of resources (pp. 164–66), sanctions for wrongful acts (p. 166), the intimations of a boundary between civil and criminal wrongs (p. 167), a list of the kinds of wrongful acts—violence, homicide, and theft (p. 168). He concludes that there is no legal procedure to speak of, noting, "In substance the existence of law is not to be recognized" (p. 170).

Law or no law, a reader will not discover from Diamond's lists the way organized life is carried on in these groups. Diamond is interested in learning only which items from his file of legal topics, drawn from societies with codes, can be found in these simpler ones. The approach might generate interesting comparisons if it were carried out with a broader sense of social context. But a laundry-list approach can never discover material that was not anticipated when the original list was drawn up. For all the hard effort evident in Diamond's work, the product is an aggregate of miscellaneous items more often than it is an effective integration. Both Newman and Roberts attempt less and achieve more. But neither is explicit enough about the changes in anthropological method and theory that have produced quite different kinds of legal ethnography at different periods, and neither sufficiently acknowledges the serious and permanent gaps in the record.

Present anthropological perspectives give much more weight to the colonial or postcolonial circumstances of most field work and to gaps in the record, the variable quality of old ethnography and other problems of evidence, than were formerly thought important. The transformations brought about among subject peoples by the suppression of the indigenous use of force and the removal of autonomy in the colonial period must have

been very great. Such measures must have affected precisely those matters regarding enforcement and the workings of the politicolegal system that writers now theorize about so freely. What is known about "social control" in most of the societies anthropologists have studied is limited to information collected in a period of colonial peace. Some few peoples were still in the midst of their traditional forms of warfare and individual fighting at the time they were studied, but those are the exception rather than the rule. Most of the ethnographic material on the use of force, as well as on fighting and warfare, consists of retrospective recollection.

Thus, "the way the system worked" as expounded in evolutionary writings is in important parts conjectural and inferential (for some good modern reports on such evidence as there is, see Meggitt 1977; Strathern 1975 [1971], on New Guinea warfare). From Bronislaw Malinowski's work (1926) on the Trobrianders to Philip Gulliver's work (1963) on the Arusha Masai, the ethnographic study was performed under circumstances quite different from those that had prevailed in precolonial days, but the interpretation was made without much attention to the colonial context. The material is no less interesting and important because of its date. But for an understanding of the social balances involved in the earlier system of using and regulating violence, and the connections of the earlier system with others through trade and warfare, there are necessarily many fundamental gaps in the information. Much that is important about the political dimensions of these precolonial systems will remain permanently uncertain. That circumstance permits moderns to make what they like of them for the purposes of theory, evolutionary or otherwise. As Elizabeth Colson has written, "Those who build theories about the nature of stateless societies have . . . differed profoundly in their view of what life is like under such conditions, a difference which rests upon different assessments of the nature of man" (1975, p. 32).

Dominant Norms and Forms; or, Foxy Manipulators Not only because what is known about them is usually a "reconstruction," but also because of the distorting pressure of political issues in the present, it is difficult to see nonstate societies as they were. Their law and their social order have come to occupy a polemic place in discussion. In 1973 Elizabeth Colson delivered the Lewis Henry Morgan lectures at Rochester University, later published as *Tradition and Contract* (1975). Fresh from the time of troubles at Berkeley in the 1960s, Colson took as her theme what she saw as the constraints and dangers of life in egalitarian stateless societies, arguing that central governmental authority can bring liberty and security. Clearly reacting negatively to the student vision of "alternative" communities of individuals freely negotiating with each other, she marshaled her knowledge of stateless societies to document the thesis that equality and absence of central authority do not spell freedom from limiting rules nor freedom of expression but that the contrary is the case (p. 51). Arguing that, because people in such societies literally have to fight for their rights and "depend on themselves for ensuring life and property," they live in a state of chronic insecurity (p. 67); she described the price of truce in such settings as involving endemic mutual suspicion and a tense vigilance.

Colson went on to discuss the benefits of centralized government: "we cannot understand . . . the colonial period, or indeed the history of our own time, if we do not understand that people may be prepared to accept authority, even though they find it both threatening and frustrating, because they see it as the guarantor of an overarching security" (p. 67). And of Africans today, who once lived in "small parochial units," she

noted, "Whatever their quarrels with government, they want good government rather than less government" (p. 8).

Colson also mentions the desirability of "escaping from those close-knit social networks of village society" (p. 102). Unlike the political evolutionists Morton Fried (1967) and Elman Service (1975), Colson considers the rule of community consensus to be frequently oppressive and requiring an undesirable degree of conformity. For Service and Fried, nonstate societies, whatever their suffocating closeness, are paradise compared with societies that include class stratification, economic inequality, and state coercion. Which side is right? How is one to see legal comparisons clearly, given the present uses of the past?

Colson's argument contains echoes of Sir Henry Maine. Indeed, her introductory remarks (p. 8) allude to the writer who also discussed the tyranny of kinship groups over their members in earlier forms of society and the modern growth of individual liberty. In keeping with the elegant duality of nineteenth-century rhetoric, Maine organized his discussion of legal evolution around two types, ancient law and modern law. He put into a set of succinct oppositions what he saw as the legal significance of the shift from one condition to the other. Most often quoted and most often misunderstood is the movement from status to contract; but more significant to his argument is the change from the family to the individual as the basic social unit. In Maine's usage, "status" meant legal position in a family group, not standing in the modern sociological sense (1861, pp. 126, 169, 170). Related to these shifts were the changes from collective family property to private individual property, from a polity based on the concept of kindred to a polity based on the principle of local contiguity, from inalienable land to salable land, and from intestacy to wills (pp. 270, 131, 260, 268, 195). Maine perceived the prefeudal condition of orderly society as originally organized into corporate patriarchal families that held property in common and whose members were ruled by the male head of the household (p. 311); "the unit of an ancient society was the family, of a modern society the individual" (p. 126). It is interesting that Maine considered the emancipation of women part of the very same historical progression:

> the civilized societies of the West, in steadily enlarging the personal and proprietary independence of women, and even in granting to them political privilege, are only following out still farther a law of development which they have been obeying for many centuries. The society, which once consisted of compact families, has got extremely near to the condition in which it will consist exclusively of individuals, when it has finally and completely assimilated the legal position of women to the legal position of men. [Maine 1880, p. 327]

The certitude with which Maine identified a single process as the mainspring of legal change is remarkable.

How current is this view of legal individualism as social progress? Discussion of some of the issues continues but in a different vein. Alan MacFarlane, an anthropologist-historian, puts forward the argument that individualism in Maine's sense was manifest in English society very early in its history, at least by the thirteenth century; he cites Maine's work in presenting his own in *The Origins of English Individualism* (1978, pp. 186–88, 201). The importance of the date derives from connections made between "individualism" and the origins of capitalism and industrialization, relating individualism also to the origin of the ideology of equality and liberty. "English property relations were at the

heart of much that is special about England" (MacFarlane 1978, p. 200). MacFarlane argues that the "individualistic pattern of ownership" was the source of all the central features of English social structure and that, moreover, by putting the date of this phenomenon too late, Karl Marx, Max Weber, and Karl Polanyi were mistaken about the sequence and timing, and hence the cause, of modern capitalist developments. MacFarlane not only contends that England had ceased to be a "peasant" society by the thirteenth century, but also suggests that it may never have been one. He makes his case easier for himself by comparing the complex realities of English history with a simple model of peasant community, but the thesis is nevertheless tantalizing. Prominent among the data he brings forward to support his argument are court records and other materials on the law of real property, particularly documents relating to the forms of tenure, alienation, and inheritance. Law, in turn, is taken to reflect the structure of the family and the place of the individual in it. Today it is plain that some of the themes that occupied Maine are far from dead, but that not only unitary evolutionary typologies but also variations in historical sequences are being brought to bear on these questions.

Maine was limited in his assessment of these matters, not only by the narrow range of ethnographic information available to him but also by his exaggerated preoccupation with what he regarded as the most important and singular feature of modernity—the freedom of the individual as epitomized by his legal capacity to hold private property in land and to make contracts. In *Ancient Law,* Maine paid little attention to developments in the relations between law and formal organizations. He was certainly fully aware of their importance, since he wrote on government in other books. In *The Early History of Institutions* (1880), he referred to two central ideas—"land as an exchangeable commodity" and "the great increase in modern times of the authority of the State"—as the "several great conceptions which lie at the base of our stock of thought" (pp. 86–87). But only the first was the focus of his evolutionary classification of law.

Nearly a century later, Max Gluckman tried to substantiate Maine's principal contentions about ancient law in his field study of the Barotse, a people living in what was then Northern Rhodesia (1955, 1965a, 1965b). But since in 1941, the time of Gluckman's field work, the Barotse were not an "archaic" society but part of a colonial one, Gluckman was "reconstructing" the "tribal" system with full prior knowledge of Maine's model (see Moore 1978a).

Despite Gluckman's respectful declaration of his indebtedness to Maine and his own emphasis on the normative importance of kinship as the model for all obligations in Barotseland, his treatment of these issues and Maine's are quite different. (See Gluckman 1965a and 1965b.) Maine equated kinship with "family"—patriarchal family at that—and saw it as a milieu in which the individual was submerged in the collective so that, except for the patriarch himself, individuals could not act on their own. "In the constitution of primitive society the individual creates for himself few or no rights, and few or no duties" (Maine 1861, p. 311). Gluckman's case analyses simultaneously focus on two aspects; they emphasize certain highly general parameters of mutual obligation lying between persons in such *paired roles* as father-son, brother-brother, and husband-wife; and they clarify the specific manipulative, self-interested activities and negotiated arrangements that actually took place between *particular individuals* in the case histories. The legal question as interpreted by Gluckman is always whether these highly idiosyncratic individual transactions were within the range of cognizable notions of proper behavior in a social role.

In his general evolutionary interpretation, Gluckman postulated that there were two types of relationship, each being the basis of a corresponding type of legal system. The first, characteristic of tribal societies, consists of *multiplex relations*—long-term personal relationships between individuals exhibiting multiple strands of mutual connection; these are connections between the same persons in the economic, political, religious, and social spheres. The second type consisted of *simplex relationships*, single-interest impersonal relationships in which only one strand connects the parties; these may be found, for example, between buyer and seller, employer and employee, and teacher and student. Gluckman never disentangled long-term single-interest relationships from single transactions, though such a distinction might have clarified his analysis. Simplex relationships were held to be characteristic of modern societies.

It was Gluckman's view that in social systems founded on multiplex relationships—such as tribal systems—the law consisted of the general standards of reasonable behavior appropriate to persons in particular roles. He believed that, although some tribal law was expressed in explicit rule statements, its major portion was implicit in role standards. By contrast, he assumed that a modern legal system dominated by simplex relationships had innumerable quite specific and explicit rules referring not to roles but to kinds of transactions and to specific acts. Any lawyer knows that many modern legal standards are related to roles. And a reanalysis of Gluckman's data on Barotse cases reveals very quickly that some Barotse rules also referred to certain acts and transactions *without* reference to the "roles" the parties might occupy. Nevertheless, the contrast Gluckman was mounting lay between a model of social relationships founded on kinship and a model of social relationships founded on commerce. (For Gluckman's general ideas on sociopolitical evolution, see 1965b.) That durable relations—some of them multiplex, some of them "single-interest"—can and do exist in modern society is evident, and Gluckman freely conceded that single-interest transactions do take place in some nonmodern societies. But he was concerned with the *dominant* type and the way it afforded a paradigmatic model for law.

This dual typology has various problems, but what is interesting is not what it is but what it and other work of the period spawned. Gluckman's general interpretations made "tribal" law consonant with a normative, structural-functional model of society, but his case studies suggested the cogency of quite different models (and Gluckman was instrumental in bringing case studies into anthropological respectability). The cases showed particular individuals disputing and often recounting the facts of series of mutual transactions lasting over many years. Gluckman insisted that the outcome of the cases that were tried depended on whether they were thought by the judges to fall within the range of proper behavior in a social role. This suggestion stimulated a great deal of countervailing work to show that often the conduct of individuals could not be accounted for by their "roles" and was much more economically explained by self-interest. In the work of Gluckman's students and colleagues of the "Manchester School"—such as F. Bailey, E. Colson, E. Peters, and V. Turner—and such non-Mancunians as F. Barth, P. H. Gulliver, and L. Nader (and her students), there emerged a picture of People as Finaglers, as competitive and manipulative beings, conscious of norms, not incapable of having ideals, behaving with generosity and even sacrificing for others, but much of the time, when an opportunity exists, acting according to self-interest.

This construct is a marriage of Malinowskian observations of individuals "using" norms and of modern game theory, with some symbolic interactionism thrown in. People as Finaglers have for some years been the stars on the anthropological case-history screen.

They "use" social and cultural institutions. They satisfy the Marxists as well as "the others" with their rapacious materialism, their gamesmanship, their striving for economic and amorous gain. They can be watched on the small scale and observed at the head of governments. They are the Everyman (Every-person) of today, "making it" within the constraints of the social milieu—in some areas, subordinate to the power of others; in their own bailiwick, the makers of momentous minichoices about which anthropologists write books.

This development has led to a changed emphasis in many studies of kinship as-it-works-on-the-ground. And if kin-based systems are not as they once seemed, how is "law" in such systems to be understood? The "old" ethnography tended to record ideal rules of behavior often treating them as prescriptive and mandatory. Current writings tend to stress the fact that even in kin-based systems individuals may nevertheless have strategizing careers. They may play one kinship bond against another or may forge closer ties with some relatives than with others. Kinship is no longer seen as altogether the straitjacket of fixed rules in which genealogy and kinship role tie the hands, but rather a set of classifications and ideas that structure an arena of action within which discretion is exercised, favors and goods are exchanged, reputations are made or broken, and competition is not unusual.

Detail is both the blessing and the bane of these kinds of data, and triviality always a danger. The anthropologist faces the dilemma of attaching the minutiae of these observed "case" situations to larger-scale, longer-term realities while determining what kinds of evidence to use to establish these connections. Legal disputes, legal transactions, and other events involving law are particularly suitable for linking the small-scale to the large-scale, the momentary to the longer-term.

When Maine focused on the capacity of the individual to make contracts and to hold, buy, and sell land, the basic unit was a generic individual who, in his eyes, was the foundation on which the entire structure of modern law was built. The present interactionist perspective on legal disputes concentrates on the experiences of particular individuals in an attempt to understand "the system" from the actor's point of view (Nader and Todd 1978). On the whole, as a result of the interactionist approach, the larger politicoeconomic context is treated the way one might treat the Congo forest or the Arctic ice floes—as an external fact of nature, simply as part of the actor's environment. Individual legal choices of action are "explained" as self-interested or required by the exigencies of the "power structure," but the large-scale background is described rather than "explained."

The neo-evolutionist tends to have a corner on producing large-scale, long-term "explanation." One of the "others," Lloyd Fallers, while joking about Marx and Spencer, grumbled about the evolutionist approach, extolled Talcott Parsons and Weber, and reintroduced the intentional actor at the bottom of it all in his last book, *The Social Anthropology of the Nation-State* (1974). Fallers discussed the unpredictable and nonrepeatable aspects of history, concluding that "neither social anthropology nor social science in general can predict the outcome of contemporary nation-states' struggles with their problems" (pp. 121, 140, 143). But he argued that social science might contribute to an "understanding" of those problems, "and hence, perhaps, to the capacity for intelligent self-direction" (p. 143). All of which is rather vague. Fallers's own collection of case studies, *Law Without Precedent* (1969), set in Busoga, Uganda, squarely faces the colonial context of his study and the complexity of the transformation he was witnessing,

producing not theoretical synthesis but only an immense amount of detail and some platitudes about legal reasoning. For Fallers, understanding the nation-state meant describing it, supplementing the national aggregate statistics with deeper local material, and taking into account the nature of the leadership. He rejected any argument about historical inevitability—"history is not made up only of the sorts of economic, ecological and sociocultural structures and patterns that social anthropologists and other social scientists may discern. History is also made by men and groups of men, themselves conceptualizing and choosing among the courses of action offered by their situation" (1974, p. 69).

Because his time-scale is much longer and grander, this kind of "historical particularism" usually gives the armchair evolutionist-materialist no trouble. But the ubiquitous Finagler makes problems for the Marxist as field worker. Is the observed choice-making merely an illusion of the actors, whose course of action is really predetermined? Pierre Bourdieu (1977), one of the more reflective of the current crop of widely read Marxist anthropologists, tries to bridge such difficult problems with a new vocabulary—perhaps on the theory that, if contradictory concepts are embraced by a single term, the paradox will vanish from sight. Bourdieu proposes that analytically one should not think of culture as a set of norms. Instead, one should postulate a kind of cultural imprinting of "generative principles" that allow for the Finagler and also for innovation. This cultural frame Bourdieu calls the *habitus* and defines it as the "durably installed generative principle of regulated improvisation" (p. 78). At first sight, there seems an ambiguity about the individual as improviser. The door seems open a crack for creativity and change instituted by individuals. But Bourdieu is too committed a Marxist-determinist for such fluidity.

> Because the habitus is an endless capacity to engender products—thought, perceptions, expressions, actions—whose limits are set by the historically and socially situated conditions of its production, the conditioned and conditional freedom it secures is as remote from a creation of unpredictable novelty as it is from a simple mechanical reproduction of the initial conditionings. [1977, p. 95]

(Someone should have told him long ago that opacity is a bad habitus.) The concept of habitus closely resembles the idea of the internalization of culture. But in defining it as a matter of "generative principle," Bourdieu, like most social anthropologists today, rejects the representation of culture as a list of norms and rules in the old structural-functional or culture-pattern frame. A purely normative mode cannot account for "real" activities—the "practice" of his title, *Outline of a Theory of Practice,* the new focus of field work. Instead of consisting of a list of rigid rules, the habitus gives form to certain capacities, it guides and disposes, and it allows a range of choices to be exercised and a range of improvisations to be generated. But having acknowledged the capacity in the manner of a processual anthropologist, Bourdieu specifies the limits of the capacity in terms of traditional Marxist formulations.

The habitus is intended to explain the operations of "custom" or "prelaw" in Kabylia, where Bourdieu did his field work (p. 16). He describes a general scheme of cultural classification that can be turned to a variety of uses, among them the definition of aggravating or mitigating circumstances. These categories are the generative principles that can be permuted and combined to deal with any case. Bourdieu's conception of modern law is such that he concludes that "the precepts of custom . . . have nothing in

common with the transcendent rules of a juridical code" (p. 17). Probably the experience of a civil law system is what leads him to think of law in this way. Bourdieu appears to be saying that the juridical code is to the customary practice what normative anthropology is to the "generative principle of regulated improvisation." He seems not to know too much about comparative law, in practice.

The concept of the habitus tries to encapsulate a paradox, that the culturally determined does not preclude the improvised. (Another analytic scheme has been proposed to deal with these matters; see Moore 1978, pp. 32–53.) Bourdieu has left other paradoxes unresolved. Persons in archaic societies must be materialists like others; but archaic societies often seem to be focused not on economic interest but on symbolic and ritual activities and other apparently "disinterested" works. This fact, according to Bourdieu, is easily accounted for by the phenomenon of institutionalized "misrecognition" (p. 22). Bourdieu considered "the expression of material interests . . . highly censored" in certain types of societies, particularly archaic ones, but contends that this does not mean that the material interests are absent (p. 22). He contrasted the "good faith economy" of archaic societies with the undisguised "self-interest economy" of modern societies, arguing that both kinds of society are really moved by economic interest, but that the archaic economy must "misrecognize" that circumstance (pp. 22, 161, 172). Thus, there is a "systematic emphasis on the symbolic aspect of the activities and relations of production to prevent the economy from being grasped as an economy" (p. 172). As an example he cites gift exchange and its cultural representation by a "sincere fiction of disinterested exchange" (p. 171).

Where the only legitimate form of accumulation is of honor and prestige, these must be regarded as "symbolic capital" (p. 170). Bourdieu argues that in precapitalist societies, just as in capitalist societies, practice never ceases to conform to economic calculation; despite appearances to the contrary, symbolic capital can be accumulated and is ultimately convertible into economic capital (pp. 177, 170). Each of these three terms—habitus, misrecognition, and symbolic capital—embodies an interpretive problem that is troublesome in anthropology for both non-Marxists and Marxists.

Although Bourdieu does not deal at any length with legal anthropology, it is obvious that the explanatory puzzles he addresses are of critical importance to an analysis of "primitive law." Are comparisons to be made on the basis of apparent similarities, or of underlying meanings? And if matters are not as they appear to be, what criteria can be used to determine underlying meaning? One may find Bourdieu's conceptual vocabulary a scholarly form of misrecognition, but he has done much to sharpen the issues. A central problem in anthropology is a problem, not of data, but of meaning. Seeking meaning rather than sociological "laws," some have abandoned the "scientific" perspective as an impossibility in social science and prefer a hermeneutical approach. (For a collection of readings on this general position, see Rabinow and Sullivan 1979; for the argument that law itself is best studied through an "interpretive sociology," see Grace and Wilkinson 1978; and for an eloquent essay on differences of meaning in three legal traditions, see Geertz 1983.)

The interpretive social science people have more to contend with than Marxism, for Marxist anthropologists have no monopoly on economic interpretations of law and legal evolution. From a "free market" political position, Richard Posner produced a comparative article entitled "A Theory of Primitive Society with Special Reference to Law" (1980) that is just as economic in rationale as anything of Bourdieu's. Posner begins by

compressing all the major characteristics of primitive or archaic societies into a generalized "type"—the preliterate or primitive. He goes on to argue that "the theory that law is an instrument for maximizing social wealth or efficiency" may be used as an explanation of many of the distinctive institutions of those societies. In fact, he explains gift-giving, reciprocal exchange, polygamy and bride-price, the size of kinship groups, and "even the value placed on certain personality traits such as generosity and touchiness . . . as direct or indirect adaptations to the high costs of information" (pp. 5, 6). He extends the argument to a number of the specifically "legal" institutions of primitive society.

It is interesting to contrast Posner's and Bourdieu's approaches to the individual. Posner, a lawyer who is not an anthropologist, treats customary institutions. Individuals are in the picture only by implication as typical actors in typical behavior. He is occupied not with individual economizing but with the economic rationality of institutions for the society as a whole. When some ethnographies report an exact schedule of compensations for killing and injuries—for example, forty head of cattle for a homicide—Posner assumes that such precise schedules were, in fact, adhered to, and he rationalizes at length why such an arrangement is optimal for primitive societies (pp. 67ff.). Posner is unaware that, even when the rules are stated with exactitude, it is not unusual for negotiation and bargaining to take place about payment; he relies for his anthropological material on Diamond, the scholar of rules.

In contrast, Bourdieu, the anthropologist, like so much of the anthropological community, focused on People the Finaglers, the choice-making manipulators, the strategizing individuals. Bourdieu's problems arise first in connection with explaining the locus of material interests if people in archaic societies appear to be altruists, and second in explaining choice-making at the individual level while preserving the determinism on a historical level required by a Marxist explanation. He solves these problems with labels; the underlying dilemmas are not resolved. Bourdieu is concerned with states of mind, with symbols, with appearances and misrecognition.

Posner, not concerned with consciousness, notes, "in suggesting that primitive people are economically rational, I am not making any statement about their conscious states. Rational behavior to an economist is a matter of consequences, not states of mind, and in that respect resembles the concept of functionality in anthropology" (1979, p. 78, n. 166). He goes on to cite *Structure and Function in Primitive Society* (Radcliffe-Brown 1952). It is interesting that he should make this analogy by way of legitimation, since in current anthropology there is such widespread awareness of the limited explanatory power of the functional framework. The assumption that everything in society has a function does not necessarily lend rigor to the process of figuring out what that function might be. In good hands, such a method may generate some insights. Radcliffe-Brown conceived of *function* as the contribution made by a custom to the life of the whole society. Thus, in practice, function stressed the interconnection of phenomena. In Radcliffe-Brown's day, social anthropologists answered the question of function by showing the dimension of social relations that attaches to customs and institutions. The function of a ceremony included not merely its declared purpose but also its effects on the social relations of those involved or its apparent fit with some other set of customs and institutions.

Posner is correct in asserting that his approach bears some resemblance to the concept of functionality in anthropology. He postulates that every archaic institution must enhance social wealth or efficiency or it would not have survived. According to Posner's method, the question follows concerning the particular way in which the institution is

economically rational. Sitting at his desk Posner then thinks out the answer. He has no problem providing logically plausible economic rationalizations of the institutions he considers; but his ingenuity is no proof that he is correct. Like reasoning about function, reasoning about economic rationality stresses a putative "effect" of the existence of an institution.

Without any intention of descending into the Althusserian murk, it is useful to consider in this connection Freud's idea (1938) that all major social institutions must be "overdetermined." Freud granted that many "origins" and "causes" may account for the invention of religion beyond his own ideas of an "original" parricide. Since social scientists have abandoned the general search for origins, and since it has become evident that causes are frequently very difficult to isolate, it is often much clearer to talk about consequences, as Posner does. Nevertheless, it could easily be argued that all major social institutions are by definition not only overdetermined but also multiconsequent. Posner is making an inquiry into the economic logic of multiconsequent institutions. That his own version of economic rationality was the only consequence he considered, that his compressed primitive type eliminates the variability that might have tested some of his conclusions, that someone more intimately aware of the ethnographic data might have saved him from some misleading sources—none of these reservations overcomes the stimulus of his challenging argument.

However, as has been noted of a functional approach, "it is of little advantage to know that everything is related to everything else . . . unless it is possible to show the extent to which it is so related" (Goody 1976, p. 119). Just as much interested in material matters as Posner, Jack Goody, in *Production and Reproduction,* used the *Ethnographic Atlas* (coded data on 863 societies) in an effort to show statistically "a positive association" or "a significant trend" of connection among factors relating to inheritance, dowry, and bridewealth (p. 10). His general argument claims that the more intensive the use given to scarce productive resources, the greater the tendency toward retention of these resources within the basic productive and reproductive unit (p. 10). The argument is, in part, a development from an earlier collaborative work on dowry and bridewealth (Goody and Tambiah 1973). There are clear implications for legal history in this work.

Jane Collier has been carrying forward a comparison on a smaller scale of bride "payments" in several societies. She considers the settings in which bride service, equal bridewealth for all brides, or unequal bridewealth is paid in connection with marriage. Following Claude Meillassoux and others, one of her interests is in developing general models of the variety of types of "simple" societies (Collier 1984). Since much of the organization of prestate societies—and, indeed, of many state societies—is kin-based, the controls over women, marriage, reproduction, and production are often closely related. Because matters of kinship and economy are central to understanding the legal order, the subject matter of this line of inquiry will continue to be of high interest to the generalizing comparativist.

The hope for ongoing work is that it will change for the good the cruder classical terms of discussion. (For a variety of current commentaries, see Black 1984.) One hopes for more subtle analyses of observable living societies and more informed speculations about unobservable past societal forms, both infused with more candor about what is not known. The dominant themes of grand interpretation and its certitudes have been the same for a remarkably long time, certainly at least since the nineteenth century; they center on whether the individual knows more security, liberty, equality, and fraternity in

primitive conditions and in small self-governing communities than in the smoky cities and rural agribusinesses of modern societies. On such questions as whether the pursuit of rapacious self-interest and the use of coercion is more contained in one kind of setting or the other, two extreme camps come to precisely opposite conclusions. Further reiteration of these arguments in the same general terms cannot be very profitable. But there are encouraging signs that in some quarters the content of the discussion is changing.

Three integrating works on modern law by Roberto M. Unger, Donald Black, and Philippe Nonet and Philip Selznick show the unmistakable influence of this long history of debate, and some of their arguments are in a familiar evolutionary mode. But the common preoccupation of these works is clearly a political one—the proper role of the state. In contrast to the 1920s and 1930s, when many American lawyers and social scientists looked with optimism to an increase in the power of government and to legislation and the courts as the source of desirable social reform, the 1960s and 1970s brought skepticism about whether government and legal institutions can carry the burden of such hopes.

After Weber, What? Some Recent Essays on the Grand Scale

Max Weber tried to synthesize the general development of lawmaking and law-finding by outlining a series of developmental stages, with law passing progressively from a high degree of formal and substantive irrationality toward greater and greater rationality. The movement was away from arbitrary and particularistic decisions, and from techniques involving revelation, chance, and the supposed intervention of the supernatural, toward the use of reason, logic, and the systematic application of general rules. Weber hastened to note of his "ideal types" that "the theoretically constructed stages of rationalization have not everywhere followed in the sequence we have just outlined, even if we ignore the world outside the Occident" (Weber 1954, p. 304). His legal evolutionism, which is anything but unilinear, is not focused on a sequence from "collectivism" to "individualism" (see his comments on the latter, pp. 188–89) but rather on other aspects of political and economic organization and what he saw as the corresponding growth of more rational styles of legal thought. Weber's legal training is evident in the large place he gave to professionalism, the development of systems of rules, and the nature of legal formalism and of bureaucratic institutional arrangements. Decidedly a candidate for the position of lawyers' favorite sociologist, Weber felt certain that nothing would ever "stop the continuous growth of the technical element in the law and hence of its character as a specialists' domain" (p. 321). But he returned again and again to the point that, in the manner of substantive content, it is not simply the legal thinking of the specialists but also the political, economic, and ideological contexts of the time and place that are paramount in giving the law its continuously transforming shape. He thought of law as "a rational technical apparatus, which is continually transformable in the light of expediential considerations" (p. 321).

In his *Law in Modern Society* (1976), Roberto Unger bravely tried to "redo" Weber on law and go further. He sought to encompass in one discussion all the world's legal systems of all times and all places and to identify how and why they change, sorting legal systems into a few great types. In a technique borrowed directly from Weber's, Unger argues that the "ideal type" is the most powerful methodological tool for "the reconciliation of generalizing theory and historiography" (p. 45). He extends specifically to law the ques-

tion to which so much of Weber's work was dedicated—how to account for the uniqueness of modern Western European society and ideas. Also following Weber's script and with the ghost of Marx watching in the wings, Unger is very much concerned with the effects of consciousness, with the way the self-understanding of people in a society affects that society. In Unger's scheme of things, all social change ultimately depends on an aspect of awareness. "The deepest root of all historical change is manifest or latent conflict between the view of the ideal and the experience of actuality" (p. 153).

Since, in Unger's dynamics, social change springs from a dissonance between ideal and real, he must set about defining these for each of the major types of law. He categorizes three such types: customary or interactional law, bureaucratic or regulatory law, and the legal order (pp. 49–85).

Each of Unger's legal types corresponds to a particular kind of society. Thus, customary law is found in tribal society, the bureaucratic order emerges in aristocratic society, and the legal order exists in liberal society. Beyond liberal society, postliberal society is the current phase; Unger named it "modern society." He was careful to note that "[t]he concepts of tribal, liberal, and aristocratic society are meant to be parts of a comparative scheme rather than stages of a universal evolutionary sequence" (p. 137).

Unger's conception of tribal society is a Durkheimian one, in which few groups exist and individuals are joined in strong communal solidarity. The major social distinction is between insiders, who share the "mental experience" of an intense moral communion, and outsiders, with whom "they do not share anything important" (p. 142). "The chief point to grasp is that in tribal societies very different standards of behavior are imposed on relations among insiders and on those between insiders and strangers" (p. 141). Reciprocity is the rule for insiders, while predation is permitted against outsiders.

Law as custom "is neither public nor positive" (p. 50). Unger uses the concept of nonpublic law to indicate that, although customary law is common to the entire society, it is not associated with a central government. He sees a lack of positiveness in the circumstance that custom "is made up of implicit standards of conduct rather than of formulated rules" (p. 50). "Customs are characteristically inarticulate rather than expressed. They apply to narrowly defined categories of persons and relationships rather than to very general classes. And they cannot be reduced to a set of rules" (p. 50).

Unger poses three questions for each of his social types: what is the anatomy of its groups?; what is the nature of the social bond within the society?; and "how will individuals" in such relations "conceive of the place of the ideal in actuality?" (p. 143). Answering these questions for tribal society Unger states that among tribesmen, ideal and actuality are inseparable. They do not have "the experience of moral doubt" and cannot conceive that nature and society might undergo basic change (p. 143; see Needham 1972 for an anthropological view consistent with Unger's on this point). This is an arguable proposition, about which anthropologists are not in agreement.

In Unger's scheme of things, "Each type of society has a focal point of tension, a hidden flaw in its characteristic way of defining the social bond," which becomes the source of its transformation (p. 151). "For tribal society, there is the danger that the community of shared values may fall apart, victim to group conflict" (p. 151). This observation is the very opposite of the primitive scene described by Barkun, Gluckman, Evans-Pritchard, and Sahlins, in which conflict is endemic and the "system" has a continuity to which conflict contributes.

Throughout the theoretical (rather than the descriptive) part of his book, Unger

juxtaposes tribal society and liberal society, to accentuate the contrast between them. He goes on to discuss aristocratic society, which he sees as a kind of intermediate type, both historically and logically. The legal order of liberal society is "general and autonomous as well as public and positive." In the legal order, constitutional distinctions separate politics, administration, and adjudication. The law becomes an "autonomous" set of integrated practices and ideas. Rules are applied by a specialized institution, whose main business is adjudication; legal reasoning differs from any other, and a specialized legal profession develops. The legal order emerged with modern European liberal society (p. 52).

In liberal society, every individual belongs to a large number of significant groups. The "association of interests" forms the social bond. The beliefs about the ideal and the experience of the actual a society is said to generate are an ideal of order and an experience of diversity of interests, groups, and ideas. As for the flaw in liberal society, "in its characteristic way of defining the social bond . . . [l]iberal society is vulnerable to the implications of its uniquely unstable system of ranking: some groups in fact have more power than others, yet no group seems entitled to dominate the others. Hence, a continuous struggle takes place between the quest for equality and the need for authority" (pp. 66, 143, 144, 146, 152). Unstable systems of ranking hardly seem the monopoly of liberal society—but Unger's is a schematic representation, not a description of reality.

Two other types are discussed in Unger's scheme—aristocratic society with bureaucratic law, and postliberal society. The latter is the modern society, which gives him his title. He also permits himself some speculations about postmodern society and the possibilities ahead. Unger divides modern society into three types—traditionalist (societies with both a modern and a nonmodern sector, as in developing countries and, in his ordering, Japan), revolutionary-socialist, and postliberal. "The Western capitalist social democracies have become postliberal societies." The reader may be alarmed to learn that in postliberal society the rule of law disintegrates as the boundary between state and society, the public and private spheres, is eroded. "Open-ended standards" come to have a major role in legislation, administration, and adjudication, and there is a shift "from formalistic to purposive or policy-oriented styles of legal reasoning" (pp. 192, 193, 194).

Traditionalist modern societies operate on basically two legal orders: that of the central government and that of the informal system of customary law "that embodies the dominant consciousness of traditionalistic society," but there is also a growth of a "sprawling body of bureaucratic law that mainly regulates the economy" (p. 228). Unger speaks of the underlying tension between "the ideal of hierarchic community, and the experience of social disintegration, bred by life in the modernizing sector" (p. 229). The dilemma of revolutionary socialist society is "its attempt to reconcile industrialism, bureaucratization, and national power with the achievement of an ideal of fraternal or egalitarian community. . . . The society has two kinds of law. There is a law of bureaucratic commands and a law of autonomous self-regulation" in the various communal organizations (pp. 231, 233).

Unger argues that all three types of modern society—traditionalist, revolutionary-socialist, and postliberal—"are obsessed, in different ways, with the reconciliation of freedom and community" (p. 266). He sees two major conflicts to be resolved in the future: the reconciliation of industrialism's need for centralization and specialization with the "longing for community" and the need to define the communitarian ideal in such a

way that it strengthens the sense of individual autonomy "to make autonomy compatible with authority" (p. 237).

Law in Modern Society is an attempt to argue for a mode of social analysis while providing an illustrative demonstration of its effectiveness. Unger's thesis is logical within its own terms. It is a closed system. Ideal types are not amenable to criticism, since they are unfalsifiable "types" not representations of reality. Moreover, Unger covers himself by stating that "the differences among the types of law always remain fluid," and he indicates, by way of example, that "a legal order operated against the backdrop of customary and bureaucratic law" (p. 54). Thus, evidence that real societies do not fully conform to the types cannot in any sense invalidate the models. Given these cautions, a critic can at most argue that there may be other, possibly more interesting, questions than those illuminated by this particular way of compressing the data.

What is fascinating about the problems that Unger defines and addresses is that they seem to be so pervasive in a number of disciplines. One set of problems consists of social paradoxes: individual and group, autonomy and authority, freedom and order. The other set is epistemological: paradoxes between subjective and objective, consciousness and reality, determined and contingent, and a whole Pandora's box of problems of communication and understanding and interpretation (see Unger 1975 for an earlier discussion of some of these). His oscillation between specific illustrations and authoritatively stated—never tentatively proposed—general interpretations is a remarkable display. But there are some curious lacunae. For the purposes of his argument, Unger treats societies as completely separate units that are somehow internally unitary, even if he acknowledges that each system contains various parts (for example, the modernizing sector and the "traditional" sector in Third World countries). But where is the interpenetration of national economies? Where is the international arena? Is it possible to speak of any complex society as having a single vision of the ideal or single experience of actuality without falling into some kind of anthropomorphism? It seems, in any case, the reduction of a complex multiplicity to a single coherent representation. But that, of course, is exactly what a "type" is. Unger's logic is not assailable within its own structure, and following its symmetries gives an aesthetic pleasure. The actual is less tidy.

Another intrepid attempt to cut through the comparative problem on a global scale is Donald Black's *The Behavior of Law* (1976). The book consists almost entirely of a series of hypotheses stated as propositions. (For an interesting critique, see Greenberg 1983.) These vary in specificity from the most general—"Across the world law has increased as homogeneous cultures have diversified, and as diverse cultures have homogenized" (p. 78)—to narrower statements about particular societies. The "theory" of law the essay exemplifies is the extended consequence of Black's initial definition of law, which locks him into an inevitably repetitive form of presentation. At the outset, he defines law as "governmental social control": "The quantity of law varies in time and space. It varies across the centuries, decades and years, months and days, even the hours of the day. It varies across societies, regions, communities, neighborhoods, families" (pp. 2, 3). It follows from the definition that, if law is "governmental social control," the amount of governmental control of social life will be found to be variable. Societies without government exercise none; and societies with governments exercise a greater or lesser amount in different social sectors at different times. *The Behavior of Law* attempts to spell out the significance of this finding in a series of statements on covariation. Black's book is not

itself a typology of legal systems but rather an essay on what Black sees as the fundamental criteria for distinguishing the "behavior" of law in one social setting from that in another. The covariations have clear typological implications.

Although Black has kind words for quantification, claiming that all his propositions involve measurable variables, he leaves the measuring to future scholars. He merely points out what should be measured, proposing not only the quantity of law but also its "style." In Black's use of the term, "style" is manifested in the measures taken after a law is violated, whether these are penal, compensatory, therapeutic, or conciliatory. "It is possible to formulate propositions that explain the quantity and style of law in every setting. Each of these propositions states a relationship between law and another aspect of social life—stratification, morphology, culture, organization, or social control" (pp. 5, 6).

Black uses these five aspects as chapter headings, proceeding through each topic. His central thesis seems unexceptionable—that the growth of law (government, in his definition) has paralleled the growth of stratification, organization, and centralization in society, as it has been to other aspects of cultural and social elaboration and differentiation. That view has been generally established for a long time. Black's particular choice of approach, however, is informed by a political perspective. The pervasive theme that emerges in Black's analysis is that, in the course of development, law increasingly becomes an instrument of the powerful and the rich; that all things being unequal, law (that is, government social control) "is less likely to serve the needs of the poor and the deviant and more likely to be at the service of the People at the Top . . . the more stratification a society has, the more law it has" (p. 13).

But, in closing, Black speculates on the future and a possible reversal of this postulated trend. He does not believe that society is necessarily destined to get more and more law, and more and more government social control, but welcomes what he interprets as present signs of the erosion of the traditional state. "[I]f the evolution of social life continues on its present course, into the indefinite future, anarchy will return. . . . Anarchy is social life without law, that is, without governmental social control" (pp. 132, 123). In conclusion:

> If all of these trends continue, a new society will come into being, possibly centuries from now, possibly sooner. It will be a society of equals, people specialized and yet interchangeable; a society of nomads, at once close and distant, homogeneous and diverse, organized and autonomous, where reputations and other statuses fluctuate from one day to the next. . . . To some degree . . . anarchy will return. But it will be a new anarchy, as new as society itself, neither communal nor situational, and yet both at once. If these trends continue, then law will decrease. It might even disappear. [1976, p. 137]

A much more proximately reformist position, also concerned with the uses of state powers, is taken by Philippe Nonet and Philip Selznick in *Law and Society in Transition* (1978). These authors also mention a possible "withering away of the state" that may come with the era of "responsive law," and they give it their own redefinition (p. 102). In a footnote, however, they add reassurance. "The idea need not be understood as suggesting the end of all government; it should be interpreted as pointing to a transformation of government away from monolithic and repressive forms of the state" (p. 103). Nonet and Selznick do not buttress their evolutionary discussion with ethnographic materials. They

are not concerned with "primitive" societies. Their evolutionary thesis, like Unger's, is constructed in the mode of Weberian ideal types, a similarity they acknowledge (p. 54, fn.).

Law and Society in Transition postulates legal parallels to three types of administrative organization—prebureaucratic, bureaucratic, and postbureaucratic—as repressive law, autonomous law, and responsive law (pp. 22, 16). Though the authors see these types as an evolutionary series, they are careful to note that, while each type has the potential of being transformed into the next, no historical necessity compels this development to happen. Indeed, they speak of their "developmental model" as "a complex dispositional statement. It proposes that certain stages of a system will generate forces leading to specified changes" (p. 23). But they are clear that, though such a model suggests the direction of change, predictions cannot be founded on it, since conditions vary widely, and countervailing forces are frequently at work (p. 23).

In the repressive type, law is the instrument of the powerful; obedience to the rules is exacted from the ruled, but the rulers who make the laws are scarcely bound by them (pp. 29–52). There is "class justice." The conservation of authority is a major preoccupation. Specialized agencies of control, such as police, become independent centers of power. Cultural conformity is enforced, diversity is not tolerated. Archaic states and totalitarian regimes epitomize types of repressive domination, "but the problems that produce it occur, and recur, everywhere" (p. 36).

The cardinal features of autonomous law are the separation of law and politics, the existence of a system of binding rules that places restraints on the exercise of power and limits the obligation of citizens (that is, the acts of the political elite must be legal), and of greatest importance, the development of specialized, relatively autonomous legal institutions (pp. 53–72). Autonomous law bears a strong resemblance to the Anglo-American legal system. "Autonomous law is, in principle, judge-centered and rule-bound." Autonomous law evolves out of the repressive law as "a way of overcoming the arbitrary decision-making of an earlier era." The legal institutions develop "canons of interpretation" and a technical professional expertise, often becoming formalistic and legalistic. "The practitioners of autonomous law are makers and purveyors of 'artificial reason.' " A great emphasis on procedure, as in due process, means that "substantive justice is . . . a hoped-for by-product of impeccable method." The capacity to restrain the authority of the rulers and to limit the obligations of citizens can develop in such a way as to encourage a "posture of criticism" that eventually contributes to the erosion of the rule of law. Advocacy "encourages self-assertion and a searching criticism of received authority. . . . Even in a rule-centered legal order, reasoning must frequently appeal from rule to purpose" (pp. 60, 65, 62, 66, 71, 72, 80).

This attitude sets the stage for the next type, a law of the future. "A vision emerges . . . of a responsive legal order, more open to social influence and more effective in dealing with social problems." Since social purpose, rather than the technical application of rules, is the central consideration of responsive law, purpose becomes a major element in legal reasoning. "With the growth of purposiveness in law it becomes even more difficult to distinguish legal analysis from policy analysis, legal rationality from other forms of systematic decision-making." Arcane language disappears, as does formalism and ritual, depriving jurists of one of their claims to special expertise. To be effective, general purposes must be translated into specific objectives—responsive law is characterized as "result oriented." A much wider range of information must be assessed than is normally

taken into account in judicial proceedings, and the potential effects of alternative policies must be projected before a choice is made (pp. 78, 82–83, 84).

Erosion of authority requires increased responsibility on the part of individuals, who become responsible for the foreseeable consequences of all their actions. But the salient virtue of the new civility is respect: "All who share a social space are granted a presumption of legitimacy." Thus, cultural and moral diversity is acknowledged and protected. In a responsive system, crises of public order—such as strikes, demonstrations, and riots—will be solved by negotiation, discussion, and compromise. The objective is the reconstitution of consensus. "Integrative resolutions of crises" should be sought to restore order rather than order being imposed by coercion (pp. 90, 91, 92, 93).

The hallmark of the postbureaucratic organization is decentralization and the broad delegation of authority. In purposive organization, "authority must be open and participatory. . . . The model is the task force organization made up of temporary problem-centered units." What is envisioned is "a loose aggregate of public corporations, each with its own mission and its own public." Risks are also foreseen—a fragmented and impotent polity might result, impervious to direction and leadership, incapable of setting priorities (pp. 99, 103).

The aim is a total transformation of law. "Legal energies should be devoted to diagnosing institutional problems and redesigning institutional arrangements." Regulation, rather than adjudication, becomes the "paradigmatic function" of responsive law. "The diffusion of legal authority and the enlargement of legal participation bring about a 'withering away of the state.' " Nonet and Selznick close with the claim that "responsive law is a precarious ideal whose achievement and desirability are historically contingent" (pp. 102, 106, 108, 116).

Although Nonet and Selznick mention the risks associated with fragmentation and an incapacity to set priorities, the solution to those problems is not really addressed except in the vaguest terms. Still more optimism attends their ideas about demystification. They seem absolutely sanguine about the possibility of abolishing ritual, formality, arcane language, and the like, and they are confident that this change would directly affect issues. They ignore the fact that what can easily happen—and has happened, in many countries with populist ideologists—is that the "new informality" itself acquires a ritual cast and becomes an orthodoxy, possibly even accompanied by an obligatory language. If participation is required by the "system," participation itself can be a ritual performance. If an assembly has to be convened in order to legitimate any decision, the convening of the assembly and eliciting its consent can be routinized, becoming as formal as the wicked authoritative decisions it is meant to replace.

When participation is obligatory, the construction of what I have called ratifying bodies public becomes mandatory, since such bodies are the only admissible source of decision-making legitimacy (Moore 1977). The rule-legitimacy of "autonomous" law is replaced by legitimation by popular consent. But the consent can be as pro forma and as "managed" as the often highly rationalized connection between rules and decisions. There seems little basis for the assumption that participatory assemblies are bound to function as intended by academic idealists. The functioning of participatory organizations in the real world can be treated empirically; there are quite enough of them to study comparatively, and such an investigation may well be worthwhile if the spreading of this style of decision-making is to be anticipated. But in my view, pace Black, and Nonet and Selznick, serious study of the potential withering away of the state in the world in general can safely be postponed.

These four writers recognize but are not troubled by the implications of an existing legal pluralism on the world scale, let alone at the local level. Unger, for one, writes, "modernism creates a basis for the universalization of the human understanding of human affairs" (1976, p. 259). But all that consensualism is for the future. In fact, modernism has not yet produced and may never produce those common understandings Unger thinks possible. Looking out from his Princeton study, the anthropologist Clifford Geertz (1983) sees only irreconcilable diversity. What Geertz argues for is an understanding of cultural heterogeneity and normative dissensus to be achieved through "an hermeneutics of legal pluralism" (pp. 224–35).

To exemplify the point Geertz writes an essay in which he sets out to compare ideas about fact and law in three legal traditions: the Indic, the Islamic, and the Malaysian. He arranges his task with his customary verbal ingenuity. While he appears to be proceeding from the Anglo-American concepts of fact and law, he loses little time in the discussion of that cultural context, and without letting the reader know that he has changed the game, he quickly re-recognizes fact and law as questions of "what is so" and "what is right" (p. 184). And later, without the slightest grinding of gears, he shifts sense again and slides smoothly into an elegant explication of three highly abstract terms in the languages of the three traditions he has chosen: *haqq*, which means "truth"; *dharma*, which means "duty"; and *adat*, which means "practice." All three also mean a great deal more, as Geertz proceeds to explain. These terms give him an opportunity to make general comments on three quite different culturally constructed visions of the world. It also gives him an opportunity to speak for his particular vision of social science. He says that he is "not engaged in a deductive enterprise in which a whole structure of thought and practice is seen to flow . . . from a few general ideas . . . but in a hermeneutic one—one in which ideas are used as a more or less handy way into understanding the social institutions and cultural formulations that surround them and give them meaning" (p. 187). But the essay in question barely gets around to the institutional level, let alone the practical implications for real situations, so the reader is left to muse over the resonant ideas which Geertz presents with his usual art. By no means do all anthropologists find Geertz's "interpretive social science" as broad an avenue to understanding as he does. From the point of view of any lawyer, law would seem to be only tangentially the subject of "Fact and Law in Comparative Perspective." Geertz is using a few legal categories as an entry point for the discussion of different conceptions of the social and moral order. Geertz has a further purpose in linking cultural difference to law. He clearly wants to take some shots at the idea that the world is becoming increasingly homogeneous, and to attack those who interpret it in terms of a materialist-evolutionary social theory. He concludes that differences in the world are increasing, not decreasing. "Things look more like flying apart than coming together" (p. 216). Legal pluralism is florescent. "Agreement about the things that are fundamental . . . is rather spectacularly absent" (p. 224). He wonders about our capacity to live with diversity and sees his own essay as related to the question of "how local knowledge and cosmopolitan intent may comport, or fail to, in the emerging world disorder" (p. 183).

CONCLUSION

Issues that have political currency in one decade are bound to surface eloquently a few years later in the more polemic forms of the comparative literature. One theme apparent in the works reviewed is the debate about government authority versus "self-regulation."

This topic has proved durable and has really become a refrain in some quarters in the Western democracies. Two quite different depictions of the role of law enliven the quarrel. Law is conceived as a potentially benevolent means of shaping and directing society, a useful machine that simply needs some improvements of design; and law is considered at its worst when it directs and at its best when it does no more than establish the external conditions for peaceful (and/or profitable) self-direction.

The latter view often includes arguments either for "free" competition or for participation in decision-making by those affected. That benevolent direction and enlightened self-rule are not real alternatives except on paper must be clear. Compared with any past time, government everywhere now has and uses unprecedented quantities of power, capital, and personnel. (For a short, simple exposition on the role of law in the mixed economies of the Western democracies, see Friedmann 1971; for an interesting essay on law and the state, see Kamenka, Brown, and Tay 1978.) Yet the state, though in some respects overwhelmingly powerful, seems unable to solve many urgent problems in its directive mode. (For an American case study of a failure, see Pressman and Wildavsky 1973.) Lawyers and social scientists are becoming increasingly occupied with the question of how much can or should be done by means of law. It is a mark of the pessimism of this trend that A. N. Allott's book, full of comparative examples, should be entitled *The Limits of Law* and subtitled "The Uses and Uselessness of Law" (1980). Marc Galanter gave one of his articles the title "Legality and Its Discontents" (1979). As some of the literature reviewed here has suggested, the pull toward more centralized authoritative direction and the opposite pull toward more local or special-purpose autonomy are widespread in the world and not confined to the Western democracies (see Galanter 1981). But in the West, given the luxuries of expression afforded by a free press, they take on a particularly public form.

The pervasiveness of these organizational issues provided the logic of the sequence of the materials presented in this article. Vilhelm Aubert is persuasive in stating, "Sociology of law must work closely with theories of organizations, for it is through organizations that modern law primarily becomes effective, if at all" (1979, p. 41; see also Pospisil 1971; Smith 1974). Considered in this framework, the state itself is an aggregation of suborganizations. Hence this essay began with the level that is the most organizationally and culturally diverse and intricate—the international—before moving down the organizational scale to plural societies, proceeding to the level of complex but putatively "culturally unitary" legal systems, next examining primitive systems and simpler societies, also putatively "unitary," and concluding with the grand-scale essays of Unger, Black, Nonet and Selznick, and Geertz who, using comparative examples, try to draw together many of the large questions.

This introduction to the literature on the variety of legal systems in the world suggests that there are a few predominant forms in which the perspectives of social science are manifest in current comparative work. Three general approaches are used in various permutations and combinations.

The first approach begins with a grand paradigm. A range of legal comparisons are then marshaled to illustrate a preconceived interpretive scheme. Systems analysis, the unfolding of legal evolution according to a given pattern, and the assumption that economic rationality can be found at the root of all durable legal rules constitute such paradigms.

A second approach uses a particular type of social (or political, economic, cultural, historical, and the like) context to "explain" or illuminate the operation of a particular

legal system. Thus multicultural and plural contexts—or tribal contexts, or socialist governments, or legal "families"—are said to account for certain characteristics of relevant legal systems. The implication of this comparative approach is that if the social or cultural or historical contexts were different, the legal system would also be different. A distinctive organizational or cultural characteristic is used initially to identify the instances to be studied and compared. The social and cultural embeddedness of law is the underlying postulate.

A third approach begins with the assumption of "law as technique" or "law as problem-solving." In this method a particular feature of legal systems is identified and examined across the board in a variety of societies to examine how problems are solved or how the technique works in different places. Thus, the management of dispute, the access of the citizenry to officials, and the treatment of crime have each been compared in this way, as have a myriad of other topics. In this approach, the "problem" solved or the legal technique used is the diagnostic criterion that governs the collection of information. The motive of such comparisons is often declared to be the search for the technique that works best or the better identification of the societal factors that facilitate or obstruct benign solutions. But in this as in both of the other approaches, comparison is as often used to call attention to previously unnoticed regularities or irregularities, thus indirectly testing and repairing the prevalent paradigms of social science itself. This work of redefining social science is at some remove from the direct, practical policy-guiding advice that some agencies solicit, but in the long run this more basic questioning may well be the most useful of all.

The demonstrably increasing interest in studying and comparing the various legal systems of the world is likely to continue to grow. Probably at the top of the list of reasons for this circumstance is the interlocking character of the world economy and the interrelated political fate of all nations and peoples. An increasing number of transactions and organizations, of increasing magnitude and importance, cross national boundaries. Geographically distant events can deeply affect even the largest countries and may penetrate into the affairs of the most remote bush villages.

On the practical side, operating effectively in this multinational arena, or even understanding it as a spectator, requires some understanding of the varieties of legal, political, and social configuration that underlie the formally equivalent national units. Having some knowledge of the legal systems of other societies is useful to anyone who operates professionally or intellectually outside of a parochial milieu—and who will admit to completely parochial interests?

As for the academic discussions about legal evolution that give learned underpinning to current political argument, some comparative knowledge is a considerable defense against being persuaded for the wrong reasons. As a rule, the larger the topic discussed, the more selectively the mass of information must be dealt with, hence, the more dominant the paradigm of the writer. This is true of most discussions of the evolution of law. Selection, speculation, interpretation, and argument can be richly rewarding, but it is an error to call these proofs. Much of what has been written about legal systems as wholes, and about legal evolution in particular, belongs in the category of learned discussion. What Charles Lindblom and David Cohen noted about a wide range of policy-oriented social science applies in this case: "Despite the accepted convention that [social scientists] are engaged in the pursuit of *conclusive* fact and proof, they are instead engaged in producing inconclusive evidence and argument" (Lindblom and Cohen 1979,

p. 81; italics mine). But even these scholars find themselves obliged to concede that professional social inquiry can, on occasion, produce authoritative information.

While much is known, much more authoritative information remains to be garnered about the legal systems of the world and the way they actually operate, and still more is to be learned from the analysis and interpretation of this material. The studies reviewed here suggest that there are encouraging signs of traffic on the academic highways, and that some frequently traveled byways had best be avoided.

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LAW AND NORMATIVE ORDER

Richard D. Schwartz
College of Law
Syracuse University

INTRODUCTION

Cross-cultural research demonstrates that societies vary dramatically in the extent to which they have an integrated normative order. Folk societies generally adhere to a stable, pervasive, consistent, deeply held set of mores. Complex societies rarely have a comparable degree of normative integration. Law represents a response to the evolutionary decline of normative consensus in complex societies. This paper addresses the following questions: to what extent and in what ways does law interact with norms to maintain, reinforce, or develop normative consensus.

In open societies such as the United States, the integrative capacity of law is especially problematic and the manner in which law contributes to normative integration, when it does at all, is complicated. Law draws on existing norms, adds some norms and principles of its own, and helps sometimes to facilitate an emergent consensus. These processes can be seen emerging as societies become more complex.

The classic model of folk culture (Redfield 1941) emphasizes the pervasiveness and intensity with which normative ideas are shared throughout a society. A normative order

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of that kind has no need for a legal system to promulgate or to enforce behavioral standards. At most, such societies require that someone act as a mediator to help resolve disputes, through agreement between the parties, within the framework of commonly held standards (Schwartz and Miller 1964).

At a slightly more complicated level of social organization, legal authority emerges. In general, legal officials in tribal societies exercise their authority by drawing on, clarifying, and reinforcing the mores. Paul Bohannan has given a plausible account of this process in his concept of "double-institutionalization." Using his experience with the Tiv as illustration, he describes law as a technique for dispute resolution that draws on and reinforces the basic institutional arrangements of the society (Bohannan 1957, 1965). Only when a relationship in those other institutions breaks down is law invoked. On such occasions, third-party intervenors (mediators, arbitrators, or adjudicators) do more than resolve the dispute. They examine the troubled relationship and, in restoring it, enunciate a standard for future conduct.

Such a legal standard tends to differ from the custom or norm in being more sharply defined and somewhat different in content. In the resultant gap between law and custom —which he believes to be inevitable—Bohannan finds a tension that leads to change. Custom and law exert a mutual pull but never fully coincide.

Tension notwithstanding, the content of law in folk societies is deeply affected by custom. Law is fashioned by members of a homogeneous culture who, though legal specialists, are steeped in custom and selected for their knowledge of, commitment to, and exemplification of the mores.

In the further evolution of society, however, a marked change tends to occur in the nature of the mores. There is no need to recount here the story of normative complexity, concomitant with the shift to urban societies based on the economic surplus generated by the agricultural, commercial, and industrial revolutions. As each of these historic economic developments occurs, it facilitates normative change.[1] Characteristically the diversity of normative structure increases.

Faced with growing normative diversity, societies have regularly reacted with cultural reorganizations, revitalization efforts, religious conversions, and other movements aimed at the restoration of normative integration (Wallace 1956). The drive for normative order, taking many forms, is regularly in evidence even as social change creates forces that undercut a simple, uniform set of mores. The pendulum swings unevenly between normative order and chaos—a slow disintegration of consensus, often followed at the extreme of disorder by a sudden movement toward reintegration. Law becomes one of the candidates to supplement or replace a traditional normative order, if not to reintegrate a chaotic one.

Law can react in several possible ways in the face of normative diversity or dissensus. It can selectively absorb norms, pervasive or not, which do exist in the society. It can seek to formulate a new set of behavioral standards, imposing them authoritatively. Or it can facilitate norm formation within the society by creating conditions of interaction in which this process can occur. In fact, it does all of these.

Traditional theorists, as will be seen, have emphasized either legal absorption or legal authority. Another approach is the mutualist position, the point of view taken in this

[1] For a comprehensive treatment of these interrelationships following the agricultural revolution, see Turner (1941); no single work known to me comparably covers subsequent societal revolutions.

essay. The mutualist position stresses the mutually reinforcing potential of laws and norms, for attaining that degree of congruence between norms and laws essential for law to function effectively as a regulator of behavior. This can occur through absorption, authority, and the facilitation and reinforcement of norm-forming processes. All three processes are discernable in complex, open societies such as the United States.

One way to attain norm-law congruence is through the absorption in law of normative content that is strongly rooted in the culture. The legal system of the United States provides many channels by which such normative content can influence the promulgation and interpretation of law. Nevertheless, the influence of norms on law is limited by the sparseness of pervasive norms and the prevalence of normative conflict.

Authoritative legal formulations do not necessarily aid in resolving normative differences; to decide between contending parties often exacerbates their antagonism. The invocation of broad principles to justify decisions does not necessarily help to settle conflict. Such principles are often at odds with each other; even when they are consistent, they may not accord with the sense of justice either of the society or of the contending parties.

Procedures that bring together contending parties for "private ordering" of their relations, under conditions that promote bargaining and norm formation, can be cultivated in many areas. Analogous arrangements, which will be called public ordering, involve the establishment by government of norm-forming entities. These activities may contribute to normative order more effectively than do principled decisions, which sometimes leave the parties confused, unsatisfied, at odds with each other, or unpersuaded of the justice or utility of the decisions. Such ordering relationships, and the norms they generate, must however be compatible with and supported by the larger sociolegal framework if they are to be fully effective. Normative integration may ultimately depend on the capacity to bring norms and legal principle into a relationship of mutual support.

This formulation states a point of view that guides the inquiry found in the main portion of this essay. It is a point of view suggested in the work of many scholars, past and present, who have studied the relationship between law and society. Some efforts at studying these questions have also been undertaken in recent years by students of law and society. Eventually, of course, the accuracy and utility of this perspective must be demonstrated through detailed research and application.

Examining the relationship between law and normative order is not the only way to study the interaction between law and society. Two other dimensions of the law-society relationship need to be examined in detail. One is the interrelationship between law and power; another is the interrelationship between law and wealth. Ultimately, a general theory of law and society must deal with all of these interrelationships. At this stage, however, it is helpful to examine each of the three separately.[2] This essay concentrates entirely on law and normative order.

[2]Normative order presumably interacts with power and wealth. If law was taken as the dependent variable and the other three as independent variables, the conceptual relationship among the four would be comparable to the models developed by the economists for predicting GNP through simultaneous equation estimations that assume interactions among the independent variables. Models of this type will ultimately prove useful in the study of law and society (Feeley 1976). I assume throughout this essay that law reflects and affects the distribution of power and wealth in society but that normative order constitutes an independent element affecting and affected by law.

PURPOSES OF THIS ESSAY

No subject is more fundamental in the study of law and society than the interrelationship of law and norms. The first purpose of this essay is to show that the topic has been treated, with considerable vitality, by many early scholars. To that end, I briefly discuss diverse classic figures in social science and in jurisprudence, including Eugen Ehrlich, Max Weber, and Henry Sumner Maine in the social sciences[3] and John Austin, Oliver Wendell Holmes, Karl Llewellyn, and Lon Fuller in jurisprudence. All of these scholars concerned themselves in some significant way with the connection between law and norms.

Depending on the reader's disciplinary background, some of these writers may be unfamiliar. John Austin, for example, may not be recognized by social scientists as the nineteenth-century founder of legal positivism, a school of thought that lives in the contemporary work of H. L. A. Hart. Similarly, Eugen Ehrlich, the founder of sociology of law, may be unfamiliar to those whose general approach to law derives from the jurisprudential tradition. Comments on these scholars are inserted to show that important thinkers in both traditions have attended to the law-norm problem.

The second purpose is to show that the subject continues to have significance in contemporary law-and-society thinking. To this end, reference is made to the works of current scholars from both backgrounds, including such contemporary writers as Black, Bohannan, Galanter, Hoebel, Lempert, Macaulay, Mnookin, Moore, Nonet, Ross, and Unger. In this list, it is noteworthy that a division between law and social science is not easily maintained. Contemporary scholars in these fields draw on knowledge of legal and social science disciplines. That these writers attend to norm-law relationships should therefore come as no surprise.

The third purpose is to contribute to theoretical and empirical work on law and norms. This purpose can be served by showing that—in processes that are both general and interesting—law interacts regularly with norms in several ways: by absorbing normative content, by exercising normative influence, and by facilitating the norm-forming process. Much evidence for the existence of these interactions derives from the legal system itself, when examined from the conceptual perspective of law and society.

The analysis of norm-law relationships is general in the sense that it applies to all kinds of law in every society. Laws are defined for purposes of this essay as standards of behavior explicitly enunciated by specialists charged by the society with responsibility for the enforcement of social control. Norms are defined as standards of behavior held as shared attitudes by a society or by a substantial segment of it. Every society that has law in this sense also has norms. Relations between norms and laws, even though varying from mutual support to complete opposition, exist for every area of behavior covered by law.

What makes the topic interesting, that is, a complex problem promising the chance of a solution, is that norm-law relations vary in an orderly way between societies and within societies. Variations between societies reveal in extreme form differences that may be harder to detect within a society. One of the interesting variations concerns the congruence between norms and laws.

When norms and laws do not correspond at all, that is, when they reach an extreme of

[3] I omit Durkheim because his position on law and normative order is too complex for brief discussion. His perspective is extremely important, however, and should be dealt with at length. For some discussion of Durkheim's *Division of Labor* (1893), see Schwartz and Cartwright (1973) and Schwartz (1974, 1980).

incongruence, law loses its effectiveness as a regulator of behavior and an integrator of society. This proposition is neither an established generalization nor, at this stage, a readily testable hypothesis. It is presented, rather, as a plausible assertion. If it is true, then research on law-norm relationships assumes great importance for the understanding of complex societies.

The fourth purpose of this paper is to contribute to research efforts in this topical area. To encourage research, more is needed than the demonstration that scholars past and present have shown interest in the problem or that the problem itself is general and interesting. Researchers also want to be assured that something can be done within the area to produce socially significant knowledge. In law-and-society research, the desire for results often involves a search for practical application, with the hope that research can affect the shaping and improvement (somehow defined) of existing legal policy. To this end I explore some of the ways in which law contributes, actually or potentially, to the private and public ordering of relationships and thereby to the formulation of norms potentially more congruent with law.

BACKGROUND IDEAS

Sociology of Law

Selective use of the mores in shaping law has been recognized, one way or another, for a long time. All of the early sociologists of law assume three basic propositions: laws and societal norms are different; societal norms have some influence on law; this influence is not the sole determinant of legal decisions.

Eugen Ehrlich (1936, pp. 26–38) described norms or "living law" as a product of "the inner order of associations." Ehrlich's inner order was, essentially, the social structure of the society. From it came the standards of proper behavior. Ehrlich's main message is that law cannot function effectively unless it adequately takes account of the "living law" derived from the "inner order" of these associations. "[T]he center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decisions, but in society itself" (p. xv). This was an exhortation as much as a description. In reality, Ehrlich observed, law usually fails sufficiently to incorporate the norms of "living law." Only in the regulation of commercial behavior does official law closely parallel custom and practice. For this reason, law tends in many other areas to be ignored, evaded, or misused.

Max Weber (1954 [1922], pp. 198–223) also noted the divergence between societal and legal norms. In his discussion of the "honoratiores," he describes ways by which legal officials incorporate into the law some elements of practice and some more abstract concepts from the society. But his emphasis is on the manner in which the legal process goes its separate way. The important requirement of legal decision-making is not that it concur with specific standards of conduct found in the society. It is, rather, that when these standards do not work, the legal process be able to decide authoritatively between disputants. This decision can be made in a variety of ways, including that demonstrated by the khadi, who merely decides particularistically, according to his own religiously informed standards (p. 213, n. 48).

In addition to being authoritative, legal decisions must also be predictable. While in a religious or traditional context, khadi justice may satisfy this criterion, complex societies

require a different basis for predictability. To meet the needs of a commercial society, the legal system must develop mechanisms that embody complex norms and rational decision processes (pp. 301–21). As Weber points out, rationality develops quite differently under the civil law of the Continent and the common law of England (pp. 305–21). But in each case, the legal system develops substantive rules and decisional procedures that offer the informed entrepreneur some basis for predicting what will happen if he or she must seek an authoritative judgment from the court. Whatever use the legal system may make of prevailing commercial practice, it does not rely solely on the existing norms. Rather, it develops a set of criteria, including some distinctive and original concepts, that reflect the organization of the legal process at least as much as they draw from the commercial culture.

Of all the scholars who have emphasized the significance of social structure and culture in determining law, Henry Sumner Maine was perhaps the most influential. His *Ancient Law* (1861) traced the manner in which cultural concepts are incorporated into law. Kinship, a basis for privileged social relationships in traditional societies, tends to be used by law for purposes somewhat beyond its original function. The state may, for example, undertake to facilitate the transmission of property or power upon death from the testator to someone other than the kin designated by custom as heir. If such transfers are to be equally effective, they must follow a regular procedure. In the early stages of legal development, they must also be seen to accord with the mores. To attain these two ends, the state invokes the "legal fiction" of adoption. Formal actions specified by law allow the testators to adopt beneficiaries as their own children. In practice, this arrangement legitimizes behavior which, left to the mores alone, would have been subject to challenge. The legal fiction thus provides a device by which the strength of the mores governing kinship can be used to gain acceptance of innovative laws. Although legal fictions continue to be used as law evolves, Maine believed that they become less essential and more transparent (pp. 13–25). With the growth of state power and legal specialization, it becomes increasingly possible for the state to legislate complex arrangements that diverge widely from the mores.

Jurisprudence

A parallel recognition occurred in the field of jurisprudence. That field, the territory of many fine scholars, has been largely ignored by students of law and society because social scientists perceive it as an unclear admixture of *is* and *ought* questions. Ironically, one of the leading figures in jurisprudence, John Austin, took great care in his leading work, *The Province of Jurisprudence Determined,* to draw the line between the *is* of positive morality and positive law and the *ought* of critical morality and natural law. He stressed the importance of looking at law as it is.

Austin's conception of law was so narrow, however, that he left insufficient room for an analysis of the legal system, let alone the normative order. In his concern for precision, he turned the "scientific" study of law into an inquiry on the intellectual consistency of legal decisions. He did not include in his vision the manner in which laws are put into effect or the consequences they produce in the regulation of behavior. It was assumed that laws, properly shaped, would be obeyed. Implicitly, that position is embodied in the dramatic, authoritarian phrase "command of the sovereign," which has become the accepted summary of Austin's position.

Austinian positivism carried another consequence, implied in the same phrase. Law is different from, and not necessarily affected by, the "positive morality" of the society. If custom is sometimes used as a source of law, it must be explicitly adopted by the judges. Once incorporated into the common law, its content remains, even though society and culture change (cf. Fuller 1968a, pp. 44–47). For Austin, the subject matter of law was properly isolated from the rest of society.

Despite the powerful narrowing influence of Austin, jurisprudence has not been constrained by his vision. Particularly in the United States, it has gone far beyond the limits Austin set. Oliver Wendell Holmes (1921) was an important influence in this regard. Associating himself in a way with Austin, he focused on "the prophecies of what the courts will do in fact" as his definition of law (p. 173). Even so, he overstepped the boundaries of Austin's province to question why judges decide as they do. For answers, he looked to history, experience, and socially supported principles. "The felt necessities of the time, the prevalent moral and political theories, institutions of public policy avowed or unconscious, even the prejudices that judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed" (Holmes 1881, p. 5). It was entirely proper, Holmes declared, "to regard and study the law as a great anthropological document" (1899, p. 444).

One clear implication of Holmes's position was that law should be examined as a product of society. This orientation found expression in the influential book by John Chipman Gray, *The Nature and Sources of the Law* (1921). In the same tradition, Justice Cardozo (1921) examined the influence on judge-made law of elements outside of the legal process (custom, for example) as well as inside (precedent and statutory construction). In a succinct summary of his views, he wrote:

> My analysis of judicial process comes then to this and little more: logic, and history, and custom, and utility and the accepted standards of right conduct are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely on the comparative importance or value of social values that will thereby be promoted or impaired. [1947, p. 153]

American legal thought continued to develop this theme: that the normative order influences, but does not exclusively determine, the procedure or substance of law. Two outstanding figures in modern jurisprudence, Karl Llewellyn and Lon Fuller, have made significant contributions to understanding the interaction between law and normative order.

Llewellyn evocatively describes the manner in which the tasks of law—the "law-jobs"—arise from "processes in the general life of the group which first led to the emergence of legal institutions" (Llewellyn and Hoebel 1941, p. 279).[4] Those processes generate claims made in light of emergent standards of rightness. Even in a society without law, such claims and standards promote the creation of law-like processes for dispute resolution. Where formal law exists, social claims and standards provide the "raw material which . . . serves as grist for [legal] institutions" (p. 279). Of particular interest is

[4]These quotations are drawn from a chapter in Llewellyn and Hoebel's work on the Cheyenne (1941) and not from a similar article written by Llewellyn in 1940. The perspective of Llewellyn in the article is the same as the corresponding chapter in Llewellyn and Hoebel, the differences being primarily editorial.

the way in which Llewellyn describes the emergence of standards or norms from the processes of social life.

> What comes to be in the way of practice produces in due course its flavor of felt rightness among its practitioners. . . . This line of normation has peculiar interest to matters legal, because it operates so generally, so inescapably. . . . It is . . . a drift in non-legal institutions which then gives off the raw material of expectation and felt rightness out of which a claim can emerge into a conflict-situation, and can emerge with excellent chance of recognition. But that only takes the matter into the legal field. [pp. 280–81]

Llewellyn was deeply concerned with the capacity of legal institutions to recognize and respond to the claims and "normations" of the broader society. Some degree of regularity and predictability is needed, he maintained, if law is to settle claims definitively and to channel or rechannel behavior. Accordingly, he devoted an enormous amount of his energy and creativity to describing, especially in *The Common Law Tradition: Deciding Appeals* (1960), how the legal process reacts with regularity to such claims, once they command legal attention. But he warned that the drive for predictability can get out of hand, producing "the wooden, externalized, graceless, and cumbersome maladaptation which is summed up as legalism" (Llewellyn and Hoebel 1941, p. 288). To avoid this danger, lawyers and judges must not lose touch with the society. They must retain the kind of "situation-sense" that makes it possible for legal decisions to reflect the processes of social relationship and normation constantly recurring and reforming in society. In the Uniform Commercial Code, Llewellyn illustrates the ways in which the normative content arising in commercial relationships can be systematically introduced into legal decision-making.

Lon Fuller showed comparable interest in the relationships between the normative ordering of interpersonal relations and the formal legal decision process. During his last years (1968–75), Fuller focused on the "private ordering" of relationships and their significance for law. In several articles written during this period, he examined the social processes that give rise to customary law, contractual relationships, and dispute resolution by mediation (Fuller 1968a, 1969a, 1969c, 1971). Out of each of these processes may come some "implicit elements" that affect judgment when the formal legal process is invoked. Among these are the shared understandings and normative judgments that emerge out of the process of human interaction.

Fuller saw private ordering as affecting law in several ways. First, in their interpretation of statutes, judges are likely to be affected by the common understandings and normative standards of the general culture. In the example Fuller gives, a judge might have to determine whether a perambulator and a ten-ton truck are "vehicles" under a statute prohibiting the bringing of a vehicle into a park. Fuller makes the point that knowledge of the culture, not a dictionary, is needed and used to achieve a consistent and socially acceptable interpretation of the ordinance (1968a, pp. 58–59). Second, acceptance of the law is likely to be increased if the positive law accords with normative standards emerging from the private orderings. Positive law that conflicts with customary law tends to incur the kinds of problems that impair its "integrity"—the consistency with which it is carried out and the readiness with which it is accepted as legitimate (1969a, pp. 1–13; 1958). Finally, knowledge of the private orderings contributes to restraint on intervention. Where relationships can be worked out among the parties—in contracts for example—the need for legal intervention may be limited to a small proportion of all cases.

Private ordering minimizes the need for third-party intervention. On this important point, Fuller suggests that private ordering works differently, depending on several considerations. The task, he implies, is to determine how well the parties can by themselves work out relationships that optimize their interests without impinging on the broader interests that are the proper concern of the society. His method for exploring this complex subject is to analyze in detail the nature of different forms of private ordering (customary law, contract, and tripartite negotiation), in an effort to determine the characteristic mode and problems of each (1975). Fuller's discussion of the factors affecting the probable success of labor negotiations, with or without the aid of third-party intervention, illustrates his thoughtful and informed analytic procedure at its best (1971).

Thus, in different but complementary ways, Llewellyn and Fuller stress the importance of the normative order as an element in legal decisions. They share a belief that normative content generated in society, while important, is not the only determinant of the law. Each devotes major works to the analysis of the distinctive subculture of the legal process. Each pays close attention to (and applauds) the mechanisms in that subculture that permit the law to absorb, without being overwhelmed by, the normative content generated by the society. They agree that the effectiveness of law as channeler, regulator, controller, or facilitator of human interaction depends on its capacity to absorb and properly use, in appropriate degree, materials derived from the normative order. To what extent do these orientations correspond with the theory and practice of the American legal process?

LEGAL ABSORPTION OF THE MORES

The mechanisms by which the normative order affects law cannot be understood without considering several elements of the legal system. Within each of the branches of government, certain mechanisms offer openings for considering the norms of society or subgroups within it. While this process occurs to some degree in all legal systems, wide variations exist within and among legal systems concerning the nature of the channels, the volume of normative content that can flow through them, and the alternative elements with which societal norms compete in determining the substance and process of law.

Much can be learned on these matters by examining the theory and practice[5] of constitutional government that emerged in England and has developed in the United States. I chose this legal tradition not only because of its familiarity, but also because its commentators and decision-makers often explicitly discuss the processes here being explored. This choice does not imply, however, that other systems of law and government preclude the absorption of mores into the law. Many modern nation-states share the basic features of Anglo-American constitutional government or differ from it in particulars that

[5]The term "theory" is used here in the conventional political sense of a set of beliefs about how the system works. In a functioning constitutional system, by definition, substantial correspondence exists between theory and practice, although the correspondence is never perfect. I assume that the practice cannot be fully understood without reference to the theory and that the practice cannot be fully understood only by reference to the theory. The first of these propositions has been underplayed in much sociolegal research as was the second in classical political science. (For a good general introduction to comparative constitutional analysis, see Friedrich 1941.)

do not alter the mechanisms in question. Others that differ fundamentally in the structure of power may well develop functionally equivalent methods for transmitting the mores into the legal decision-making apparatus.

In the Anglo-American constitutional tradition, two desiderata are constantly reiterated: to open government to popular decision and to limit the power of government. These two objectives of constitutional government carry major implications for the selective inclusion of norms into positive law. Each of the branches of government is amenable to some influence by public attitudes but resistant to complete reliance on them, especially when they would infringe on constitutionally protected rights. If the reasons explicitly stated by the courts are assumed to be accurate, there is abundant evidence that the norms enter, albeit selectively, as a consideration in the making, upholding, and implementation of the laws. This is apparent even at the formal level of lawmaking, statutory interpretation, and judicial review.

Sexual mores provide a useful example. Before the so-called sexual revolution of recent years, the conservative strain in American culture manifested itself in legal prohibition of a wide range of socially disapproved sexual conduct. Not only were "crimes against nature" widely prohibited; even the use of contraception was banned in some states. The challenge to the constitutionality of laws prohibiting the sale of contraceptive devices did not succeed until recent years (*Griswold* v. *Connecticut,* 1965).

Rapidly changing moral standards in the sexual area seem to have created a disjunction between law and societal standards.[6] There is plenty of evidence that norms on the use of contraception began to shift well before the legislatures moved toward relaxing the standard (Dienes 1972; National Center for Family Planning Services 1971). Only after changes had occurred in the norms (and, in many states, the law) did the Court find the remaining anticontraception laws to be unconstitutional (*Griswold,* 1965).

This sequence illustrates the tendency of the courts to defer to the legislatures as barometers of public opinion. Courts declare repeatedly that on matters of protecting the public morals (along with the health and well being of the society), the states may use police power to incorporate into law a set of moral standards regarding sexual conduct and to authorize the executive (police and prosecutor) to enforce them.

Judicial deference to the legislature can ensure norm-law congruence if the legislature reflects current public attitudes. Legislatures often imperfectly embody current mores, however, because of cultural lag, pressure group politics, or other considerations. Legislation at variance with the mores creates tension throughout the system. Such laws tend to be erratically enforced because of the diversity of priorities with which police or prosecutors exercise discretion, the difficulty of detection, vice squad cooptation, or even submores (strongly held attitudes of a segment of the population) contrary to the legislation (Kadish 1967). Courts often reflect these tensions by invalidating convictions for "morals" offenses.

There are several bases on which courts may dismiss charges of sexual misconduct, even in the face of legislative action. Such decisions are often justified on due process grounds. For example, the courts might decide that a particular sexual act—such as fellatio or cunnilingus—falls outside the common-law definition of "crimes against na-

[6] See, for example, the refusal of the Supreme Court to interfere with the conviction of consenting adult homosexuals for sodomy in private. "It is enough for upholding the legislation to show that the conduct is likely to end in a moral delinquency" (*Doe* v. *Commonwealth's Attorney* 1976).

ture," a term traditionally limited to sodomy and bestiality. If the legislature or state courts did not make clear the broad interpretation of "crimes against nature," the higher court might overturn the conviction, on grounds that the defendant had not received fair warning or that the legislature has failed properly to guide the police and prosecutor in the exercise of their discretion.[7] Such, at least, is the type of formal reasoning favored; it can, of course, be used as a rationalization for intervening in a norm-law conflict.

In cases of this kind, the court typically invalidates the conviction by strictly construing the statute or by declaring the statute itself void because it is vague. In such circumstances, the legislature would, in principle, be able to revise the statute or pass a new one to overcome these problems. Unless the court found other grounds for invalidation, convictions under the revised or new statute could be expected to stand.

In general, the courts defer to the legislatures in permitting them to set standards on behalf of the community. The presumption is that the state is generally empowered to write morality into law, unless some specific constitutionally protected right is impinged. A dramatic instance to the contrary is found in a New York decision that invalidates statutes prohibiting voluntary homosexual practice on the broad ground of a right to be free of unwarranted governmental interference (*People* v. *Onofré*, 1980). This decision appears to be exceptional in the area of sexual behavior (*Fordham Law Review* 1976), although possibly indicative of a trend. For the most part, under the doctrine of separation of powers, the legal system allocates to the legislature the right to decide which of the mores shall be backed with the force of law.

To a lesser extent the court itself may explicitly take account of the mores. An example of explicit judicial use of the norms in statutory interpretation is furnished by a case involving polygamy, *Cleveland* v. *United States* (1946). In the *Cleveland* case, the Supreme Court upheld the conviction for polygamy of a man who had brought some of his wives across state lines to marry them and live with them in accordance with his Fundamentalist Mormon religion. The Court found that the power to convict had been provided by Congress under the Mann Act, the statute passed several decades earlier to attack the practice of "white slavery," in which women were imported into the United States and moved across state lines for "prostitution, debauchery, or any other immoral purpose." In deciding that the Mann Act applied to polygamy, the Court held that marrying plural wives fell into the same category (*ejusdem generis*) as prostitution and debauchery (*Cleveland*, pp. 18, 19). In this instance, deference to the legislature as the agency to decide which mores shall become law is not evident. Rather, the Court decides, in effect, how Congress might have, or should have, treated polygamy if it had taken into consideration traditional and contemporary mores.

The Court characterizes the "establishment or maintenance of polygamous households as a notorious example of promiscuity" (*Cleveland*, p. 19). In a narrow sense, the Court is declaring its conclusion that polygamy falls squarely under the congressional term of "promiscuity." In a larger sense, it seems to be stating that it believes polygamy to be immoral and that this belief is widespread in the society. Under the second interpretation, the Court identifies its own moral judgments and those of the society as congruent.

[7] The cases are summarized by Judge Galbreath, dissenting, in *Locke* v. *State* (1973). In that case, the 6th Circuit Court of Appeals overturned a conviction for an act of cunnilingus under a statute prohibiting crimes against nature (*Locke* v. *Rose*, 1975), but it was reversed by the Supreme Court (*Rose* v. *Locke*, 1975).

In effect, the Court relies on the authority of the mores to justify its decision and uses its own authority to reaffirm the mores.

Quite a different role vis-à-vis norm-law congruence is played by the Court when, in constitutional review, it declares a particular law to be beyond the power of governmental regulation. In such cases, the Court is not merely associating itself with pervasive mores. In many instances of constitutional review, strongly held norms rendered into statutory law are found by the Court to be constitutionally impermissible. In that event, the Court finds itself opposing congruence between law and mores or submores. To justify this position, it seeks a principle more general than the specific norms and the laws that embody them.

This situation occurred in recent years when the Court invalidated state laws prohibiting or limiting the mother's right to obtain an abortion during the first trimester of pregnancy (*Roe* v. *Wade,* 1973). In that decision, the Court appears to have contravened some widely held, though not pervasive, moral beliefs.[8] The primary ground on which *Roe* rests is the right to privacy. While the Constitution itself does not contain that phrase, the decision finds such a right in various clauses of the Constitution, in earlier precedents, and in the history of the common law (*Roe* v. *Wade,* 1973, p. 152).

Is the abortion ruling an instance of two mores in conflict, the Supreme Court deciding which shall dominate? One way to look at the process is to find two submores—prolife and prochoice. How large or vocal or powerful a minority must exist before it can be concluded that, instead of a single pervasive more, the society has two divergent submores? On the continuum from mos to submores, the latter predominates when each of the opposing views is advocated openly by organized, politically effective groups. From one point of view, in this stance, the Court has merely taken the side of the prochoice group, using the Constitution to justify its partisan position. In that perspective, its decision embodies one of the submores, which, with judicial help and changing times, might become the mos of the future. In this interpretation, the Court is merely acting as an official arbiter between two political camps.

The Court need not, of course, make a decision between two opposing mores. It can, instead, choose to exercise the "passive virtues," as Alexander Bickel (1962, pp. 111–98) described them (see also Cole 1980). Rather than granting certiorari, for example, the Court might choose not to hear the case. Such a decision decides without deciding: the power of states to limit abortion would be upheld de facto without an explicit decision. This strategy would permit the Court to avoid the choice between the two mores. Again, the Court might take the case but decide the issue on technical or very narrow substantive grounds. Among aficionados of the Supreme Court, such techniques of avoidance are frequently admired as evidence of the highest form of judicial skill.

The Court does not always avoid such choices. In a situation such as abortion, the Court did choose between two standards. It is important to note that the choice appears to be made between principles that are more abstract than the submores immediately at issue.

In effect, when the Supreme Court decides the issue of abortion on demand, it invokes more general principles as a basis for decision. Instead of considering whether it approves

[8] Public opinion poll data on attitudes toward abortion do not squarely correspond to the legal decisions. Generally a majority (about 55 percent) opposed abortion on demand but not all abortion. (See Tedrow and Mahoney 1979; Wardle 1980.)

the banning of abortion or permitting abortion on demand, it asks a more general question: Are the state legislatures, in passing this legislation, exceeding their powers under the Constitution by authorizing an impermissible invasion of privacy? In rendering a decision at that level of abstraction, the Court distances itself from two specific norms in conflict. If the submores remain the primary focus, the decision may be very unpopular with those who lose, popular with those who win. If the decision is viewed as merely judicial legislation, a political act reflecting the preferences of the judges or those whom they favor, the stature of the Court may suffer. In cases such as this, the decision may also be carried back into the political arena.

Raising the decision to a more abstract level of principle may alter the public perception of the matter. The chances of such an outcome may well be enhanced if invoked principles already exist in the mores. If, for example, the right to privacy was a revered principle in the culture, could the Supreme Court, in basing its decision on that principle, justify its holding, resolve the political conflict, and enhance its own status? Or might it do the same for a decision holding the opposite, by invoking the principle that accords the states wide discretion under the police power to regulate the health, welfare, and moral standards of the society?

LIMITS TO THE ABSORPTION OF THE MORES

In open societies, the mores are rarely strong enough to determine general legal principles. The reverse process is, if anything, more significant. The enunciation—and widespread adoption—by society of such principles may well depend largely on legal initiative. The principle of privacy, for example, appears to have been shaped as much by the legal process as by cultural history.[9] In a society as diverse as that of the United States, principles of this kind do not emerge spontaneously. Nor do they easily gain pervasive acceptance. When they do, it is often with the help of the legal process. Alternately, the legal process may absorb the content of the mores and redefine, shape, specify, and extend. In either case, moral formulations usually do not become dominant without help from the legal process.

Legal principles may also be invoked in the face of a widespread norm that runs to the contrary. Such appears to have been the situation in the cases concerning the obligation of school children to salute the flag. Although legislatures at every level of government passed such statutes or authorized such rules to be promulgated, the Supreme Court ultimately decided that, when applied to Jehovah's Witnesses, this regulation was unconstitutional under the First Amendment (*West Virginia Board of Education* v. *Barnette,* 1943). The Court thus asserted, in the face of one of the most pervasive mores, that in those circumstances, the law was unconstitutional. Here, the nature of the interaction is clear—a pervasive mos defeated by a constitutional principle. Did this ruling reflect a counter-mos against saluting the flag?

The Jehovah's Witnesses are a small and unpopular sect. If they—together with all

[9]This statement merely reflects a general impression. I have in mind a range of compelling statements by legislators, lawyers, and judges such as Pitt (1968), Warren and Brandeis (1890), and William O. Douglas (*Griswold* v. *Connecticut,* 1965, p. 484). While legal formulations may coalesce privacy sentiments, many other factors also enter. Consider, for example, the thesis persuasively advanced by David Potter (1968) that material abundance promoted a degree of privacy in child-rearing, which contributed profoundly to the strength of the value of privacy in American culture.

who personally refused on moral grounds to salute the flag—were added together, the number holding that position would still constitute a small and scattered minority. While the Witnesses' position might be described as part of the mores of a subgroup, this was not one of those situations in which two submores are held by opposing groups of roughly even size or strength. Yet the outcome went against the popularly held standard. Comparable instances can be found in court decisions regarding civil liberties and—regionally, at least—civil rights (Hyman and Sheatsley 1964). Public-opinion polls have found majority, or substantial minority, opposition to free speech for atheists, socialists, and Communists.[10]

In such cases, it is very important to ask how the courts, the "least dangerous branch" of government, decide when to oppose mores as reflected in statutory acts of the legislature. This is one element of the problem discussed at length and with great intensity by the proponents of judicial self-restraint and judicial activism (Berger 1977; Ely 1980; Dworkin 1977; Chayes 1976). Its history as an intellectual problem goes back to *Marbury v. Madison* (1803) and beyond. Its familiarity should not be permitted to obscure its importance in the present context. When the Supreme Court exercises the power of constitutional review, it sometimes prevents strongly held norms, as reflected by legislation, from being accepted as valid law.

The Supreme Court and its commentators recognize that such an act creates tension; Alexander Bickel described it as "the counter-majoritarian difficulty" (1962, pp. 16–23). How can a court, whose members are not popularly elected, thwart the will of elected representatives of the people? Bickel's justification reflects some of the charisma of the sacred-secular institution of the Supreme Court.

> [M]any actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material but also certain enduring moral values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government—if any single one in particular—should be the pronouncer and guardian of such values. [p. 24]

Bickel states as his own view that, because of its detachment, scholarship, and attention to particular cases, the Court provides the most favorable set of conditions for cultivating those larger values (pp. 24–26).

The enunciated and applied values to which Bickel refers, like the principles earlier mentioned, constitute a distinctive and elaborate set of ideas concerning what is right. Though these ideas are not necessarily shared throughout the society, they do constitute a major part of the subculture of the legal profession. They are learned at law school, in a socialization process that is one of the most intense experiences of adult socialization in

[10]The most carefully done study of this subject (Stouffer 1955) is now somewhat dated, but I have no satisfactory evidence of a major change on this matter.

American society. They are reinforced through membership and by performance in the profession.

Of particular interest within the legal subculture are those procedural principles described by Lon Fuller in *The Morality of Law* (1969b). The idea of an internal morality first took shape in Fuller's celebrated debate with H. L. A. Hart, in articles published together in the *Harvard Law Review* (1958). The discussion began with Hart's assertion of the positivist thesis—that morality does not always become part of law, and that it should not. If law were isomorphic with morality, claimed Hart, Mill's principle of liberty for all harmless behavior would be infringed. In his response, Fuller did not directly contradict this position; instead, he stated that law itself embodies some moral principles of its own, that is, functional requirements, without which "fidelity to law" would be impossible (Fuller 1958, p. 644). Describing this internal morality, he listed eight procedural attributes. The need for these was derived from the nature of social life—that laws could not succeed in controlling behavior and be accepted as fair unless they were stated generally and publicly in advance of their application. They would also have to be clear, internally consistent, moderate, stable, and administered in a manner that accorded with the stated laws (Fuller 1969b, pp. 46–91). What Fuller described is a set of standards toward which lawyers (attorneys and legislators as well as judges) supposedly aspire.

If Fuller is correct in these observations, law is affected not so much by the society's norms as by the requirements of successful governance, rooted in the structure (rather than the norms) of the society. In meeting those functional needs of society, the legal subculture generates, and to some extent practices, a set of principles. The principles become guides within the system and perhaps for the society beyond (see Selznick 1969; Scheingold 1974).

It is not clear from Fuller's discussion whether he considers this internal morality essential for every society. Elsewhere (1968a), he stresses the variability from one society to another (such as Trobriands and Barotse) in the kinds of relationships that are central and the type of dispute resolution system that works best for different kinds of interaction. His discussion of these variations implies a broad and flexible conception of the optimal mechanisms for social ordering. In his later writings, he clearly sees the significance of social structure as a variable determinant of the normative order, if not also of the legal system (Fuller 1968a, 1969a, 1969c, 1971, 1975).

On this subject a question may be raised concerning the universality of Fuller's prerequisites for law. Societies differ widely on such fundamental process questions as the importance of compromise versus all-or-none outcomes. Such differences might be expected to affect the Fuller requirements, all of which assume the primacy of explicit general rules. Whether societal norms favor Fuller's type of formality, even in American society, should be treated as problematic—a promising and important subject for empirical investigation. If the internal morality of law diverges from societal norms of fairness in significant segments of the society, the legitimacy of law could be undercut, rather than enhanced, by legal adherence to Fuller's internal morality.

Before leaving the concept of the internal morality of law, it should be noted that the legal subculture gets less enthusiastic treatment from many other authors. The idea of a vigorous legal subculture is not novel with Fuller. While descriptions of the legal subculture vary, it is generally recognized as a coherent way of looking at and dealing with the world, different from the society's other subcultures. From that common starting point, however, the observers begin to disagree. While some see law as a way of resolving

disputes, others view law and lawyers as creators of chaos. While some applaud legal contributions to equality, others assert that law concentrates privilege. Where some see clarity of thought, others find only confusion.

To what extent can such judgments lend themselves to empirical investigation? Even when stated as hypotheses, propositions of this kind sound primarily exhortative. Yet the questions they raise are worth following. Assuming that all the aforementioned characteristics of the legal culture exist, the interesting questions once again concern the conditions under which they are most likely to occur. The sociology of law need not choose between integrative and conflict models of the legal process; it can learn more by assuming that elements of each exist and by asking when, where, how, and to what degree each functions. The question of which picture is closer to reality bears on the question of how law is affected by the mores and how it, in turn, affects the normative order. If law can be guided by or help to generate pervasive mores or widely accepted principles that might otherwise be lacking, law might minimize conflict and contribute to social integration. If it chooses sides, without persuasively justifying the choice, conflict will be exacerbated.

CONFLICT AND INTEGRATION

The conception of normative integration rests on the premise that the society as a whole can accept common assumptions concerning the society's proper structure and the role of individuals and institutions within it. When such a consensus exists, law can draw on it. In the absence of consensus, law tries to cope through a variety of techniques.

If, for example, the right of property is widely supported, legislatures reinforce that right and courts support it. When, by contrast, the uses of private property arouse a strong reaction from a significant segment of the society, law is challenged to choose between opposing interests.[11] Similarly, if racial discrimination is widely accepted, law has shown its capacity to support it. *Plessy* v. *Ferguson* (1896)—the case that established the legality of "separate but equal accommodations"—is the classic example. When the forces favoring and opposing discrimination become more evenly balanced, the conflict is reflected in the divisions of all branches of government.

The capacity of law to moderate between conflicting norms or principles depends on the perceived legitimacy of the institutions of law and government. When opposing interest groups struggle with each other, their conflict can eventually threaten the stability of the society. Whether this occurs depends on many factors—the power available to each side, the nature and strength of their aspirations, the availability of a mutually acceptable solution, and the capacity of the third-party intervenor to contribute to such a solution.

[11] It is easy to illustrate the point if one accepts at face value reasons given in judicial decisions. In *Pennsylvania Coal Co.* v. *Manon* (1922), for example, the Supreme Court upheld a state regulation forbidding the mining of coal in such a way as to cause subsidence of structures even though the coal company had sold land to the plaintiff expressly reserving the right to mine under plaintiff's land. A more recent example is furnished by *Penn Central Transportation Co.* v. *New York City* (1978), wherein the Supreme Court upheld a city regulation prohibiting construction on historical landmarks, affirming an injunction against building an office building on top of Grand Central Station even though the plaintiff owned Grand Central Station. Though opposing interests seem to be at play in these cases, detailed research is needed to estimate the strength of the interests opposed to the assertion of traditional property rights.

As the ultimate recourse in such disputes, the institutions of law and government in stable open societies bear major responsibility for promoting solutions to socially disturbing conflicts. In societies where the mores are strong and pervasive, such challenges tend to be rare. But in a society such as the United States they are frequent enough. Tocqueville pointed out that in America, every political problem became a legal problem (1899).

In the contemporary United States, recourse to the legal process occurs for every kind of problem—social, economic, medical, scientific, and governmental. Such a range of questions, intensely pressed, creates difficulty for law as an integrative mechanism. If disputes are not satisfactorily resolved in the courts, they return unsettled to the legislature, to the administrative agencies, to the institutions in which they originated, or to the streets. As unresolved disputes multiply, they create increasing discontent, conflict, or alienation. If the interests involved in several conflicts coalesce, a split in the society develops, threatening the very structure of the regime. By the time that danger occurs, it may be too late for the institutions of law-government to restore their authority.

The capacity of constitutional government to avoid such instability must be treated as problematic. While great stability exists in Scandinavia, England, most of the British Commonwealth, and the United States, the same has not been true of Latin America or the rest of Europe. Even the stable democracies have shown signs of potential society-wide conflicts. How can the institutions of law-government deal with such conflicts in ways that will strengthen their legitimacy and authority?

The solutions of the past rested to a large extent on a normative consensus regarding the structure of society and the role of law and government. In the United States, the concept of a "land of opportunity" was more than mere ideology: it was supported by demographic realities (Sibley 1953). While mobility was not available to all, enough succeeded, individually or vicariously, in gaining access to wealth and power to minimize discontent. Low-access groups, such as women and racial minorities, were also low in power and, as a result, in expectations. For large segments of the population, a sense of community existed, whether in the small town, the ethnic enclave, the gentlemen's club, the religious congregation, or the political machine. The conflicts that developed (except for the fundamental question of slavery) were managed within the framework of constitutional government. Common law was an acceptable instrument for dealing with crimes of violence, breaches of contract, and personal injuries. The courts and legislatures facilitated in many ways the massive economic development that was widely accepted as paramount in the nineteenth century (Hurst 1960, 1964).

The changing structure of American society in the twentieth century created more difficult problems for the institutions of law and government. Many of the problems took the form of battles between the public and special-interest groups—robber barons, meat packers, political bosses, sweatshop owners. The tendency, starting with the first Roosevelt, was to turn to government for protection against such outrages (Schlesinger 1957). By the time of the second Roosevelt, the New Deal demonstrated that governmental regulation was a politically acceptable method for dealing with a wide range of problems.[12]

[12] Roosevelt's overwhelming victory over Landon in 1936, after four years of vigorous regulatory undertakings, is perhaps the best evidence. The regulatory approach continued through Republican as well as Democratic administrations, until the first serious efforts at deregulation under Carter and Reagan.

The role of the courts in this trend merits attention. At first resistant to the extension of government regulatory powers, the Supreme Court gradually accommodated to this development until the final spasm of resistance and acceptance in the mid-1930s. After the Supreme Court accepted the principle of federal regulatory power, Congress assumed command. In that sense, it could be said that a representative body was specifying regulatory policies derived from public sentiments. How well that claim charted the reality is not self-evident. Historical studies in several of these areas suggest that special-interest groups, rather than a broad public consensus, underlay many of these measures (see generally Lowi 1979).

As the evolution continued, however, the connection of governmental regulation with specific norms became increasingly remote. A major shift occurred as Congress and the state legislatures increasingly delegated their authority to regulatory agencies (Waldo 1948). In a generally permissive approach, the courts after 1937 settled for minimal limitations on the power of regulatory agencies. As long as the agencies stayed within the broad mandate accorded by the legislature and applied it in a manner that was not "arbitrary or capricious," their powers were upheld. In case after case, it became clear that the criterion phrase meant the observance of some kind of procedural standards. Recently, even the scope of those court-imposed standards has been limited (*Vermont Yankee Nuclear Power* v. *NRDC*, 1978).

After 1937, the capacity of the Congress to delegate this authority was not called into serious question by the courts.[13] From a constitutional perspective, the powers of Congress were deemed broad enough to encompass every kind of regulation, provided it fell within an appropriate grant of authority, such as the Commerce Clause. In exercising standards against actions that were "arbitrary and capricious" or unsupported by substantial evidence, the courts seem to have felt that they were ensuring the "proper" part of that limitation. As to "necessary," that judgment was left to the legislature.

Within the branches of government then, the courts in effect declined to limit administrative discretion except in extreme or unusual cases. This arrangement, vigorously developed by the New Deal, continued and grew in a wide range of economic, social, and technical areas. The "fourth branch of government" came to be a major mechanism for setting behavioral standards affecting every sphere of life in the society.

Any account of law in modern American society must treat the rules of the administrative agencies as at least *quasi*-legal. They are administered by governmental officials charged by the legislature with responsibility for social control. They are enforced with sanctions administered by the agency, or under agency aegis, by the courts. They are promulgated publicly as general standards. And they are applied in individual instances.

In other regards, agency rules lack some of the typical features of judicially administered law. They are not promulgated by elected representatives, and they are not subject to presidential veto and override. Neither are they a product of common-law evolution. Adjudication under them is not accorded the full protection of procedural due process, although some due process features are sometimes present.[14] Rules of regulatory agencies

[13] The leading case, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* (1937), broadened and simplified the powers of Congress under the Commerce Clause. The delegative powers of Congress were not seriously discussed thereafter until a recent decision, a concurring opinion by Justice William Rehnquist in the benzene case, *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute* (1980).

[14] See Davis (1972) for a general discussion of due process in administrative proceedings. During the sixties and seventies, Congress and the courts contributed to what has been described as a "due process explosion." For a review, see the discussion and cases in Gellhorn, Byse, and Strauss (1979, pp. 434–515).

are typically applied without practices intended to protect the objectivity of the judge. And they do not utilize anything comparable to the jury of peers.

If regulatory-agency rules are quasi-legal, to what extent do they incorporate the mores of the society? There are some mechanisms by which the agencies can be informed of public opinion. Congress, representing the public, provides a channel by which constituents' views can be heard. Oversight hearings, budgetary hearings, and statutory changes may apprise the agency of public opinion. This channel is remote enough, however, to severely limit its capacity to transmit. Further, the issues of regulatory policy tend to be so technical that a coherent norm rarely emerges. Instead, matters of regulation are likely to be left to "the experts" and to those groups whose interests are manifestly involved and who have the organization and resources to affect the agency, through Congress or directly.[15]

Another channel of influence is available through the rule-making process. By publishing proposed rules in the Federal Register as required under the Administrative Procedure Act (5 U.S.C. 551 et seq., 1981), the agency invites comment from all interested parties. Sometimes the result is supplemented by hearings, by comments on the comments, and by the publication of a revised set of proposed rules before the rules are made final. As with congressional oversight, the populations tapped by these procedures are self-selected from those whose interests are most deeply involved. Even with this selectivity, the two channels hold open the possibility that pervasive mores could affect the final rules.[16]

One reason this outcome does not usually occur is that in the areas in question, the society usually lacks pervasive mores relevant to the rules. In the current heterogeneous society, attitudes and interests are so diverse that a desired policy can rarely be agreed upon. For any given regulation, there are likely to be proponents whose interests are served by the rules and opponents who consider the policy harmful (cf. Jaffe 1954). Although some lobbying groups have purported to represent the public interest, it is difficult to define in a convincing way. The premise that the administrative agencies themselves represent it, once widely accepted, has worn thin (Jaffe 1973).

When opposing interest groups attempt to influence agency policy, neither the process nor the outcome is likely to enhance normative consensus. Agency proceedings are, for the most part, conducted with a minimum of publicity, so that most agency work is unknown, even to the most well-informed outsider. Those whose interests are affected learn of agency actions, if at all, in various undependable ways: sometimes through interest groups to which they belong, sometimes when informed of the rule, sometimes when they are confronted with an instruction to comply, sometimes when they are found in violation. Rarely does this kind of information produce publicity that leads to widespread public awareness (see Boyer 1981).

Furthermore, there is a tendency to assume the expertise of the agency. While this kind of confidence has eroded rapidly in recent years, it has not been replaced by confidence in any alternative. If those affected by the rules are knowledgeable, they are viewed with suspicion because their expertise is combined with vested interest; no one knowledgeable is thought to be objective. If professionals are looked to with some hope,

[15] Davis (1972, pp. 26–52) makes the best justification for such delegation by describing the needs it fulfills.

[16] For a suggestion that the multiplicity of such agencies—charged with sometimes overlapping and conflicting goals—might inhibit the expression of widely held views, see Nader and Seber (1980).

their performance on such matters has been so uneven as to inspire little confidence regarding either expertise or objectivity.

The justification of administrative policy in terms of efficiency does not necessarily invite public support. It may be true, as has often been claimed, that this society favors practical results. Such a value may have created some disposition at the outset toward administrative agencies designed to achieve publicly approved goals. Any such inclination to support regulatory rules has certainly eroded in the face of a widespread belief in bureaucratic inefficiency. So far, movement in Congress to require evaluation of agency policies seems to have produced anecdotal confirmation of the inefficiency theme rather than a serious evaluation of agency efficiency.[17]

Disillusionment with governmental "bureaucracy" may reflect a societal need for something other than efficiency. Criticisms invoked against "Washington" give some clues: waste and inefficiency are included, but so are interference, indifference, and arrogance. Two successive presidents were elected with the help of a promise to "get the government off your backs."

This situation suggests a widespread sentiment that the agencies are delivering the citizens little but a hard time. A popular riddle tells the story:

Q. "What are the three most frequently told lies?"

A. "(1) I gave at the office. (2) It's in the mail. (3) I'm from the government and I'm here to help you."

What is involved here is a sense that power is being exercised against the interest of the citizen. A recent study suggests the grounds for such a suspicion. The source of the difficulty is not so much in the initial characteristics of the administrative official as in the nature of bureaucratic organization, the definition of the task, and the criteria of success (Lipsky 1980).

Another criterion on which the agencies score poorly is access. While formal measures have been provided for hearings on rules and decisions (see, for example, Administrative Conference of the U.S. 1981), affected citizens frequently complain that the government simply took over.[18]

An interesting contrast in Washington is found between the offices and corridors of the agencies and the legislative office buildings on the Hill. The House Office Building swarms with people, while the FTC offices are very quiet. Perhaps elected officials attract large numbers of visitors because they welcome their input and their votes—two elements that go hand in hand.

Another consideration, beyond access and input, is a sense of fairness or justice. Many regulatory agencies were originally conceived as instruments for achieving some socially desirable end (see Friedman and Macaulay 1977, pp. 610–20). The widespread belief in inefficiency and indifference undercuts that basis for popular support. In addition, agency decisions are frequently felt to be unfair, taken without consultation, ignoring relevant information, and conceived in ways that do not provide equal treatment or a coherent basis for differentiation.[19]

[17] For a thoughtful discussion of the limitations of policy evaluation, see Lindblom and Cohen (1979).

[18] For a collection of such complaints, see *Regulatory Reform: Hearings Before the Senate Committee on the Judiciary* (1979). Manning (1977) suggests that the absence of warning is inevitable given the proliferation of applicable regulations.

[19] For a general review of these problems and some proposed solutions, see Stewart (1975).

All these tendencies suggest that the quasi-legal regulatory agencies are failing to meet criteria deeply imbedded in the constitutional scheme and in the legal subculture. In leaving the field of regulation to them, Congress and the courts may have added unduly to the estrangement of the society from the institutions of law and government.

This is not to suggest that a close correspondence of law and the mores is to be found in a radical restoration to legislatures and courts of the tasks now handled by regulatory agencies. A step toward limiting agency discretion has been repeatedly proposed by Senator Dale Bumpers and has received considerable, though not majority, support calling for judicial review of the agency's interpretation of its delegated authority (Amendment to the Administrative Procedures Act, 1981). A call for reassertion of the power of the courts, in a broad spectrum of rights, has been vigorously advanced (Stewart 1975, Chayes 1976). Whether either trend will substantially develop remains to be seen. Such measures might moderately increase the channels through which public sentiment flows into the lawmaking process, compared with the access provided under agency procedures as they now exist or even as they might (in the interest of "representative bureaucracy") be revised. Unaided proposals of this sort are hardly likely to reconstruct the common-law concept of law as the embodiment of society's normative consensus.

LEGAL IMPACT AND LEGAL CENTRALISM

The discussion thus far suggests the difficulty of attaining norm-law congruence in a pluralistic, anomic society. Neither the courts, the legislatures, nor the administrative agencies provide an easy answer to this problem. Although each of these entities has developed methods for hearing, absorbing, and registering normative consensus—the messages received typically reflect dissensus instead. In these circumstances, law is often called upon for authoritative decisions. Do such decisions contribute to normative consensus?

In general, the answer is no. While the research results are sparse, they do not support the view that law can directly command compliance and directly or indirectly command normative agreement in an open society. Studies of legal impact usually assume that the topic can best be addressed by isolating a law and examining its effects in modifying behavior. The effects characteristically examined in impact analysis are those relating to compliance with the legal standard. To what extent does the implementation of the law decrease violation or increase compliance with that standard?

Thus defined, the inquiry concerning legal impact relates most obviously to law and normative order when law is seen as a device for enforcing legally embodied morality. According to this view, when a law is enforced against a defendant, the judgment serves as a reminder that the legal standard is to be taken seriously. Those who are chastised may modify their subsequent behavior by bringing it into line with the standard. Others, not directly subjected to legal sanctions, learn vicariously to avoid the disapproved behavior. In either case, the effects sometimes achieved, it is argued, include a change in individual attitude and a reinforcement of the societal norm. Through a combination of exhortation and sanction, law may thus lead people to alter their ideas of what is right in conformity with the legal standard.

The conception of law as an effective regulator of behavior is well represented in legal thinking. In criminal law, it does appear to be the dominant view. LaFave and Scott (1972, p. 21), for example, mince no words in presenting this view: "The broad purposes

of the criminal law are, of course, to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable." Packer (1968) acknowledges the centrality of crime control but adds as an equally important purpose the maintenance of due process protections for the accused.

The purposes of the criminal law, written into penal codes and discussed in appellate decisions, include four major objectives—general deterrence, special deterrence, incapacitation, and rehabilitation. Recently retribution has reappeared as an additional acceptable purpose of the criminal law.[20] General deterrence is intended to teach others than the offender to comply with the law. The remaining three purposes represent efforts to prevent the offender from repeating criminal conduct—special deterrence, by inflicting consequences that will lead to subsequent avoidance; incapacitation, by making it impossible (through incarceration, banishment, physical disability, or execution) to act criminally in free society; rehabilitation, by encouraging law-abiding habits. Each of these three is supposed to reduce the frequency with which the violation and other criminal acts occur. Instead, behavior is altered either to inaction or to conduct approved by society. Rehabilitation presumably promotes law-abiding activity in place of crime; special deterrence is expected to inhibit criminal behavior; and incapacitation, for the period of its duration, eliminates the opportunity to commit crimes outside of prison.

Comparable assumptions, less explicitly articulated, are found in legal thinking concerning the law of tort and contract. Personal injuries resulting from a failure to exercise reasonable care are subject to civil sanctions, requiring the negligent person to pay the victim for damages inflicted. Where the tort feasor behaved especially badly (intentionally, deliberately, or maliciously), punitive damages may be imposed. Here, a major part of the explanation is phrased in terms of the effort to require people to behave more carefully, although the element of compensating an innocent victim assumes a prominent place as a parallel objective (see Prosser 1971, p. 9). In contract law, the objectives move even more in the direction of the plaintiff. While the principal aim of contract law is to compensate the plaintiff for losses resulting from breach of contract, the intended effect is also to require that the defendant and similar others be warned of the price they may be forced to bear should they break contracts in the future.[21] For the injured plaintiff, another kind of behavioral effect is envisioned. In effect, the law is saying to the particular plaintiff and to other potential makers of contracts, "Go ahead with a written agreement; the law will see to it that either the agreement is kept or that you will be protected from financial harm." A Comment on the Restatement of Contracts (1932, §329a) puts it in the following terms:

> In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract.

[20] In the debate on this issue between Justices Thurgood Marshall and Potter Stewart in *Furman* v. *Georgia* (1972) and *Gregg* v. *Georgia* (1976), Stewart's position favoring retribution as an acceptable legislative purpose seems to have majority support in the Supreme Court. On this matter, *Gregg* runs contrary to earlier dicta, such as that expressed in *Williams* v. *New York* (1949, p. 248): "Retribution is no longer the dominant objective of the criminal law."

[21] For an illuminating discussion of the generality of law as a defining characteristic, see H. L. A. Hart (1961, pp. 18–25).

The residual interest in deterring breaches of contract is evidenced in such concepts as anticipatory breach, under which liability may be imposed on a contracting party who has bargained in bad faith (see Fuller and Eisenberg 1972, pp. 51–57, 759–65).

The accuracy of such assumptions concerning the impact of law on behavior must be questioned. Empirically, there is very little evidence to support them. Despite years of research, social scientists have rarely been able to demonstrate the behavioral impact of a given law, much less its normative effect.

Some of the best-known examples of legal-impact studies support the contrary proposition: that law seems to have a null or negative effect in regulating behavior.[22] The case of Prohibition has often been cited as an instance where criminal law, in this case the Eighteenth Amendment and the Volstead Act, contributed to the opposite of the intended consequences. Not only did Prohibition fail to reduce the amount of alcohol consumption; it added to its production, importation, and use. By subsidizing organized crime, moreover, it contributed to related forms of organized criminal activities. A failure of this magnitude is attributable only in part to the inadequacy with which the Prohibition laws were enforced. The law itself seems to have reflected the views and efforts of a minority of the population. While, by zeal and organization, the temperance movement secured the votes necessary to change the law, it was little help against determined purveyors and consumers of alcohol in getting the law implemented. The failures of prohibition enforcement are attributable in important part to the refusal of the public to support enforcement activities (Sinclair 1962).

On the civil side, manufacturers and suppliers rarely utilize the courts to enforce contracts (Macaulay 1963). They avoid litigation, which would be harmful to their appeal as good business partners, in most instances in which they would have a cause of action. Instead, they make every effort to settle their differences without legal intervention and to maintain the business relationship.

Both these instances, and many more like them, point to the difficulties of the law's regulating behavior in the face of mores running contrary to it. It is this kind of finding that leads a number of scholars to question the accuracy of what has been described as a "legal centralist" view, which supposedly attributes to the agencies of the state the capacity to control behavior throughout the society, without regard to the degree of correspondence between law and the mores.[23]

Recent critiques of legal centralism merit close consideration in this context. While there is a danger that such characterizations can become mere caricature, the efforts of sociolegal scholars in recent years have avoided this temptation. Accordingly, there are available a few statements that soberly seek to describe the prevailing view in the legal subculture of how law and society interrelate. A succinct description of the legal-centralist position is given by Marc Galanter: "Legal scholars and professionals, while accentuating various differences with one another, display a broad agreement about legal phenomena [comprising] adherence, usually tacit, to a set of propositions which, taken

[22] Null effects are found, for example, in Rheinstein's 1972 study of the effects of divorce laws. For an illustration of negative effects, see the studies by Kaplan (1976) and Grinspoon (1977) about legal control of marijuana use.

[23] For a definition and critique of "legal centralism," see Galanter (1977). The extensive description of the "common paradigm" given by Galanter presumably spells out his conception of legal centralism, though the term is not used.

together, provide a cognitive map or paradigm of legal reality" (1977, p. 18). As described by Galanter, this is the common paradigm:

1. Governments are the primary (if not the exclusive) locus of legal controls; that part of the legal process which is governmental is the determinative source of regulation and order in society.
2. The legal rules and institutions within a society form a system in the sense of a naturally cohering set of interrelated parts articulated to one another so that they form a coherent whole, animated by common procedures and purposes.
3. The central and distinctive element of this system is a body of normative learning (consisting, in various versions, of rules, and/or standards, principles, policies) and of procedures for discerning, devising and announcing them.

3A. Purposiveness: rules are (should be) designed to embody principles or effectuate policies.

4. Legal systems are centered around and typified by courts, whose function is to announce, apply, interpret (and sometimes change) rules on the basis of or in accordance with other elements of this normative learning.

4A. The basic, typical, decisive mode of legal action is adjudication (i.e., the application of rules to particular controversies by courts or courtlike institutions in adversarial proceedings).

5. The [body of] rules (authoritative normative learning) represents (reflects, expresses, embodies, refines) general (widely shared, dominant) social preferences (values, norms, interests).

5A. Broad participation in rule-making by adjudication (and by representative government) insures that the rules embody broad social interests.

6. Normative statements, institutions and officials are arranged in hierarchies, whose members have different levels of authority.

6A. "Higher" elements direct (design, evaluate) activity; "lower" ones execute activity.

6B. Higher elements control (guide) lower ones.

7. The behavior of legal actors tends to conform to rules (with some slippage and friction).

7A. Officials are guided by the rules.

7B. The rules control the behavior of the population.

7C. Conformity is the result of assent and the (threat of) application of governmental force.

8. If the above obtain, then

8A. The authoritative normative learning generated at the higher reaches of the system provides a map for understanding it; and

8B. The function of legal scholarship is to cultivate that learning by clarification and criticism; and

8C. Legal scholarship directs itself to remedy imperfections—to bring legal phenomena into conformity with paradigm assumptions. [pp. 18–19]

This useful model can be taken as a substantially accurate description of the prevailing assumptions of the legal subculture. Thus, it helps to explain the behavior of legal actors.

The legal-centralist model can also be used as a set of hypotheses against which to describe the legal process as it functions in the real world. Galanter's view on this matter, shared by many scholars, emphasizes the differences between this model and the actual

performances of the legal process.[24] As Galanter states it, "If we look at the legal process in America, we find that as descriptive propositions these assertions do not self-evidently fit the reality very well" (p. 20). I infer from this that Galanter believes the model to be so far from reality that it must be replaced by a substantially different conception of the relation between law and society. Other scholars (including Griffiths 1979; Abel 1973; Black 1972) have joined Galanter in suggesting that patent contradictions of the model are so numerous that only a new model will suffice.

While I would not discourage such efforts, my own inclination is to explore the existing model in order to seek out the changes necessary to make it more realistic. I am drawn to this approach for several reasons. First, there may be substantial truth in widely accepted assumptions. It is important to resist the temptation to assume that whatever explanations people give for their own behavior are inevitably false. While social scientists have generally prided themselves on the discovery of hidden motives and inaccurate perceptions of reality, the enjoyment of the search does not justify the presumption that overt motives and perceptions cannot possibly be substantially accurate. Second, the specific assumptions described in the legal-centralist model seem to me close enough to a realistic description to provide a good starting point. Because it contains much that is correct, it can be especially useful in locating discrepancies from reality. Third, when such inaccuracies are repeatedly discovered, they can be used to correct the model. Galanter asserts that each instance of the gap between the centralist model and the reality tends to be dismissed as an exception—something atypical, peripheral, and transient (1977, p. 20). That response seems to me not inevitable. In fact, the professionals in this field have, over the years, engaged to a surprising degree in major reappraisals of assumptions concerning the legal system. The paradigm described by Galanter is substantially different from what it would have been before Holmes.

The Legal Realists in particular brought about much rethinking—some, though not all, of it reflected in the Galanter model. This does not mean that the basic model has been completely changed. Galanter regrets that "awareness of such discrepancies does not induce professionals (or others) to relinquish their model of the legal system. Rather it spurs them to add ad hoc explanations to account for these irregularities" (1977, p. 20). This dichotomy contains a very important excluded possibility; instead of either ad hoc explanations or total relinquishment, the discrepancies can lead to significant modifications of the model, precluding the need for an entirely new one. Fourth, a model accepted by the professionals in the field, if close to accurate, can be used to encourage members of the profession to think in their own terms about changes in the legal process that they may want to institute. I do not believe that all professions are certain to pursue their individual interests at the expense of broader goals. Given contrasting views of professional commitment to societal service, the attraction of service to the society seems to me a possibility that might be enhanced by the use of an already internalized model, illuminated by empirical reality testing, to show how societal contributions could be increased. Finally, the urgent call to scrap the existing legal-centralist model is unacceptable until a plausible alternative is brought forward to take its place. Those models that have thus far been proposed seem to me either to vary too little from the legal-centralist model to deserve the grand designation of "new paradigm" (Abel 1973) or to have varied

[24] For an early expression of this general perspective, see Jerome Frank's *Courts on Trial* (1949).

so much as to have left far behind those empirical findings that accord with, and tend to support, the older model (Black 1976).

I do not mean that the search for new paradigms is unwise. Alternatives are valuable in testing the adequacy of existing models. I do mean that the legal-centralist model as described by Galanter lends itself to use and to constructive modification, especially absent a plausible replacement.

A modified model should begin, however, with a new name, since legal centralism does not accurately describe legal thinking or the legal process. I propose to describe the needed model as "mutualist" rather than "centralist." By mutualist, I refer to an orientation that sees law as (1) affected by the extra-legal norms and structures of the society and as (2) affecting those norms and institutions. A proper use of the term "centralist" denies the influence of society on law. As I read Galanter's description of legal centralism, I think the name is misapplied. His model contains too many assumptions concerning the first type of process to merit the centralist label. His propositions 5 and 5A are especially noteworthy.

> 5. The [body of] rules (authoritative normative learning) represents (reflects, expresses, embodies, refines) general (widely shared, dominant) social preferences (values, norms, interests).
> 5A. Broad participation in rule-making by adjudication (and by representative government) insures that the rules embody broad social interests.

Other models of the legal process seem to me far better described by the centralist label than is Galanter's. Austinian legal positivism, for example, is much more extreme in its centralism. In Austin's view, the command of the sovereign is the starting point of the analysis, and it makes no difference to him whether the sovereign is a king or a legislature, unpopular or popular, reflective of the values of positive morality or not. While Austin acknowledged the possibility that custom could sometimes be converted into judge-made law, he viewed this process as dominated by judicial discretion and discontinuous because custom, once accepted as judge-made law, was converted into positive law and cut off from its origins (Austin 1861, lecture 5; Fuller 1968a, pp. 44–46). H. L. A. Hart (1958, 1961) continues the Austinian approach in stressing the importance of minimizing the transmission of morality into law. Prescriptive implications aside, the Austin-Hart model may be a good description of how law worked in nineteenth-century England (cf. Dicey 1914).

Another highly centralist position is represented in the means-ends orientation. Fully developed by Jeremy Bentham (1948), this type of centralism would guide law by utilitarian considerations, largely determined by the expert lawgiver. Ideas of rightness in the population, to the extent that they differ from the scientific calculus of the greatest pleasure for the greatest number, were to be rejected as wrong (pp. 8–23).

Roscoe Pound's ideas of law as increasingly effective social engineering fit in the same tradition, although tempered by Pound's readiness to include in the calculus the diverse interests (not necessarily rationally justified) of various segments of the population (Pound 1943, p. 39). Despite that development, Pound's approach continues to emphasize the technical decisions of the scientist-engineer: once interests are identified, the prime question becomes one of efficiency rather than normative preference in the population or even in the internal morality of law (Pound 1942, pp. 64–65).

Among the Realists, the same orientation appears in extreme form in the thinking of Walter Wheeler Cook (1927):

> Underlying any scientific study of the law, it is submitted, will lie one fundamental postulate, viz., that human laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable. If so, it follows that the worth or value to a given rule of law can be determined only by finding out how it works, that is, by ascertaining so far as that can be done, whether it promotes or retards the attainment of desired ends. If this is to be done, quite clearly we must know what at any given period these ends are and also whether the means selected, the given rules of law, are indeed adapted to securing them. [p. 308]

The exclusive concentration on law as an instrument seems to me characteristic of a centralist approach. This view implies that the instrument is available for use by the "sovereign," with or without influence from the population. As Galanter (1977, p. 18) phrases it, in a genuinely centralist part of his model, law-government "is the determinative source of regulation and order in society." In practice, the instrumental approach promotes the role of the expert to determine means-ends relations and of the governmental official to determine priorities and to optimize among conflicting policies. In principle, it calls for input from the public, if at all, to determine only ends, not means. It is government for the people (or the state), but not government by the people.

In the Galanter model, the means-ends orientation is lumped together with principle under the heading of purposiveness—"rules are (should be) designed to embody principles or effectuate policies." This combination blurs an important distinction related to the issue of centralism. Contrary to the means-ends approach in "effectuating policies," the embodiment of principles is not necessarily centralist. Principles enunciated within the legal tradition often correspond to societal morality. Such principles as the right of privacy and free speech connect potentially with pervasive mores; policy calculations, transitory and technical, are less likely to do so. For the current American culture, at least, pragmatic mores are a contradiction in terms.

In this discussion, I am pointing to a distinction that seems to me of fundamental importance for the present topic. The fullest development of legal centralism occurs when the normative orientations of the population are excluded from the processes of law formulation and administration.

In the first part of this essay, considerable attention was paid to the methods by which normative content finds its way into positive law. The occurrence of such normative infusions correspond to propositions 5 and 5A of Galanter's model.

In addition, the legal process sometimes demonstrates a tendency to promote the generation or transmission of societal norms. To the degree that these processes tap normative elements in the society and are not merely reflections of governmental messages being beamed back, the centralist nature of the legal process is further diluted. Often, these processes entail an intertwining of legal and societal elements—an important characteristic of the mutualist model.

Emphasis on these processes is consistently found in the works of Karl Llewellyn and Lon Fuller.[25] Both these scholars were clearly oriented toward the interaction of law and

[25] Llewellyn's bibliography was compiled by Twining (1973, pp. 555–61) in his extremely thorough study *Karl Llewellyn and the Realist Movement*. For a bibliography of Fuller, see Bechtler (1978, pp. 223–27).

society and away from legal centralism. In Fuller's work, there is also a strong emphasis on what might be called legal decentralism—an effort to identify those situations of "private ordering" in which governmental intervention is unnecessary or mischievous (Fuller 1969a, 1975).

Considering the influence exercised by these two men, their mutualist orientation indicates that the centralist approach is less dominant than has been suggested. Though it is possible that their positions were not fully understood by the supposed legions of legal centralists, it seems unlikely, in view of the emphasis placed on the mutual approach throughout their work.

I believe that these two scholars gained acclaim not in spite of but because of their commitment to a mutualist perspective, which seems to reach back very deeply into the common-law tradition. It is reflected, for example, in a work thought to epitomize the codification of the common law, Blackstone's commentaries. In a quotation attributed to Blackstone, he resorted to a legal fiction to imply notice of the law: "every man in England is, in judgment of law, party to the making of an act of Parliament, being present thereat by his representatives" (Fuller 1968a, p. 66).

Thus, the statutory act was viewed as witnessed, if not participated in, by the entire population. Depending on its use, such a fiction could promote or reduce attention to the societal norms in the legislative process. While the imperfections of the representative process during this period suggest reduced attention, Edmund Burke's thoughtful observations on the role of the legislator as delegate and as trustee imply the opposite (see, for example, his Speech to the Electors of Bristol). The practice of Lord Mansfield of sharing the bench with merchants in commercial cases also suggests a concern that considerations be given to commercial practice (see Fifoot 1936, p. 93). The pervasive inclusion of the jury in the English and the American tradition further attests to the strength of the mutualist commitment.

The themes developed by Llewellyn and Fuller command attention for a more important reason. Their work constitutes significant progress in trying to locate mechanisms for promoting the integration of norms and law.

Llewellyn's work can be interpreted as a lifelong effort to analyze and shape the mutual interaction of norms and law. His work on the law of sales (1930) paid particular attention to the element of custom in the interpretation of contracts. In developing the Uniform Commercial Code, Llewellyn embodied his general idea that law must be "open-textured" to utilize information from the society (Twining 1973, pp. 302–40). Only by understanding the nature of relationships in the commercial world can legal decisions demonstrate the kind of "situation sense" needed for law to work well. This general philosophy underlies his proposals, implemented in the Uniform Commercial Code (see especially sec. 1-205), to introduce evidence of usage of trade (that is, customary practice) to clarify the intent of a contract.[26]

Similarly, Fuller's work in the study and practice of labor negotiation (1963, 1971) manifests his commitment to the private ordering of social relations. Active in the labor field almost from the beginning of the New Deal, Fuller saw in the labor legislation of the 1930s evidence that statutory law works best when it facilitates the relations between conflicting parties in the society. In the history of American law, there is no more

[26]Kirst (1977) contends that Llewellyn's intended role for usage of trade has not been followed by the courts.

dramatic example of the transformation of human interaction, with the aid of a legally generated framework, to promote the private ordering of relationships.[27]

LEGAL FACILITATION OF NORM FORMATION

In the two examples of commercial law and labor law, legal structures provide opportunities for the use of normative content from the society and for the creation of conditions that generate that content. In a society as heterogeneous as the modern United States, the latter process may prove to be extremely important. Lacking pervasive mores and faced with submores in conflict, how can the law contribute to normative order? The following examples—illustrative rather than comprehensive—are intended to emphasize the diverse ways in which such contributions can be made. While the instances are stated in positive terms, it is clear that law can also create conflict and normative disagreement.

1. *Law can equalize the relative power of groups and require them to seek agreement.* In the current society, does legal intervention which equalizes power tend to facilitate the private ordering of relations? That, at least, is a plausible hypothesis. Labor-management relations provide an excellent example. Initially law supported the superordinate position of management by prohibiting, as criminal conspiracy, an effort to organize with the threat of withdrawal of labor (*Commonwealth* v. *Pullis*, 1806). That tactic, discontinued after Chief Justice Lemuel Shaw's landmark decision in *Commonwealth* v. *Hunt* (1842), was followed by the use of the injunction, which came to be regularly employed by the courts to prohibit strikes (cf. Frankfurter and Greene 1930). When these efforts failed to reduce labor unrest, a thoroughly different approach was employed. Under the Norris-LaGuardia Act of 1932, the use of the injunction in labor-management disputes was sharply restricted. Three years later, the Wagner Act (National Labor Relations Act of 1935) established provisions for the conduct of representation elections and laid the foundation for collective bargaining between management and the elected union. In effect, this procedure equalized the power relations between the two parties.

The success of this arrangement in reducing labor violence is widely accepted.[28] The outcome appears to have been accomplished by providing each side with an opportunity, within a new framework, to optimize its own interests. It thus facilitated the kind of reciprocity which—in theory, at least—affords a basis for continuing peaceable exchange between parties who had earlier been in conflict. In these circumstances, two kinds of norms seem to have developed—substantive and procedural. Substantively, each of the parties was free to adhere to its own ideas of the proper wages, working conditions, and fringe benefits. It seems fairly clear that there continue to be differences between management and labor on such questions as what constitutes a "fair day's pay for a fair day's work," even though both sides might agree on that verbal formulation.

Closer study than I have seen or done is needed to determine whether an evolution has occurred between labor and management in the acceptance of common standards of

[27] Fuller's focus was on the shaping of law to accord with existing relationships. "For a given social context one form of law may be more appropriate than another, and . . . the attempt to force a form of law upon a social environment uncongenial to it may miscarry with dangerous results" (1969a, p. 27).

[28] I have not been able to locate a rigorous time series which establishes this point (but see Richberg 1954, pp. 112–33, for a knowledgeable account of the decline in unrest on the railroads after the passage in 1926 of the Railway Labor Act, precursor to the Wagner Act).

fairness, and, if so, whether this change is attributable to the sudden introduction in the early 1930s of a new regime in labor-management relations. Attitude may not have followed behavior in these matters. It is an empirical question, potentially an important one, for understanding the norm-forming effects of law.

Norm formation is far clearer at the level of procedure. In this process, the National Labor Relations Board (NLRB), using administrative and judicial support, developed the concept of bargaining in good faith and avoiding unfair labor practices (see Cox 1958). The agency and the courts were clearly affected in their judgment on these matters by the norm-forming processes occurring in bilateral negotiation, mediation, and arbitration. The law, as administered by the NLRB, created multiple opportunities for labor-management interaction, generating a wide range of variation in the relations between the parties. From these variations could evolve the patterns of bargaining and practice that minimized conflict between the two sides, or at least their leaders (Atleson 1973). The selective process included the enunciation of boundaries (unfair labor practices) and the evolution of a prescriptive concept of good-faith bargaining—both important procedural norms generally understood and accepted by management, labor, arbitrators, administrators, and the courts. By now, these norms are perhaps widely enough known and accepted in general terms to have been adopted by the society as a whole. (For an imaginative discussion of the extension of these norms to a campus conflict, see Scheingold 1974, pp. 39–45.)

The example of labor-management suggests that law can create a framework to facilitate private ordering of relations between parties. Detailed study of this example and many others must precede generalizations concerning the conditions under which private ordering occurs and the ways in which law can facilitate these processes. The use of law to equalize power relations may have been only one of the conditions that facilitated the development of procedural and—perhaps—substantive norms shared between originally antagonistic groups. It may also be true that common interests in labor peace, and even a shared sense of equity, contributed to the evolution of these norms. These factors might have existed as background conditions making the new laws more acceptable or providing the motive, once law opened the communication channel, that contributed to more peaceful dispute resolution. If so, the labor-management approach will not necessarily apply to other group conflict situations.

One of the important considerations in the case of labor-management relations is the fact of labor solidarity, or group consciousness, which preexisted the labor reforms of the 1930s (see Daugherty and Parrish 1952). This factor contributed not only to labor violence in the earlier period (see Adamic 1960), but also to the political influence reflected in the labor legislation of the 1930s (Richberg 1954, pp. 125–33). When equalizing legislation is passed, it will not necessarily serve an interest unless the interest group is organized to press its claim. (See Scheingold 1974, pp. 131–48; Sorauf 1976; Handler 1978.) Nor do interest-group politics inevitably guarantee the continued effectiveness of group action in a bargaining or litigation context.

It may be the case that litigation distinctively tends to undercut an interest group by placing the initiative in the hands of lawyers who perceive their task as winning the case. A dramatic instance of the erosion of an interest group during litigation is found in the history of the Contract Buyers League (Fitzgerald 1974). A set of individuals with similar interests may not coalesce because of the weakness of the interest vis-à-vis other concerns, its sporadic nature, or the absence of communication among them. Lawyers are

less likely to be available to the isolated individual, the one-shot player, than to the repeat player—especially, of course, if there are differences in the capacity to pay (Galanter 1974). Such barriers to group pursuit of an interest may be diminished by the creation of group interaction, as in labor-management bargaining.

Courts are not the only, or necessarily the most favorable, setting for bringing groups representing opposing interests into interactions that can resolve conflict, channel or rechannel behavior, and facilitate the generation of norms. As an alternative type of setting, labor-management negotiation may be a model from which much can be learned.

2. *Law can foster limited agreements between parties whose basic relationship has disintegrated.* The instance of marital breakdown is the classic case. A careful analysis of time-series data indicates that laws prohibiting or permitting divorce have very little relation to the maintenance of family ties (Rheinstein 1972, pp. 277–307; cf. Glendon 1977). The results point clearly to the dominance of societal norms as a product and reflection of the social forces that have undermined lifelong monogamy.

However, law does have the capacity to contribute to private ordering, even as the marriage dissolves. This process has been described in recent work on child custody. (Mnookin 1975; Mnookin and Kornhauser 1979). The relationships arranged in situations of marital breakdown may be affected by the legal rules and by the expectations of the parties as to what will happen when the rules are applied. The parties are "bargaining in the shadow of the law," using as chips a knowledge of what they may expect if they go to court (Mnookin and Kornhauser 1979). One possible pattern, the norm-centered model, is of particular interest, since the bargaining is governed directly by the legal-norm structure (see Eisenberg 1976).

Thus, if a husband believes he can obtain a binding agreement for visitation rights, he may be prepared to give primary custody to the wife. If such an agreement were subject to invalidation by the court, as proposed (Goldstein, Freud, and Solnit 1979), the husband's willingness to accord the wife primary custody might be diminished (Mnookin and Kornhauser 1979, pp. 968–69). Despite the resounding rejection of this position by the proposers (Goldstein et al. 1979, pp. 185–86), the issue remains an open question, which could benefit from empirical research when jurisdictions adopt the invalidation proposal.

Although Mnookin's work is not directed toward reinforcing the marriage bond, it illustrates ways in which law can affect the process of norm formation. As the parties bargain to settle their postmarital relationships, the legal process may affect the nature of the outcome. In an earlier era, divorce requiring a showing of fault contributed to the open bitterness between the parties. Current research suggests that no-fault divorce has lessened the display of hostility, although the issue is still in doubt as to the destructive effects—as opposed to the cathartic ones—of such open hostility on the range of participants. A careful study in California points to the conclusion that no-fault divorce diminishes overt hostility as well (Weitzman and Dixon 1980).

With the relaxation of fault as a condition for divorce, there is evidence of a growing tendency to treat marital breakdown as an occasion for negotiation to optimize the goals of each partner. Mnookin's analysis suggests that the courts may facilitate the private ordering of relations (1975; Mnookin and Kornhauser 1979). The original position emphasizes the importance of the courts' protecting the stable relationships that emerge, especially as these might affect the child, whose interests may not be adequately repre-

sented in the bargain struck between husband and wife (Goldstein, Freud, and Solnit 1979).

The decision as to when and how state intervention is needed depends very much on an analysis of the interactions between the parties, given the nature of their relationship and the objectives they and the society seek to optimize (Fuller 1971). The nature of those interactions as they actually occur must be fully studied to provide a basis on which policies encouraging intervention, abstention, or bargaining can be wisely shaped.

In this example, it should again be noted that the interaction process can generate norms. As divorcing couples struggle with the problem of custody, variations will occur in the conduct of negotiations and in the substantive outcomes. To what extent will these variations contribute to a set of norms as to how these matters should be handled? Will these ideas form into a variety of norms, associated with subgroups in the society, or will a pervasive norm develop? How is this normation process affected by, and responsive to, the economic, demographic, occupational, religious, social, and ideological forces in the society? In what ways can law affect the norm-formation process? What balance can it strike between the facilitation of interaction and the exercise of social control? Does law succeed in accomplishing the jobs of resolving the dispute and channeling or rechanneling the behavior? All these questions and more call for the kind of investigation that can best be carried out by empirical research informed by an understanding of the potential interrelations between law and the normative order.

3. *Law can contribute to norm formation by creating new social entities.* In the above examples, law contributes in various ways to the conduct of interactions; it utilizes entities which, with its earlier support, already exist: a company, a union, a marriage. Law has helped to create these entities through the processes of institutional recognition and support described by J. R. Commons (1924). In addition, the legal process can, for its own purposes, create groups that would not otherwise exist. This situation occurs most clearly when a new law is passed or a new rule is promulgated, setting up a different kind of entity, such as an administrative agency, a port authority, or a regional school district.

A recent example of a law-created entity is the Institutional Review Board (IRB), a group brought into being under rules for the protection of human subjects.[29] The reaction of the academic community—largely one of objection to restraints imposed on the planning and execution of research—expressed a norm on which the researchers substantially agree: autonomy in the planning and execution of research (Katz 1977; Reynolds 1979). Some invoked a broader set of principles, arguing, for example, that the new procedure violated rights protected by the First Amendment (Pool 1980). In the discussion, less attention was paid to the norm-formation potential these regulations created. The IRB typically brought together scholars from a variety of disciplines to deliberate on a case-by-case basis concerning the risk posed to human subjects if a particular research proposal were carried out as planned. These discussions often led to the revision of proposals as a condition for approval; in fact, 30 to 45 percent of all proposals were modified by the IRB (Reynolds 1979, p. 267). Among the most important elements entering these discussions were the magnitude of the risk, the compensating benefit, and

[29] See provisions for the Protection of Human Research Subjects in the National Research Act of 1974 (42 U.S.C. 2891). Recent regulations were published in the *Federal Register*, July 27, 1981.

the informed consent of those subject to the risk or those presumed able to consent on their own behalf (Katz 1977, p. 241).

Considerations of this kind derived in part from the statute and in part from the rules promulgated by HEW (now HHS) under the statute. But the application of the rules to particular cases brought about an elaboration of the meaning of the rules similar, in a way, to the process of common-law evolution. Not surprisingly, some variations developed in procedure and substance at different research institutions (Reynolds 1979, p. 261). In the process, norms were produced in each institution as a product of the interactions required by the government. To what extent these emergent norms systematically reflect the local attitudes, activities, personnel, and values is a matter to be investigated. It would be interesting to discover whether local norms differ from one institutional setting to another or whether substantial uniformity is preserved. If there are differences at the local level, on what matters are the differences greatest? How do these differences relate to the preexistent culture and structure of the institution, and to what extent do they penetrate that culture? Does the vesting of this decision-making role in the hands of scholar-teachers—rather than academic administrators or government administrators—facilitate the emergence of standards felt to be more acceptable than they might otherwise be? Has this norm-forming process contributed to the emergence of more general norms among academics regarding the proper measures for protection of human subjects? Has it led to the explicit definition of situations where no such "protection" should even merit consideration if, for example, risk is considered negligible? How do these emergent norms enter into the process by which the Congress, a special commission, and HHS redefine the statute and rules to take into account the emergent ideas of propriety as they emerge from the experience of the IRBs and those affected by it? Are there parallel processes, by which norms reflecting the interests of human research subjects are developed by the subjects themselves or their representatives? Or does the principal source of the opposing interest derive more from the legislators, the press, public opinion, and the courts responding to post-hoc claims of damage?

In the contrast between post-hoc handling of trouble cases—in any of these fora—and preventive measures is found a major difference. Those totally opposed to the IRB often condemn it by invoking the legal principle of opposition to prior constraint (Pool 1980). Those distressed by the danger to human subjects, as revealed in some dramatic examples, protest the absence of effectively enforceable rules. Such opposition might lead to a decision to reject entirely the IRB approach or, alternatively, to compromise the differences. The latter outcome seems reflected in the HHS final rules (Protection of Human Research Subjects, 45 C.F.R. 46, 1981). At all events, for those interested in the process by which law can create new interactions capable of generating norms, the IRB stands as an important example to be researched.

Many other examples of this kind cover a range of phenomena that, when enumerated, sound in other respects utterly incommensurable. I would include on the list of norm-generating entities, created or reinforced by law, such diverse units as draft boards, state endowments for the humanities, the National Conference on Uniform State Laws, professional examination boards, petit juries. An inventory is needed to replace this illustrative list. Research must investigate how such entities generate norms, how these norms interact with the norms of abutting or competing groups, and how the agreements or conflicts between them affect the tasks of dispute resolution. Also, how to channel that research to the institutions of law-government, and how the output from those

institutions (such as the law) affects the behavior, attitudes, structure, and process of the norm-generating or private ordering entities (legally created or not) that exist in society.

4. *Law can aggregate the decisions of multiple groups to discern an emergent normative pattern.* In holding capital punishment to be constitutional, the Supreme Court approved a procedure that goes beyond earlier requirements in several ways (*Gregg* v. *Georgia,* 1976). The procedure combines legislative, jury, and judicial roles in a manner to evoke normative citizen judgments to register pervasive patterns if they exist, and to absorb these patterns into law.[30]

In the leading capital-punishment cases (*Furman* v. *Georgia,* 1972, and *Gregg,* 1976), the Supreme Court recognized the significance of public opinion in several ways. The Court agreed that the meaning of "cruel and unusual punishment" is not fixed by its history. Otherwise, that clause would prohibit nothing more than the archaic punishments of the past against which it was originally directed—the rack, the screw, the iron boot, and other penalties designed to inflict intense physical pain. Chief Justice Warren Burger, even though in dissent, expressed the judicial consensus on this point as follows:

> The Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of the society change. [*Furman,* 1972, p. 382]

The justices differed, however, in the method for determining whether the "basic mores of the society" were opposed to capital punishment. Those upholding capital punishment relied on the legislatures to provide the best test of community sentiment. The Court, said the Chief Justice, should overrule legislatures in this area only if there is "unambiguous and compelling evidence of legislative default" (*Furman,* 1972, p. 384)—that is, presumably, a failure of legislatures to register the basic mores.

Between *Furman* and *Gregg,* thirty-five legislatures passed new capital-punishment statutes, providing the majority in *Gregg* with evidence to support their belief that the basic mores were not opposed to the death penalty. Justice Potter Stewart, willing to consider nonlegislative indicators of popular sentiment, found nothing in national public-opinion polls or state referenda (in Massachusetts, Illinois, and California) to counter the inference of public support arising from the new statutes. On this basis, he declared, "American society continues to regard capital punishment as an appropriate and necessary criminal sanction" (*Gregg,* 1976, p. 179). If, in the face of such sentiment, the Court was to declare the death penalty constitutionally impermissible, it would shut off "the ability of the people to express their preference through the normal democratic processes"(*Gregg,* 1976, p. 176).

Justices William Brennan and Thurgood Marshall argued for different criteria. Brennan would have held capital punishment contrary to "the evolving standards of decency that mark the progress of a maturing society," a test for the interpretation of the Eighth

[30] For a detailed discussion of the capital punishment cases and their potential for norm formation, see Schwartz (1979).

Amendment enunciated by Chief Justice Earl Warren in *Trop* v. *Dulles* (1958). Capital punishment, Brennan declared, denied one of the most fundamental of those standards of decency—human dignity for all. In his words, "even the vilest criminal remains a human being possessed of common human dignity" (*Furman*, 1972, p. 273). According to Brennan, the Court should give voice to these evolving standards of decency, contributing to the process by which they evolve.

While joining Justice Brennan, Justice Marshall, in a separate concurrence, proposed a different basis for interpreting public sentiment. He would rely on the opinion not of a cross section of the population, but on what the public would think if it was fully informed about the nature and consequences of the death penalty (*Furman*, 1972, pp. 361–62 and n. 145). In *Gregg*, Marshall was able to cite experimental findings by social scientists (Sarat and Vidmar 1976) suggesting that a majority would oppose capital punishment if informed of its ineffectiveness (relative to life imprisonment) in deterring crime (*Gregg*, 1976, p. 232).

In upholding the Georgia statute in *Gregg*, the Court provided several interesting ways in which public sentiment could be expressed regarding the death penalty. It left to the legislatures the power to determine, within limits, whether to authorize capital punishment. It retained, as under the Constitution it must, a role for the jury in determining guilt. Under the Georgia statute, the role of the jury was enhanced in the requirement that it must specifically determine whether aggravating circumstances existed, that it must recommend the death penalty, and that it could do so only if it found aggravating circumstances.

In this use of the jury, the legal process relies on a sample of the population—supposedly, and increasingly, cross-sectional—to express community sentiment on appropriate punishment. In the traditional use of the jury, this function was concatenated and confused with the factual determination of guilt. In developing a bifurcated procedure, where the judgment of guilt is separated from the determination of sentence, the law has helped to disentangle the questions of guilt and punishment. In introducing the concept of aggravating circumstances, the Georgia statute provided a legislative framework within which individual juries can appraise severity, taking into consideration the particular crime and defendant.

The importance of relating severity of the offense to the magnitude of punishment has, of course, long been recognized in criminal statutes. In murder cases, it has typically been handled by allowing the jury to decide on the degree of murder or lesser includable offenses. But this procedure did not permit the jury explicitly to express its sentiments regarding the details of the offense and the characteristics of the offender, as the jury is specifically asked to do under the Georgia statute. In a procedure that requests explicit findings regarding aggravating circumstances, the jury is asked to consider characteristics of the offense and the offender that lead it to recommend the punishment of death.

If these jury findings and recommendations lead to a death sentence, the case, under *Gregg*, must be reviewed by the Georgia Supreme Court. This review is required to determine whether or not the sentence resulted from passion or prejudice and whether or not the evidence supported the specific finding of aggravating circumstances. In addition, the Court is called upon to decide whether or not, in the particular case, the death sentence is "excessive or disproportionate to the penalty imposed in similar cases." This last provision, properly administered, carries the potential of recording the existence of mores, if they exist, or promoting their formation. Operating under this procedure, the

Georgia Court (*Coley*, 1974) and the United States Supreme Court (*Coker*, 1977) found the death penalty for rape too infrequently applied in similar circumstances to meet the test of comparability. From one point of view, these rulings suggest the existence of widespread opinion that rape does not warrant capital punishment. Nevertheless, such a sentiment was not reflected in the penal statutes of Georgia. It is more likely that such a sentiment was inchoate, latent, and beneath the level of general consciousness. It was evoked by a legal procedure which, putting the question in specific form to specific panels of jurors, repeatedly elicited a recommendation against the death penalty in rape cases. The aggregate review, mandated by the statute, calls upon the Court, in effect, to declare the mores. Such a procedure may not only make explicit what has been inchoate; it might also stimulate the evolution of mores by providing a realistic means by which they can emerge.

CONCLUSIONS

The observations of this essay, while presenting a point of view, do not provide a comprehensive conceptual or theoretical formulation. At most, the essay is intended to bring into focus the tasks that emerge from the present perspective.

It states that norms affect law to some extent in varying ways and that law can affect norms not so much by imposing them, as by recognizing their existence and by setting up circumstances to generate them.

A comprehensive formulation developed from this perspective must fulfill several requirements. First, it must specify the processes by which norms affect law. Second, it must specify the processes by which law affects norms. Third, it must locate the circumstances under which each of these effects occur. Finally, it must approach the dynamics by which each process affects the other.

In pursuing these ends, a broad qualitative strategy will probably be valuable. Insitutional studies of norm-law interaction over time are likely to be particularly helpful. Some examples of these are already available. For example, a study of workers' compensation law traces the way in which changing legal doctrine of employer liability reflected the cross pressures of employer and employee interests (Friedman and Ladinsky 1967). As doctrinal complexity (such as respondeat superior, fellow-servant rule, and nondelegable functions) multiplied, results became less predictable and less satisfactory to employers as well as employees. The move toward workers' compensation appears to have reflected a combination of economic interest and normative change. When that occurred, however, a new process developed that set a frame within which new norms arose (for a detailed study of the process in California, see Nonet 1969). In that context, it was possible to address several relevant questions concerning the nature of the new norms; how they were affected by group interaction in the new setting; and how they entered social, political, economic, and legal processes.

Institutional historical studies of this kind are important for understanding interactions between laws and norms. They afford an opportunity to search for dynamic processes. In addition, they offer insight into the variations in such interactions in different institutional settings. Institutions may vary widely in their vulnerability to legal impact and in their capacity to affect the law. Labor-management relations seem to have been radically altered by the legal changes of the 1930s, for example, while family changes seem to respond primarily to extra-legal forces. There is a need to establish the nature of such institutional differences and to explore the determinants behind them.

While institutional studies of this kind are crucial, they should be accompanied by research aimed at individual dynamics and societal processes. These interactions are undoubtedly affected by general ideas of morality and legality. Work concerning individual moral development (Piaget 1932; Tapp and Levine 1977) and equity judgments (Adams 1970; Walster et al. 1976) provide valuable knowledge concerning the dispositions carried into institutional settings by their participants. Social psychologists' interaction studies further illuminate the processes of norm formation as affected by group pressures (Asch 1958; Mintz 1958; Sherif 1961) and the resolution of conflicting interests (Kelley and Thibaut 1978). Such processes may have a significant effect—at least indirectly—in determining experience with the law and a propensity to rely on, or to reject, law as legitimate authority or as a functional device for securing the general good.

Work by economists and political scientists at the societal level adds another dimension of importance to the interaction of law and norms. Policy choices reached by voting and by the aggregation of individual preferences transformed on the assumption of transitivity reach contradictory conclusions as a general matter (Arrow 1977). Studies of the Prisoners' Dilemma regularly reach the conclusion that, in most circumstances, collective interests cannot be optimized. Neither of these analyses assumes the existence of motives other than self-interest. In the Prisoners' Dilemma, a solution of value to both parties can, however, be secured if the prisoners have a continuing relationship of trust (Axelrod and Hamilton 1981). Arrow also suggests that the contradictory results of his analysis could be altered in the presence of a compelling normative tradition.

In the end, we are left with a large question. To what extent can the legal system, supported by societal norms, constitute the open society's way of achieving group goals, the equivalent of a traditional belief system and the alternative to totalitarianism for modern societies? That may be the very question on which the future of U.S. society depends. If so, there is every reason to explore it in greater depth, to learn how law-norm interaction works when it does, and to explain how—the society willing—it could be made to work better.

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3

LAW AND THE ECONOMIC ORDER

Edmund W. Kitch
University of Virginia

INTRODUCTION

The subject of law and the economic order can be divided into two questions. First, what is the impact of law upon economic activity? And second, what is the impact of the economy upon the law? The answers to these questions are interrelated, for the ways in which the law affects economic activity will in turn affect the ways in which economic activity creates needs for legal arrangements of one type or another. Indeed, the separation of society into two separate parts—a legal part and an economic part—can be viewed as only a crude metaphor (Cain and Hunt 1979, p. 49). It is convenient for discussion and compatible with the disciplinary divisions of the social sciences, but like any metaphor, it can both illuminate and confuse.

These two questions have been studied separately. The question of the impact of laws upon the economy has been the domain of the applied political economists, from the seminal work of Adam Smith to a contemporary derivative: law and economics. This tradition has tended to see law as a barrier to the operation of the economy, disturbing the operation of the efficient "invisible hand" of the market through harmful regulations (for example, Schultz 1980, p. 649).

The question of the impact of the economy upon law has been the domain of the

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sociological-historical tradition inspired by the work of Karl Marx. This tradition has asserted the dominant role of the needs of production in shaping the legal system (Sumner 1979, pp. 246–53; Cain and Hunt 1979, pp. 48–51), a position derived from materialistic determinism.

These two traditions have had little to do with each other. The argument of this essay is that fruitful work will ensue if the political economists take seriously the question implicitly posed by the sociohistorians—does the economy shape the legal system, and if so, how?—and if the sociohistorians apply the methodologies of the political economists—particularly modern analytic price theory—to the interrelationships that have traditionally concerned them. This argument is principally supported by the example of recent works that have—although diverse in origin, style, and conclusion—raised provocative issues about the dynamic of legal development. A central question posed by these works—do formal legal systems embody that set of arrangements which optimizes the productive potential of the social group in which they arise, or, as often put, is law efficient?—provides a unifying theme for the diverse topics surveyed here.[1]

A major theme of the sociohistorical tradition is the importance of ideology and class interest in explaining the structure of legal systems (Sumner 1979, pp. 253–77).[2] Although ideology and class are in the longer run seen as themselves the product of economic forces, in the short run they operate to entrench the position of the dominant class. The rise of a contractarian legal system and its supportive ideology in the nineteenth century—a development greeted with considerable distaste within this tradition[3]—is explained by the needs of the capitalist mode of production and is viewed as a transitory phenomenon. Contractarian ideology is now being displaced by egalitarianism as the capitalist mode of production fades. Thus, a contemporary writer seeking to explain a perceived decline in contractarian legal principles observes that contractarian notions of free choice

> bring with them, inescapably, many other consequences which are today less admired, especially in England. They bring, in particular, the recognition that some individuals are better equipped to exercise free choice than others. . . . And the greater is the scope for the exercise of free choice, the stronger is the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing inequalities. [Atiyah 1979, p. 6]

[1] The term "efficiency" is used in this essay as a synonym for that set or sets of arrangements which maximize the productive potential of the social group. Efficiency is not used in a technical, Pareto sense for two reasons: first, to avoid any implication that such a legal system represents a unique equilibrium; and second, to avoid the tautology that since efficiency simply reflects the utilities of the participants in the system, any legal system that arises is likely to be efficient because the participants accept it.

[2] Thus, a leading contemporary example of work in this tradition explains changes in American law during the first half of the nineteenth century as the result of changing conceptions of law. "By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. While the words were often the same, the structure of thought had dramatically changed and with it the theory of law. Law was no longer conceived of as an external set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change" (Horwitz 1977, p. 30).

[3] As displayed vividly in a work like that of Polanyi (1944) which, written from the perspective of the cataclysmic impact of World War II on Central Europe, argued that nineteenth-century free-market reforms represented a tragic departure from historic and fundamental human arrangements.

The applied political economists have come at the matter from an entirely different direction. It has always seemed obvious to them that the economic needs of mankind were unsatisfied, and that if it were possible to change human institutions to increase the supply of economic goods, then—at least upon careful reflection without regard to narrow and parochial interests—all would join in seeking their reform. To these writers all too much of the law has appeared as a barrier to economic production (for example, Schultz 1980, p. 649). In part because of the strongly reformist spirit of their writings, they have put heavy emphasis on those features of the law that stand in the way of freedom of trade, most notably tariffs. This tradition attacked the mercantilist regulation of eighteenth-century England, inspired important English legal reforms in the nineteenth century, and in the twentieth has been troubled by the advance of contemporary economic and welfare regulation. In recent years these writers have attempted to deploy their principal methodological instrument—self-interest analysis—to account for this perversity in the law (see, for example, Peltzman 1976; Downs 1957).

Given that throughout human history they have been the dominant preoccupation of most people, it would be odd to find that social systems were not responsive to the needs for food and shelter. In modern economics property and contract are seen as having a central role in the operation of efficient markets. But it does not necessarily follow that the productive legal system in all times and all places assigns a central role to property and contract as we know them today. Modern property and contract institutions require a high level of human capital in the form of literacy and organizational and productive know-how that has not been available to all societies. Primitive people can engage in exchange transactions, but a productive contractarian regime requires long-term contract relations of the most subtle and complex sort.

The outcome of extended inquiry along the lines suggested here might be the knowledge necessary to develop a more sophisticated and satisfying theory of the dynamic of legal systems than presently exists. Explanations of differences in legal systems in terms of ideology or power leave unanswered the question of why the particular ideology or form of power. It would be much more satisfactory to link the structure of particular legal systems to exogenous factors such as the conditions of production in the society.[4]

This essay reviews literature relevant to these issues. The universe of potentially relevant literature is vast—much of social science. The discussion will inevitably reflect my perspective. I am trained as a lawyer and industrial-organization economist and have worked within the law-and-economics tradition since 1965. The inquiry is beset with difficulties—the lack of sufficient competence located in a single discipline, the inability to measure the theoretically relevant parameters, the ambiguities of the issues, and the subtlety of the institutions. My principal strategy is to entice by example, to demonstrate that the questions are important and interesting, and to show that the literature gives promise of further advances in understanding.

This essay is divided into three major sections. First is a discussion from a general-equilibrium perspective of what a legal system shaped by the needs of production might look like. It is followed by a summary of the principal findings of the modern American

[4]The case for such an approach has been elegantly made (Stigler and Becker 1977). For example, it would be much more satisfactory to link the shifts in the conception of law described by Morton J. Horwitz and discussed above in note 2 to the conditions in the states after the separation of American law from its English origins. The frontier economic conditions of the states may have made maintenance of other than part-time legislatures and an informal and instrumental jurisprudence too costly.

literature in law and economics and consideration of its findings on property, contract, tort, antitrust, and economic regulation in relation to the hypothesis that a legal system is shaped by the needs of economic production. The essay closes with a discussion of the implications of a productivity perspective for the role and structure of government.

GENERAL EQUILIBRIUM: CONCEPTS AND PROBLEMS

Identifying a Legal System Shaped by the Needs of Production

Transaction Costs In "The Problem of Social Cost" (1960), Ronald Coase introduced a helpful analytic device: examining the effects of law in a world where transaction costs are zero. Transaction costs include all those costs that must be incurred in order to efficiently arrange property and contract affairs among individuals—the costs of acquiring information about the facts, the likelihood of future events, and the tasks and talents of others; the costs of devising suitable and reliable arrangements; the costs of enforcing or responding to breaches of those arrangements when they occur; and so on. The assumption that such costs are zero is both powerful and unrealistic. If true, it would both eliminate the need for a legal system and render irrelevant any existing legal system. All actors in a society of zero transaction costs will have the incentive to agree on arrangements that maximize their joint welfare and will be able to do so costlessly. Any existing legal system becomes irrelevant because in a system that has rules reducing the total welfare, the members will simply make costless, offsetting arrangements that improve welfare. Problems generated in the real world by strategic bargaining maneuvers and enforcement costs are eliminated by the assumption of zero transaction costs.

The insight is suggestive for analysis of the role of law in a society; a legal system will promote production to the extent that it optimizes transaction costs.[5] It is easy to understand some legal rules in this framework. For instance, rules that permit parties to make binding contracts between themselves lower the costs of certain kinds of cooperation. If production is a dominant purpose of legal systems, we would expect them to have a strong tendency to permit contracts to be made and carried out, even in a centrally planned economy. The insight is less tractable when applied to a legal system as a whole because it does not predict the specific rules of any legal system. From such a perspective, the legal system does not simply facilitate agreements—it is the agreement. Just as the theory does not predict the content of contracts between merchants, it does not predict the content of an "optimum-transaction-cost" legal system.

The problem is further complicated if the element of time is introduced. One way to cut the cost of transacting is to make bargains that last over a longer period of time, allowing the costs of transacting to be amortized over more units of activity. If the society operates under constant conditions, the legal system that facilitates production at time one will do so at time two as well. However, if the system experiences such exogenous shocks as changes in technology, climate, or population, productive arrangements at time one will not necessarily be productive at time two. This difficulty could be alleviated

[5] Which is different from just reducing transaction costs. In many important situations, the law exploits transaction costs to further productivity. For instance, secrecy exists because of transaction costs and enables firms to gain from investments in information (Kitch 1981a). To use an analogy between friction and transaction costs, an engineer designs machinery employing means to reduce friction (lubrication) and exploiting friction to achieve his ends (braking).

by making the arrangements at time one less costly to change. If change affects wealth distribution, provisions that lower the cost of change will increase resources dedicated to attempts to change the system, shorten the average life of the agreements, and thus raise the costs of transacting for the society per unit of activity. If the costs of making changes in the agreement are raised, the agreement in operation at time two may appear to impede production. However, if its effects through all time periods are taken into account, its effects on production are positive.

The process of change is further complicated by the consideration that the existence of a set of laws at time one will generate responses in the society adaptive to those laws. Those responses will represent investments and will be costly to change. Thus, at time two, with changed circumstances, the optimum legal arrangements will in part be determined by the existing customs and practices generated by the legal system in time one. For instance, if a society accords the vote only to citizens who own property, it will create an incentive for property owners to invest in acquiring the information necessary to make use of the right to vote, and those who anticipate special gains from voting will expend resources to acquire the necessary property. If it is then proposed to void the property qualification for voting, an obvious problem arises from the circumstance that the previously disenfranchised voters have had no incentive to invest in learning how to use the right. Put another way, the path that a society follows to reach a particular position will have a significant impact on what facilitates production in that time period. Two societies otherwise facing the same present conditions may have very different sets of rules, both efficient. The history of any set of legal rules can be expected to have an important role in both determining and explaining their present state.

Private Arrangements The extent to which private arrangements can offset the impediments to production of legal rules is relevant to the need of the legal system to adapt to changed circumstances. In the theoretical world of no transaction costs, private arrangements are very powerful. No theory exists to predict the relative importance of these forces in the real world. An understanding of the private responses to a rule of law is essential in order to be able to analyze its effects on the society. For instance, it is important in order to understand the effects of such laws as rent control, workmen's compensation, or mandatory minimum-warranty standards that the affected parties—already in a close and continuing bargaining relationship—will readjust their relationship in light of the law. It is plausible that the ability of private arrangements to offset the effects of legal rules increases as the relevant time period increases—that effective transaction costs tend to fall as the time during which a rule is in effect increases. As time passes, the members of a society will learn from experience about the rule's effects. Assuming the absence of exogenous shocks during the period, and assuming that such learning is cumulative and retained and will include learning about the identity of the affected persons and their tastes and abilities, it should be progressively less expensive to make the private arrangements necessary to eliminate the inefficiency. A legal rule can be consistent with the needs of production simply because offsetting private arrangements have made it so.

To take a simple example, the long and well-established rule of contracts that makes unenforceable liquidated damages (damages computed under clauses specifying the damages recoverable in the event of breach) not reasonably related to the actual damages incurred appears to constrain economically productive arrangements (Goetz and Scott

1977; Kronman and Posner 1979, pp. 194–207). If the two contracting parties believed that their welfare would be enhanced by such a clause, there seems no reason to think that they are not correct. There are quite plausible situations in which a contracting party would want to make himself subject to high liquidated damages. For instance, if firms wish to enter an industry where a reputation for reliability is an important asset and entrants have no such reputation, then entrants might compete by offering to be liable for high and easily computed damages if they do not live up to reliability standards—their willingness to do so serving as a substitute for their competitors' reputation. The rule would seem to be an anomaly if law promotes efficiency. Yet if other available devices can serve the purpose equally well, the rule will have no adverse effects on production, and there will be no pressure to change it. Thus, if the entrant can compete by offering lower prices to purchase the needed reputation, funding the purchase through the capital markets, and if this alternative offers entrants an equally effective way to establish themselves, the rule constraining a liquidated-damages clause will not lead to inefficiency in this hypothetical situation. (It may, however, affect the position of particular parties relative to others if there are different comparative advantages in using one strategy as opposed to another.)

It is not known how strong these private forces are, how quickly and at what cost they can overcome impediments to production imposed by law, or how costly it is for a legal system to effectively suppress them—although some systems clearly try from time to time. There is much to suggest that the private forces are very strong, particularly when the legal environment supports the notion of individual freedom of action.

In fact, private arrangements can operate so completely that it becomes difficult to separate the legal system from private custom, as illustrated in the classic example of fine and recovery, where a legal system that constrained the sale of land was converted by the tacit cooperation of conveyancers, advocates, and judges to a system whereby land could be bought and sold through a fraudulent procedure that coopted the officials of the legal system (Plucknett 1956). A contemporary example is furnished by the ownership of radio frequencies under the Federal Communications Act, which provides that station frequencies shall be assigned for three-year periods, to be reallocated at the end of the period "in the public interest" (47 U.S.C. §307). A system that assigns the right to use a frequency for a limited period, subject to an open, public-interest reassignment, impairs the incentive of the holder of the frequency to maximize its long-run value by making investments whose payout period exceeds the three-year period. In fact, however, the broadcast industry and the Federal Communications Commission treat the station licenses as vested property rights; licenses are almost always renewed and they are freely bought and sold. The sophistries and evasions required to square this result with the statute make for interesting logic and occasionally confuse the courts, but the fact is that the result approximates more what efficiency requires than what the legislature contemplated.

In defiance of federal law, settlers in western Wisconsin established a self-enforced system of claims on federal land closed to homesteading (Hurst 1956, pp. 3–6). The story of the legal system generated by the California gold rush to make possible the efficient mining of gold—a system of law built by trespassers on federal land with no standing de jure—is equally dramatic and perhaps better known (McCurdy 1976). It has been suggested that in the more highly regulated and centralized modern environment, the failure of the massive worker-to-retiree transfer in Social Security funding to have a measurable

effect on the rate of saving in society may be due to offsetting transfers within families (Barro 1978).[6]

The "Invisible Hand" and Efficient Legal Rules

When they attempt to identify efficient behavior in the marketplace, economists are guided by theory. If the market is competitive and no important externalities are present, behavior of market participants that is persistent over time can be considered efficient; the self-interest of the independent competitive actors generates an "invisible hand" to produce efficient behavior. No such automatic inferences can be made about the institutions that produce law; their differences from the model of the competitive market are too great. Yet it is not implausible that the importance of wealth to every individual in society generates strong and persistent forces toward legal systems that maximize production. It is illuminating to speculate on how those forces might or do operate.

Assuming that such forces are at work in an important way, it nevertheless seems reasonable to assume that there would be substantial time lags in the process by which legal systems tend toward production-enhancing arrangements. It is known in macroeconomics that substantial departures from equilibrium of significant duration can occur. An increase in the supply of money would have no effect in a world of constant equilibrium; if the government doubles the money supply, prices—stated in units of the currency—should also double. This is not, in fact, what happens. Individuals continue to act as if the value of money had not changed while their personal wealth had doubled. They increase their spending, and the economy is stimulated. Only later do they discover that they have been fooled and begin to make adjustments. The system oscillates around an equilibrium, with undershoots and overshoots. Free of shocks, it will tend to settle along a stable trend; but it may take many years for a shock to be fully evened out (Mayer 1968; Hamburger 1974).

The process by which a legal system reaches equilibrium is surely much more complex. It is not at all inconceivable that the periods of the adjustment process frequently exceed the periods between significant exogenous shocks and that legal systems are seldom in equilibrium. This circumstance does not destroy the utility of such a theory as a way of thinking about what is going on in a legal system, but it makes more ambiguous the interpretation of data about a legal system at a particular point in time.

Economists have not inquired into these processes as they have examined the phenomenon of growth. The area of growth could be viewed as one that should be a central preoccupation of the discipline of economics. But the subject of how a society increases its wealth has not yielded easily to inquiry, and work in the field seldom rises above the descriptive except to attain the metaphorical (Rostow 1960). Large elements of the differences in growth rates among different societies are rather easily explained: those who apply a larger stock of capital and effort grow more rapidly—an insight not much more profound than the exhortation to be rich or work harder. While multiple-regression studies of gross national product changes show that such factors account for a large part of the differences in growth rates (Kuznets 1971; Denison 1967), the residual presents an

[6]The opposite effect was reported by Martin Feldstein (1974), whose computer program was found to be in error (Leimer and Lesnoy 1980). Feldstein (1980) has reasserted the correctness of his conclusion but not of his program.

unexplained phenomenon. The most popular explanation points to differences in technology, although that explanation leads immediately to the question of the cause of the differences in technology. One hypothesis that seems worth investigating holds differences in legal systems responsible for differences in growth rates. Legal differences may not have figured importantly in economists' research because the legal systems of the countries that have been the principal objects of investigation have not had differences that are significant for these purposes. To examine a group of advanced countries such as the Organization for Economic Cooperation and Development group may be simply to look at a set of countries with similar and economically successful legal systems.

Much informal theory attributes a significant role to legal systems as determinants of growth rates. The slower rates of socialist countries are often explained by their form of legal organization, which greatly attenuates the scope of personal property rights and freedom of contract. The suggestion that underdeveloped countries need strong governments in order to grow is based on the notion that such governments can promulgate stable legal systems that will encourage the growth of a society. The political settlement of 1688 in England laid the foundation for the economic dynamism of the eighteenth and nineteenth centuries (Atiyah 1979). The common-sense notion claims that in order for a society to turn its energies to growth, it is important to resolve the question of who holds what rights. On the other hand, a strong government runs the risk that the promulgated rules will be inappropriate to the situation. To the extent that a government's powers increase, the nonproductive use of resources dedicated to influencing the uses to which those powers are put within the society can also be expected to increase.

It has been argued that the relationship between the degree of stability of a legal system and growth is inverse (Olson 1977). Countries such as the United Kingdom and the United States, which have long-established, stable governments and legal systems, now grow at slower rates than do countries that have experienced severe disruptions, such as West Germany, France, and Italy. It is clear that "too much" law can be bad if it suppresses the ability of people to rearrange their affairs in ways that benefit them. In the modern nation-states, it is regulation of various types that has tended to be labeled "too much law," and these highly sophisticated and intrusive legal regimes require a well-established legal structure. The observation may simply mean that these countries are presently out of equilibrium and that it is reasonable to expect that, in these respects, their legal systems will be reformed.

One plausible strategy for testing the hypothesis that the needs of production shape law is to examine the records relating to lawmakers' perceptions of their intention. If they appear to be unconcerned with production, that disclosure would furnish a basis for rejecting the hypothesis. In fact, materials in the Anglo-American legal culture do not show a dominant, explicit interest in production; legislators are concerned with electoral politics and judges with precedent, consistency, and fairness. But such a strategy is simplistic, because the productivity-enhancing legal system is not necessarily one in which lawmakers pay dominant attention to the current needs of production. In order for a legal system to have any impact on a society, it must have stability over time, so that its rules can become known and people can respond to them. A legal system that focuses explicitly on current production will have a rhetorical structure of short-run expediency, making it impossible for members of society to rely on those rules in planning their actions.

A rhetoric based on precedent and on consistency with that precedent may provide the

stability necessary for planning. Similarly, the most productivity-enhancing sources of law may be not explicit preoccupation with production but the implicit rules already present in society's customs, language, and moral codes. To the extent that legal rules can rely on these preexisting cultural phenomena, the problem of social adjustments to the legal rules is simplified and the cost of giving credence and force to the legal rule is reduced.

A central problem with the "invisible hand" hypothesis for a theory of legal development is that there is no mechanism by which the actors can receive information that will signal the path to efficient law. In the price-theory model, market actors whose costs are above the market or who erroneously price their products learn of their error from the market itself; their competitors flourish while they do not. But in the lawmaking process, the law is a monopoly system, and the assignment of property rights is about as imperfect as can be imagined. The judge or legislator receives no benefit equal to the social gain from good law.

Members of the bar tend to become exasperated with the "invisible hand" inquiry into the dynamics of legal reform. American legal professionals have been taught to think of themselves as social artisans, and their enthusiasm for the task obscures its difficulty. How can a legal planner identify a good law without the opportunity to experiment with different approaches? In a market, firms can experiment with various strategies, and successful firms will find their strategies copied by others. The optimum strategy is not discovered through the kind of abstract analysis and interest balancing that is the stock-in-trade of the American lawyer. Nor is it found by formal logical deduction from past practices. Given all the good will in the world, how is a judge or legislator to recognize the optimum path? And if there is no mechanism to guide the jurist, how does the evolution of the legal system amount to more than a set of random events?

Identifiable "Invisible Hand" Mechanisms

The Role of Honor In spite of the weakness of the responses in the legal system, compared to the highly visible and easily understood reactive processes at work in markets, there are important forces that push toward efficiency. The first of these is similar to the motivation for advances in basic research. The understanding obtained from successful basic research enriches all of mankind, yet the researcher has no property that enables him to capture the benefit. In both cases, in an apparent effort to compensate for the lack of monetary reward, societies confer honors upon the discoverer and the just lawgiver. The successful entrepreneur, who may bestow equally valuable benefits on society, is left with his wealth—which more nearly approximates the value of the benefits he has conferred; the great scientist or lawgiver is accorded a kind of cultural deification. The key figures in the planning and promotion of the American Revolution were well aware of the rewards that would attend a successful venture in lawmaking (Smith 1776, bk. 4, chap. 7, pt. 3). Certain features of lawmaking procedures allow these processes to operate. Even in systems that give high rhetorical service to the concept of citizen governance, law is usually made not through anonymous mass referenda but by identifiable individuals who can receive either public praise or public scorn for the results of their work.

Competing Jurisdictions Another force that creates incentives for good law is competition among jurisdictions (Tiebout 1956). The importance of this force depends

greatly on the geographic scope of a legal system. Accidents of geography and war will produce authorities controlling populations of various size and area, and over time the units of the most successful size will be copied. The need to preserve these competitive forces may explain why well-intentioned calls for world government receive so little favorable response. A federal constitutional system consciously tries to preserve autonomous lawmaking centers within a larger union—an effort that requires complex jurisdictional allocations over subject matter. Even within formally unitary systems, such as the American states, there is a tendency to create different levels of government with different areas of lawmaking competence. The optimum requires a balance between the gains from economies of scale in lawmaking and administration and the losses caused by the reduction in competition between lawmaking authorities and the greater difficulties for a unified system in adapting to nuances of local conditions.

Changes in transportation and communications technology have increased the amount of effective competition in lawmaking, as they have in many product markets. In the United States, even with its elaborate constitutional commitment to federalism (Kitch 1981b), there has been a trend to expansion of the powers of the national government for the last century. It is not clear whether this development represents a shift toward more monopolistic lawmaking or is simply a response to changed technology. For instance, in the 1970s the federal government asserted paramount authority in the areas of environmental regulation and worker safety. It is possible that this development simply reflects technological changes that have increased the geographic range of environmental and safety problems and the strength of international competition, so that the national level has become the desirable level for the exercise of these powers.

From the point of view of someone who disagrees with the outcomes produced by a competitive lawmaking process, the process itself is bad. Thus, advocates of a national minimum wage argued for their cause precisely on the ground that competition among the states would result in a minimum that was too low; proponents of a national incorporation law have argued that competition among the states has resulted in a Delaware incorporation statute that is too permissive (Cary 1974). But the necessary inquiry is more subtle and difficult. It is necessary to determine whether the gains and losses from a particular policy are borne by the authority that makes it or whether the costs of the policy are imposed on others. It is easy to see that a jurisdiction that allows highly noxious polluters to operate on its downwind side does not bear the consequences of its own policy, just as a corrupt sheriff who permits organized criminal gangs to establish bases in his territory to prepare for raids on adjacent jurisdictions is not confronted with the results of their depredations. But where the arrangements being regulated are consensual, it is hard to see how the competition is defective. A state that permits workers to accept contracts for unreasonably low wages faces all the consequences and benefits of that contract. Corporations organized under the laws of Delaware must induce investors to invest voluntarily—an activity in which Delaware corporations have had some small success (Winter 1977, 1978; Dodd and Leftwich 1980).

On a day-to-day basis, emigration and the movement of capital serve as competitive checks on law. Because it is more costly for people to change legal systems than to change toothpaste, the process of adaptation will operate more slowly. But it requires only shifts at the margins to release significant forces. Not everyone must move—only a few people have to change location. Just as I can eschew comparison shopping, secure in the knowledge that the propensity of others to comparison shop will provide some limit on

the price I will pay, so, too, can I accept a legal system, secure in the knowledge that the propensity of others to avoid the effects of socially harmful rules will provide some limit to the tyranny I may face.

The people and capital that will respond to differences in legal systems will be those with the lowest costs of doing so. Thus, within a society, the competition may cause emigration most readily among ethnic minorities with cultural ties elsewhere or among groups with foreign-language skills. Their responses generate information and pressures that benefit everyone in the society. To the extent that other factors increase the size of the group with a low marginal cost of emigrating or shifting investment, these pressures are increased. Thus, the opening of the New World to settlement, which increased the advantages of emigration, may explain, in part, the extensive reforms of Western European legal systems during the nineteenth century.

Governments that are losing in this form of competition can resort to restrictions on emigration and capital movements to blunt its effects, just as producers in a failing product market may turn to market price supports or import restrictions. These policies will have their own costs, and in the long run they may be completely ineffective. They can raise the cost of emigration and capital movement, but if at the same time they strengthen the reasons for flight, they will not stop the movement they are designed to affect. In a federal system the national government can limit the use of these strategies by lower-level lawmaking authorities. National citizenship combined with prohibitions on restrictions of the movement of goods, capital, and people will leave those authorities unable to escape this competition (but see Kitch 1981b). A federal system can also employ devices for the effective receivership and reorganization of lawmaking bodies that have failed.

Competing Private Arrangements If parties who are involved in a long-term, ongoing relationship find that the rules and procedures of the official courts and agencies are not responsive to their needs, they can create their own system of dispute resolution. The most obvious example is contractual provision for arbitration in commercial contracts. Choice-of-law clauses (clauses that state what jurisdiction's law is applicable to the contract) can serve a similar purpose, preventing the application of unfavored law. The ability of parties in many situations to leave the court system puts pressure on the courts to offer rules and procedures acceptable to those parties (Landes and Posner 1979, pp. 242–53).

A government can free-ride on these processes of private lawmaking and adjudication taking place within the society. For instance, if merchants are permitted to arrange delivery terms among themselves and one set of delivery terms proves so convenient and workable that it is widely adopted, in situations where delivery terms have not been agreed upon, the courts can read into the contract the terms that other contracting parties seem so strongly to prefer. Or, to take another example, if private deliberative bodies in corporations, lodges, or political parties develop a common set of procedural rules that seem to facilitate their work, it will make good sense for public bodies to model their rules on these. Again, if a strong social custom develops that people under the age of 18 should not marry because of the harm such marriages can cause to the children and others, the law may refuse to sanction marriage below that age or impose special conditions on it. Thus, even within a unitary legal system, matters can be arranged to allow

competition in the development of rules that can then be incorporated into the legal system.

In this process, procedural protections that raise the cost of law enforcement—such as guarantees of trials, provision of counsel, and restrictions on the ability of the government to acquire information—play an important part. These protections raise the cost of enforcing law and make it difficult to impose a legal regime not accepted by significant portions of the population. Because the procedural protections limit the ability of government to impose laws at variance with the needs of the people, the tendency of a legal system to reflect and absorb the practices and customs of the population should be greater in a legal system that recognizes procedural limits on its enforcement strategies.

Courts and Legislatures There is a large literature comparing lawmaking by courts with lawmaking by legislatures. Frederick Hayek speculated that courts may have an inherent tendency to make law that is superior to that of legislatures (Hayek 1973, pp. 94–144).

If courts make law by following past rules, while legislatures make law by announcing new rules, courts would appear more supportive of productivity than legislatures. Law that follows past rules will have the advantage of compatibility with the private responses generated by those same past rules. If legislatures specialize in situations requiring change, they are working in areas that necessarily will appear less supportive of production than do more stable areas. If, for instance, new technologies of transportation and communication require changes in past rules, new rules will require that parties make adjustments for which they are by definition unprepared.

But such appearances are deceptive. For instance, if modern technology has greatly increased the range of environmental externalities, it may enhance production to create whole new regulatory bodies to deal with them. Adjustment to such new regulatory authorities will necessarily be costly. Viewed from the present, it will be clear that the new legislative initiative is more costly than the old arrangements—a perception that may become confused with the conclusion that making the change is more costly than not making it. Then, too, legislation that has been in place over a long period of time tends to lose its distinctly legislative quality and begins to merge with the larger body of the law; it is easy to lose sight of the fact that the English common law was the product of a long process of interaction between judges and Parliament. In any effort to assess the comparative effects of judges and legislatures, it is necessary to remember past legislative initiatives that have succeeded as well as those that have failed.

Some features of judicial organization more nearly approximate the firm, as that term is used in economics, than the organization of legislatures does. Efforts to model these properties to generate incentives for efficient law seem only to emphasize the missing properties. One model has generated efficient law by the assumption that parties will not relitigate efficient precedents, thus preserving them intact (Rubin 1977; Priest 1977), while another has generated it by assuming that parties will relitigate efficient precedents, thus strengthening them (Goodman 1978). A court can be viewed as a firm composed of judges, and even in an era where courts do not charge fees based on their ability to attract business, a judge's importance and prestige will be enhanced by the fact that the court attracts business of large moment. The importance of this rather trivial incentive will be increased if the arrangements are such that all other aspects of a judge's compensation—his salary, tenure, and amenities—are invariable. Then, at the margin, prestige, honor,

or a sense of importance will be the only incentives operating on judges. Judges tend to enjoy long terms, giving them an incentive to invest in enhancing the position of their court.

Concurrent, competing jurisdiction has been a recurrent feature of judicial systems. The common law was the product of judges who faced competition from numerous feudal jurisdictions and from other courts of the king. In the United States, diversity jurisdiction has enabled the federal courts to compete with the state courts across a wide range of law (Landes and Posner 1980). In many cases, geographic competition will also operate. Because plaintiffs seem to have a disproportionate role in the selection of the forum, this competition should generate law biased toward plaintiffs, for instance, rules that lead to larger personal-injury verdicts. However, such procedural devices as the jury and various devices available to defendants to resist jurisdiction—including withdrawing from business in the jurisdiction altogether—may check this tendency.

In the area of lawmaking, judges, unlike legislators, are not able to force acceptance of their rule. The rule made into law by the vote of a coalition of legislators is law and they control the enforcement resources needed to make it meaningful. A rule announced by a court will be law only if it is accepted and followed by other judges. An appellate court has the formal authority to impose new rules on lower-court judges, but it will find that the exercise of its authority contains the seeds of its own destruction. If the appellate court implicitly asserts that it is an appropriate judicial role to depart from precedent and make new rules, it legitimizes the use of this role by all judges. The lower-court judges are then released to find that changed circumstances or more complete arguments justify disregarding the appellate precedent as "badly reasoned," "obsolete," or "unintended." In recent years, the Court of Appeals for the District of Columbia—inspired by the judicial activism of its nominal reviewer, the United States Supreme Court—has become quite skilled at according such treatment to the precedents of its reviewing Court (see, for example, Scalia 1978, pp. 359–75). Consequently, judicial rules must face repeated tests of acceptability in a context where parties adversely and directly affected by them have incentives to produce evidence and argument designed to persuade the court that the rule is misconceived or misguided.

Judges can extend the same treatment to the work of legislatures. And since it is legislatures who provide for courts and give them a role in the enforcement and interpretation of statutes, why should not the legislature get the credit for the work of the courts (Landes and Posner 1975b)? The law is sufficiently complex and interrelated that the task of making significant changes and integrating them with the larger body of the law cannot be completed in a single effort. Surely legislators understand that their product has rough edges and that the courts will smooth them out.

Legislators face the discipline of the vote. Will not legislators who make unsuccessful laws be voted out of office and will not this sanction create as much incentive for legislatures as is created for the judiciary by other forces?[7] It is easy enough to point out that the right to vote for a legislature is so weakly related to the legislative product that few if any citizens have sufficient interest to invest in understanding the issues. After all, the probability that any one vote will affect the outcome is infinitesimal. But the checks

[7]Many American judges are elected, and it is widely assumed that the performance of elected judges is inferior to that of unelected judges. This proposition has not been systematically demonstrated.

operating on judges are also weak, and it is not clear which of these incentive structures is weaker.

THE PROPERTIES OF A LEGAL SYSTEM THAT ENHANCE PRODUCTION

The Role of Property and Contract in a Nonmodern Legal System

From a modernist perspective, the keys to a legal system that enhances production are property and contract. If the resources of value to a society are allocated to individuals who, through a system of contract, are given the power to rearrange their rights, markets will operate and the society can move toward an optimum. Much historical work has been done to show that this is, in fact, how legal systems facilitate economic development. James Willard Hurst's classic case study of the lumber industry in Wisconsin documents this process in great detail. The only available way to ship the lumber from any area, for instance, was to float it downstream. The law reinforced a customary system of marks to enable the "shipper" to reclaim his logs at the end of the run (Hurst 1964, pp. 378–80). Similar processes have been documented in primitive legal systems; as a resource becomes scarce, a system of property rights will evolve for the resource (Demsetz 1967).

This vision of property and contract is incomplete. Where large gains result from the uniformity of transactions, those transactions will become uniform and will be incorporated into the legal rules. Just as gains from uniformity will cause form contracts to dominate particular markets in spite of the theoretical power of the parties to vary the form, so, too, will gains from uniformity cause "form" arrangements to become the law. Uniformity makes it unnecessary to retransact the relationships in each time period and saves work in the interpretation and enforcement of relationships so widely followed and understood in the society.

In a society where few variations occur in the economic conditions faced by its members and where the resources available for administration of a legal system are limited, the comparative advantages of form legal relationships may be great. Because the economic conditions of those affected by the rules are virtually identical, identical rules are appropriate to all. Uniform rules reduce the resources that must be used to transmit information about the rules, detect their violation, and enforce them. These advantages would be particularly great prior to the advent of literacy, when the applicable rules and cases can be retained only in the memories of men as stories and moral codes. In such a society the introduction of great diversity in legal relationships could well overwhelm the ability of the legal system to function.

The importance of these effects has been closely documented in the important work of Donald N. McCloskey (1975, 1976; extended and further developed in Dahlman 1980). He studied the phenomenon of the English commons—a system whereby a village cooperatively controlled the public land, known as the commons, under a complex system of regulation and allocation of usage rights.[8] No single member of the peasant

[8] The economic regulation of the Middle Ages as it is commonly described in the texts is a challenge, too, under the approach of this article—full of restrictions on the movement of capital, goods, and labor. One wonders how much of the regulation represented an unenforced ideal that did not affect daily economic life. If the current scholarship on the commons proves to be sound, the next challenge will be to understand other economic institutions of the medieval period in welfare terms.

village was allowed to alter the rights the system conferred upon him, although the system did not preclude further transactions relating to the allocated rights. From the fifteenth to the nineteenth centuries, the system slowly eroded, until it was eliminated altogether. In the eyes of the nineteenth-century reformers who advocated the enclosure movement, the commons system was inefficient, the product of superstitious custom. To romantics, it has represented a more cooperative and socially cohesive past. But either view leaves puzzles McCloskey has undertaken to explain. Why did the system display such strong uniformity over such a wide area for such a long period of time? Why did it disappear at different times in different places? His explanation is that, in fact, the system enhanced production under the conditions faced by medieval peasant society; when those conditions changed, the system was changed. The feature most strongly criticized as wasteful—the scattering of an owner's plots—he explains as a response to the need of the members of the village to diversify their crop risk across the different kinds of land in the village. This method of risk diversification arose in a situation where broader markets (which would have enabled saving and purchasing from the inventories of others) did not exist. The commons system disappeared as these markets reached the villages, generally moving inland from areas with access to water transportation. Because the system had enhanced the security of each member of the village and had proven itself across many generations, it became highly standardized—the law of the village. Yet it never precluded retransacting, and McCloskey's strongest evidence for his thesis is that such retransacting did not occur.

More recently, Richard Posner (1980a, 1980b, 1981) has employed an insight of this type to provide an explanation for the highly standardized customs of primitive men in relation to their possessions—customs that seem to mandate donative, nonmaximizing behavior and thus thwart a market economy. Analyzed as a social system, these customs can be seen as devices to reduce individual risk in a world where markets were meager, storage was costly, and survival was problematic.

In the modern setting, those contracts, such as marriage agreements, whose enforcement is largely outside the courts, continue to exhibit a highly standardized character.

The modern system of contracts and property, which is considered so basic to productivity, may, in fact, be a phenomenon closely related to the increased specialization of economic function so evident in industrial society. The gains from specialization generate the resources necessary to support specialized institutions and their accompanying professions at the same time that specialization creates a need for legal arrangements tailored to the needs of each area of economic activity.

The Modern American System

Property and Contract The modernist, contractarian perspective on the law of property and contracts has generated a considerable and rapidly growing literature on the specific rules of these areas of law. In general, it has been found that the rules of modern Anglo-American property-and-contract law enhance production. A system of property rights presents two central problems.

The first concerns assignment of rights in resources that have no ownership. This question tends to arise when some resource that has previously had no scarcity value for the society acquires value. Examples are the shortage of free land under the pressure of population growth, the scarcity of books to copy in response to printing technology, and

the recent positive value of oil deposit on the continental shelf. The most general solution is to confer ownership upon the first possessor. Sometimes a residual-ownership theory finds ownership in the sovereign, but in such instances, the sovereign often uses a first-possession rule to allocate the resource. An alternative allows for competitive bidding, which tends to be used where a rule of first possession would result in severe dissipation of resources in the competition to be first (Barzel 1968).

The second central problem concerns keeping the definitions of property-right boundaries simple enough to prevent the costs of administering the system from becoming excessive. Rules as diverse as the rule against perpetuities (restricting the creation of remote and complex interests in property) and the rule that ideas are not patentable (because it would be impossible to define the limits of a right in an idea) can be understood in this framework.

A principal concern of contracts is to provide easily administered rules for the formation of binding agreements. Such rules as the statute of frauds and the requirement of seals—now abandoned—can be understood in this light. Another concern of contract law is to develop approaches for interpreting agreements in ways that will be responsive to the expectations of the parties.

The Role of the Firm Analysis of the economic effects of the property-and-contract system usually proceeds on the assumption that the property is owned, or the contracts are made, by individuals. It is an observable fact, however, that property rights are frequently held by firms—partnerships, for-profit or nonprofit corporations, and trusts. This circumstance has on occasion been used to criticize price theory,[9] on the ground that, while individuals may maximize something of human relevance, corporations and other abstract entities clearly cannot. Corporations may, for instance, have no incentive to maximize the value of their property but may have every incentive to maximize the income of their present executives.

The question of which unit to take as the maximizing one is important chiefly because it may affect the power of the theory to explain the economic activity being analyzed. For example, work on the economics of the family has found that much behavior can be explained if the family, not the individual, is treated as the maximizing unit (Becker 1981). The individual has been used as the unit of analysis to explain the emergence of firms, which will emerge to hold and contract in relation to property when that form of the holding optimizes the position of the individuals involved (Coase 1937).

Two schools of thought now dominate economic analysis of corporations. In one, all corporations are efficient because of the discipline that factor markets will place upon the constituents of the entity. If stockholders receive less than a competitive rate of return, the entity will have to pay more for future investment. If management is overcompensated, competition for the management positions will drive the compensation down to the competitive level (Fama 1980). To the other school, the complexities of the corporate structures and positive transaction costs mean that particular arrangements will maximize the value of the firm. These arrangements are thus made a significant area of

[9]Price theory is a body of analysis developed by Alfred Marshall and others and now taught as the core subject of economics which derives predictions about the behavior of markets from the assumption that actors in markets act in their own self-interest. The criticism has been that if firms do not maximize their self-interest and are important factors in markets, then markets will not operate as price theory predicts.

study. The details of optimum arrangements will vary, depending upon monitoring technology, the nature of the inputs to the firms, its activities, and the nature of the output (Jensen and Meckling 1976).[10]

The labor union represents a kind of firm closely related in its activities to the business corporation. Traditional analysis has viewed the labor union as a cartel, organizing the labor input to the firm (Posner 1977, p. 527). It has thus been seen as wasteful by raising input costs and restricting the movement of additional labor into areas where it could be used. This theory makes it difficult to explain the seeming stability of modern unions, since the employer could always gain by the expenditure of resources to escape the cartel. Recent work has explored an alternative theory—that labor unions are firms specializing in the provision of high-quality labor inputs (Brown and Medoff 1978; Freeman and Medoff 1979).

Work on property and contracts and the role of the firm has been important for these fields within the professional schools. But it has not presented the theoretical difficulties and challenges involved in work on torts, antitrust, and regulation, where the appropriate approach is far more problematic and difficult.

Torts The importance of torts rules was highlighted in research on social cost, because it is precisely in the situation where transacting is costly that the rules matter (Coase 1960, pp. 2–6).

In order to illustrate why the legal rules do not matter where transacting costs are low, Ronald Coase took as an example the rights and duties of adjoining landowners. Assuming that one raises livestock and one raises grain, who has the obligation to fence? Coase pointed out that, from an efficiency point of view, it will make no difference where the obligation is placed, as long as the parties can negotiate with each other at negligible cost. Either the responsibility can be put on the owner of the cattle to pay for damage to the grain, or the loss of the grain can be left to the responsibility of the grain owner, who can pay the cattle owner to keep his herds off the cultivated land (or erect a fence, if that proves to be cheaper). At the margin, the incentives of both parties will remain the same.

One property of an efficient rule is that it is clearly communicated to and understood by the members of the society affected by it. A rule with these properties will reduce transaction costs. One way to achieve this goal is to adopt rules consistent with the shared expectations of the culture. If it is widely believed—no matter how irrationally—that when cows eat someone else's crops, the owner of the cows should pay, because "to eat" is an active verb while "to be eaten" is not, then the law can base itself on this expectation. Then, when the adjoining landowners begin negotiations over the problem, they will not be surprised to discover that the law assigns the responsibilities according to their expectations. If liabilities were assigned contrary to the expectations of the society, the friction between "reasonable" expectations and the law would increase costs.

In the case of torts between strangers, transaction costs are high and the content of the controlling legal rule is important. As a result, the most difficult tort problems involve those situations where individual negotiation before the wrong is clearly not feasible. In the case of adjoining landowners, the two owners can identify each other and anticipate

[10]The one subject that has generated a significant literature is the market for corporate control (for an introduction, see Posner and Scott 1980, p. 195).

the types of harm in which they are likely to be jointly involved. Indeed, the legal rules that evolve may simply reflect the fact that repeated negotiations have led to the outcome the law incorporates. The same is true of harms arising out of the employment relationship. But in the case of torts between strangers, there is no possibility of negotiation prior to the accident to correct an inefficient rule. The major modern social context in which this problem arises is road accidents. The correct rule has been debated in the literature. Some writers have argued that liability for negligence is the efficient rule in order to make each driver weigh the costs of taking precautions to prevent accidents as against the magnitude of the loss caused by failure to take those precautions. In this view, the negligent driver is the wasteful driver, and the negligence rule reduces the incidence of inefficient conduct (Posner 1972).[11] Other writers, principally Guido Calabresi (1970), have argued that a simple fault system is an inefficient way to assign liabilities from automobile accidents and that liability should be imposed on classes of persons who are the "least cost avoiders." In the common law, the archetype of this approach was the strict liability of blasters for damage to adjacent landowners. No matter how much care the blaster took, he was liable for damage caused by the blasting activity. This put the blaster in a position to weigh whether the gains exceeded the losses before blasting.

This literature is quite abstract, the argument proceeding on the basis of hypotheticals that limit the complexity of the problem. The negligence standard requires the trier of fact to make sophisticated assessments of gains and benefits from particular ways of acting. A strict liability standard that does not admit of contributory negligence as a defense will not work in the almost universal situation where the accident is the joint product of two or more different activities. Such accidents are an example of a joint-cost problem, two or more actors having foregone possible precautions to jointly produce the accident. The only institution that can efficiently solve joint-cost problems is the market —but it is impossible to structure a market for accidents. The available analytic tools cannot handle the problem in its full subtlety.

The difficulty of a direct approach focusing on production in this context may explain why theories based on moral principles or linguistic structure can lead to results congruent with much of the law (Fletcher 1972; Epstein 1973). Given the absence of a "correct" solution assuring efficiency, the efficient solution may be to assign rights and duties and permit the affected parties to adjust to that set of assignments over time. If the assignment process can build on preexisting cultural phenomena, such as the structure of the language or shared moral codes, the assignment can be made more cheaply.

The question remains whether the changes in tort rules that have occurred over time can be explained as responses to changing economic and technological conditions or whether they reflect changes in other cultural values. In this area, a notable phenomenon in the Anglo-American legal world was the rise of a negligence standard in the nineteenth century and its gradual erosion in the twentieth. It is plausible that, if accident-causing technologies are stable over a long period of time, the society will learn through experience the optimum set of rules for the participants in the accident-causing process. This knowledge may express itself in increasingly detailed rules about particular categories and types of activities whose violation would result in liability. The rule that a motorist who does not stop, look, and listen before crossing a railroad track is negligent,

[11] This essay argues the case for negligence within the context of nineteenth-century cases and Posner recognizes the problems involved in the use of a negligence system in the context of automobile accidents (Posner 1977, pp. 153–57).

for example, amounts to the rule that any person who violates it is strictly liable for the possible consequences.[12] Any introduction of new accident-causing technologies throws such a system into disarray. The short-run optimum would be to shift to a standard of reasonableness administered in a decentralized way until the society obtained enough experience with the new technology to formulate specific rules applicable to the actors. At that point the system can begin to shift back toward more explicit rules, specifying strict liability. Whether or not there have been significant changes in accident-causing technologies that should have affected the appropriate legal rule, and whether such technological shifts are in fact related to the legal changes that have taken place, are subjects that have barely been investigated.

Antitrust An intensely studied area has focused on those rules designed to correct real or fancied inefficiencies in the system of property and contracts. In the United States the most notable of these is the Sherman Antitrust Act of 1890, but numerous regulatory schemes also serve the ostensible purpose of improving market operation. The question of whether the Sherman Act was, or could become, a program of market enhancement stimulated the first sustained contemporary effort to use the insights of political economy to illuminate the law (Director and Levi 1956). The literature on the Sherman Act has concluded that the act can and does, in general, promote efficiency. Ironically, the literature has concluded that much economic regulation does not promote efficiency. It was partly the understanding that the rules of the Sherman Act were the product of judicial interpretation, while the regulatory regimes are statutory, that gave currency to the notion that courts make relatively more efficient law.

Sherman Act policy presents two central questions. The first asks whether the system of property and contracts has an inherent tendency to attrition through monopolization; the second addresses the possibility of fashioning a set of legal rules that stop monopolization while permitting production-enhancing forms of competition. The literature has tended to concentrate on the second problem rather than on the first, accepting as given a congressional determination that the problem was of sufficient importance to require a criminal statute. The productivity vision of the Sherman Act is most fully stated by Robert H. Bork (1978). In his view, the Sherman Act is a charter for efficiency, the details having been satisfactorily worked out by the Supreme Court in the early years of the act and tarnished only by more recent judicial and legislative errors.

This view is challenged only by the description of the act as a Jeffersonian charter to preserve independence and autonomy within the economic system. Although this view has clearly had some impact on the decisions of the Supreme Court, it has been in intellectual retreat. Its high point may have been the now discredited opinion of Judge Learned Hand in *United States* v. *Aluminum Co. of America* (1945), in which competitive success was equated with monopolization.[13] The reason for its retreat is that its advocates

[12] This particular rule, announced by Mr. Justice Holmes in *Baltimore & Ohio R.R.* v. *Goodman* (1927), was made obsolete by changes in automobile technology practically before it was announced, as the Court recognized in *Pokora* v. *Wabash Ry.* (1934). The rule was applied to an issue of contributory negligence.

[13] Judge Hand denied this, observing that "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster" (*United States* v. *Aluminum Co. of America*, 1945, p. 430). It is, however, impossible to determine from the opinion what Alcoa did to violate the act other than to plan for competitive success.

have not been able to derive a set of rules that consistently implement its vision. It is difficult to mobilize Jeffersonian antitrust ideology in support of a program that tolerates a corporation such as General Motors. A rule that severely limits the constraints oil companies can place on their independent retail franchisees makes sense only if one is equally willing to limit oil companies' integration forward into retailing. The gains available from modern economic integration are too apparent to make the Jeffersonian vision of the Sherman Act very appealing. And if that vision is applied inconsistently and haphazardly, it becomes a vehicle for obvious unfairness.

The extensive literature on judicial interpretation of the Sherman Act has identified a central flaw in its implementation from a productivity point of view. The courts have tended to confuse forms of vertical integration with constraints on competition. The analysis began in the literature with the patent tie-in cases (see Director and Levi 1956, pp. 291–92; this analysis is fully developed in Bowman 1973). The owner of a patent would license it on condition that the licensee make use of some nonpatented input supplied by the licensor. The courts saw this agreement as an attempt to extend the patent "monopoly" beyond its legal scope and to eliminate competition in the market for the tied product. One famous case involved a requirement imposed by IBM that users of its computers also use punch cards supplied by it (*International Business Machines Corp.* v. *United States*, 1936). The courts' reaction seems sensible until one begins to analyze why IBM might wish to impose such a requirement. The purchaser of the computer is interested in computing services, and if IBM raises the cost of punch cards to the user, it will decrease his demand for the computer. The tie-in does not enable IBM to increase the profitability of its market position in computers. Why, then, might IBM impose such a requirement? One possibility is that IBM can supply punch cards suitable for its computers more efficiently than can others, but, if this is so, IBM would not need to require their purchase, since it would dominate the market anyway. Another possibility is that IBM was in a position to charge monopoly prices on its computers and that the punch cards were being used as a device to meter demand, enabling the company to discriminate in pricing—that is, apply different charges in different markets. However, the effect of price discrimination by a monopolist is to increase his output, contributing to social efficiency. Only if the monopoly is socially undesirable in its origins can a rule prohibiting price discrimination be defended, since price discrimination increases the incentives to engage in such monopolization. But in the patent cases, the monopoly has been treated both by the courts and by commentators as socially desirable.

A related problem is the judicial prohibition of resale-price maintenance agreements. In these cases, a manufacturer has required that distributors of his product sell it for no less than a specified price. The courts have treated such agreements as pacts to eliminate price competition in the markets for distribution services. But again, why does the seller extract such a promise? It would seem that his interest is in lowering, not raising, the selling price. The lower the distribution markup, the greater the demand at the factory. Two explanations have been proffered. One claims that the agreement is not really imposed by the seller but is a response to a cartel of the distributors (Bowman 1955, pp. 826–32). The distributors organize and refuse to handle products unless the manufacturer agrees to accept a minimum markup and enforce it through a resale-price distribution scheme. The other explanation holds that the manufacturer imposes resale-price maintenance because the arrangement is helpful to him in that he wants to create an incentive for the retailers to compete in terms of offering services related to the product rather than

in the price of the product itself (Bowman 1955, pp. 840–44; also Telser 1960, pp. 89–96).[14] An easy example in the case of automobiles and appliances is the provision of showroom space and information about the product. If customers can first shop the showroom and then buy from a direct-sale, no-service firm, there will be no incentive for anyone other than the manufacturer to provide this kind of preselling service. Resale-price maintenance will also change the inventory policy of retailers and increase the geographic availability of the product. If consumers know that the retail price is uniform, they will be saved the costs of searching out the most advantageous price.

The literature on antitrust policy toward resale-price maintenance has proceeded largely in terms of abstract price-theory analysis. (For the leading dialogue, see Bork 1966; Gould and Yamey 1967, 1968; Bork 1967; notable exceptions are Bowman 1955; Yamey 1952, 1966). The competing hypotheses could be subjected to more rigorous testing. For instance, it should be possible to determine historically the extent to which distributors did organize effective cartels.[15] Some products have been subjected to resale-price maintenance while others have not, and the competing theories have different implications as to the products to be covered. The cartel theory implies that output would fall as a result of resale-price maintenance. It also implies that all products handled only by stores of the type that successfully organized would be subject to resale-price maintenance and that the intensity of resale-price maintenance would vary from market to market depending on the nature of retail competition in that market. The services theory predicts that resale-price maintenance will cause output to rise, and will be associated with products that require point-of-sale services.

The resale-price maintenance problem is interesting from the point of view of the productivity hypothesis because the law on this point has been unstable in the United States during the twentieth century. After the Supreme Court held that resale-price maintenance violated the Sherman Act (*Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 1911), the Congress reversed the rule by a statute that permitted states to provide for resale-price maintenance.[16] Many states chose to permit resale-price maintenance; others did not. Resale-price maintenance expanded during the Depression and contracted during the years after World War II. Only recently, Congress repealed the statute that permitted the states to have resale-price maintenance [Pub. Law 94-145, 89 Stat. 801 (1975)]. Are these changes to be explained as instability in the system or as adaptations to changing conditions? Was the judicial rule wasteful and therefore corrected by Congress? Did the judicial rule become desirable as technological changes greatly reduced the service component of distribution? Or did the ability of retailers to use political power to protect their monopoly position decline as retailing passed into the hands of large and impersonal corporations?

A striking feature of the antitrust area is that the economics literature has had a substantial impact on the legal rules, and the legal cases have had a substantial impact on

[14] Telser (1960), influenced by the record in *United States* v. *General Electric Co.* (1926), puts heavy emphasis on a third explanation, the use of resale-price maintenance to assist in the policing of a manufacturer's cartel.

[15] Yamey (1952) found that the impetus came from retailers.

[16] The Miller-Tydings Amendment to the Sherman Act [ch. 690, 50 Stat. 693 (1937)]. When the Supreme Court read the statute in a restrictive fashion in *Schwegmann Bros.* v. *Calvert Distilling Corp.* (1951), Congress immediately responded with the McGuire Act [ch. 745, 66 Stat. 632 (1952)].

the economics literature. The most notable example of legal borrowing from economics is the use of concentration ratio concepts to identify horizontal arrangements that impair competition.[17] The concentration ratio concept was developed by economists as a hypothesis for testing. It ran as follows. Price theory shows that monopolists will have higher profits. It is arguable that industries consisting of few firms will behave like monopolists, because each firm will have an incentive to consider the reactions of its competitors to its pricing and product strategies. If such firms coordinate successfully and behave like monopolists, there should be a systematic correlation between some measure of the number of firms and rates of profitability. The empirical work has yielded confused results (Demsetz 1974; Weiss 1974) and has been bedeviled by serious technical problems. Most important, accounting data are not the same as economic cost data. They may fail to include various assets of real economic value, primarily good will and know-how, or they may incorporate capitalized monopoly returns through past purchase transactions. The courts, however, have adopted the concentration-ratio notion of how to measure anticompetitive effects, with little awareness of its theoretical flaws and empirical weakness.[18] The principal theoretical flaw lies in the circumstance that a product market with even a single seller will not be monopolized as long as there are other sellers who will enter the market when the single seller starts to charge a noncompetitive price. This situation suggests that the real inquiry should concern barriers to entry or concentration measured by potential sellers. A substantial economic literature on barriers to entry exists, but the courts have not made such barriers a central test. Indeed, they have shown a tendency to apply the concentration-ratio notion in a highly inconsistent way, sometimes limiting the market to actual sellers and at other times including potential sellers where necessary to find a transaction illegal. The courts, of course, cannot wait for economics to arrive at consensus tests before proceeding to construe the antitrust laws.

The impact of law on industrial organization has come from the fact that the reported decisions are among the few sources where economists can find detailed descriptions of business behavior. The literature on industrial organization has tended to accept the descriptions and characterizations of the behavior in the opinions (Scherer 1980). Lawyers understand better than do economists that judicial opinions are not scientific reports of the facts involved in the litigation but briefs on behalf of the result that the court has reached. A notable example is the issue of the importance of the strategy of predatory pricing as a tactic to deter competitive entry. The theory has not concluded whether the tactic will work. For many years it was accepted in the economics literature that the Standard Oil case had shown that Standard Oil had systematically and successfully engaged in predatory pricing to deter entry. John McGee (1958), however, showed that when the record was reviewed by a knowledgeable economist, it supported no such finding. This finding raised the question of whether an antitrust rule against predatory pricing was good or bad, since such a rule created the danger that it would be applied to competitive pricing and thus reduce, rather than enhance, competitive pressures.[19] Al-

[17] This approach dominates the Department of Justice merger guidelines, 1 CCH Trade Regulation Reporter ¶4430 (1968).

[18] Richard Posner suggested that the courts use the Herfindahl measure (1969, 1976), an idea adapted from Stigler (1968), in order to better capture the relevant economic variables, particularly the role of potential output expansion by fringe firms. The Herfindahl measure expresses the level of concentration in terms of the sum of the squares of each firm's market share.

[19] The subject has generated a large literature on the theoretically correct test. For recent reviews of this literature, see McGee (1980) and Easterbrook (1981).

though there are other substantial sources of information about business behavior—trade magazines and newspapers, business archives, biographies of business leaders, company histories, and so on—economists have not used these sources to illuminate the problems of industrial organization. Conversely, the historians who have worked with these materials on the whole have had little familiarity with the important economic issues the material might clarify.

The literature on industrial organization is notable for its failure to attempt scientific investigation of the question of whether monopolies and cartels—the central targets of the act—promote or retard efficiency.[20] The only admitted exception to the standard analysis consists of so-called natural monopolies. These are thought of as single-firm industries that emerge because of economies of scale in production that are as large as the market itself. Ever since transportation technologies created national and international markets in many products, these firms have seemed a rather unimportant phenomenon. But cartelization offers other potential gains. One is to organize markets in ways that reduce the buyer's cost of search. Another is to facilitate the exchange of technological information among the members of the industry. What are the effects of cartels that have actually existed? To read the American literature on industrial organization, one would conclude that countries that tolerate cartels have consigned themselves to the scrap heap. Yet a fair number of successful industrial countries tolerate them or have done so in the past.

One particular effect of an anticartel policy is that it restricts the ability of an industry to organize to offset the effects of a rule that impedes production. Where an industry is confronted with rules that cause it to operate inefficiently, one way of overcoming the inefficiency is for the industry to agree on offsetting arrangements. A leading antitrust case that illustrates an agreement of this kind is *Fashion Originators' Guild of America* v. *F.T.C.* (1941). American law has provided no design protection to the fashion industry. This omission has a long and idiosyncratic history, but the economic rationale for affording such protection is as strong as the rationale for extending patents to inventors and copyrights to authors. In *Fashion Originators' Guild*, a group of the fashion industry had voluntarily associated into a system for according protection to dress designs. Member manufacturers agreed to refrain from copying each other's designs, and member retailers agreed to refrain from selling pirated designs. This association provided some protection, although it could be effective only if, over time, the members were able to prevail in fashion market competition with nonmembers. The Supreme Court found that the arrangements violated the antitrust laws, since the members of the association had pledged themselves not to compete with each other in a way that the law recognized as legal.

The extent to which cartels provide important ways for offsetting the effects of legal rules that cause inefficiency is an unexplored question. In my own work, I have identified a stable, pre-Sherman Act cartel that seems to have had precisely that role (Kitch and Bowler 1979). This cartel of elevator operators in Chicago set a uniform rate for the

[20] If cartels that do not promote efficiency are unstable, either because they fall apart internally as the result of conflicts among the participants or because their monopoly pricing attracts entry, then the only stable cartels that would be observed would be those that promote efficiency. They would be stable because they are in the interest of all the members and would not attract entry because their efficiency would make entry unprofitable. The issue of what is the actual effect of real cartels can be answered only by close examination of their behavior.

transfer and storage of grain. In effect, the uniform cartel price overcame the effect of a court rule imposed on the railroads that they had to deliver cars to the elevators designated by the shippers. If there were price competition among the elevators, the shippers would have an incentive to exercise this right, impairing the ability of the railroads to handle the trains on a unit basis. Thus, the railroads encouraged the uniform pricing policy of the elevators, their lessees, but they were in a position to capture back from the elevators the profits gained through the rental terms of the leases. Actual cartels have seldom been studied to determine the efficiency effects of their organization.

Economic Regulation The diverse and complex phenomenon of economic regulation has generated a large literature dedicated to examining its effects on the economy. (For the leading general works on regulation, see Kahn 1971 and Breyer 1982.) Three efficiency rationales have been proffered: natural monopoly, excessive or inadequate competition, and externalities. One nonefficiency explanation has been proffered: redistribution of income. Two other explanations—contracting problems in the transfer of the right to use a government-owned asset and the creation of appropriate incentives for the development of new technology—have not been closely examined.

The natural-monopoly rationale for regulation is as follows. The technology of certain industries dictates that single firms will supply the market. The most prominent natural-monopoly industries are the distribution utilities—telephone, electricity, water, and sewage. The network problems in efficiently arranging the delivery of these services dictate a single system. Yet, because there is a single system, that system, unconstrained, will be able to engage in monopoly pricing. Under this hypothesis, the purpose of regulation is to make a natural-monopoly firm engage in efficient pricing. The problem with this hypothesis is that the imposed regulation has no resemblance to competitive pricing. It has had two features—first, pricing based upon average cost; and second, prohibitions against price discrimination. Competition would force the firm to price at marginal, not average, cost; and in the absence of competition, price discrimination can be used to induce the optimum output from the monopolist.

Regulatory schemes based upon a rationale of excessive or inadequate competition tend to date from the Depression period of the 1930s. This rationale is now discredited. Principal examples of regulation once justified on grounds of excess competition are entry restrictions in airlines, trucking, and long-distance telecommunications and pricing constraints in the field market for natural gas and pipelines and long-distance electricity transmission. More recent examples that seem to be based on the same idea are constraints on petroleum and petroleum-product prices. The argument for these forms of regulation holds that competition in these particular industries is defective, occurring in forms that result either in chronically inadequate or in chronically excessive returns to capital. The problem with this rationale is that no one has been able to explain what makes these industries different from any other industry. The recent moves toward deregulation of the airline, trucking rail, telecommunications, broadcasting, and petroleum industries demonstrate the extent to which these ideas have become discredited.

Nevertheless, closely related ideas have resulted in economy-wide wage-price controls based on the notion that all private firms have a systematic tendency to overprice. The general belief is that the private firms overestimate the propensity of the government to inflate and that wage-price controls are necessary to force them to engage in correct and, hence, efficient pricing. The implementation of such wage and price control programs is

accompanied by statements that the government itself has no intention to inflate and that wage-price controls must be imposed because the private sector has erroneously come to believe that the government will, in fact, pursue a policy of inflating the price level.

The recently emerged political and intellectual consensus that regulatory schemes impeding the movement of capital in and out of industries or impeding adjustment in the price level in response to shifts in supply costs or demand schedules are wasteful is not based on new analytic insights. The long-standing opposition of political economists to protective-tariff policies is based on the same ideas. The effect of protective tariffs is to retard the shift of capital within the economy to areas of relative comparative advantage and to overprice imports to the domestic purchaser. Such tariffs are bad for the country in the same way that laws restricting entry and exit or constraining price adjustments are bad.

It is notable that such regulatory regimes tend to arise in the context of atypical shifts in the general price level. During the Depression it was argued that the seemingly continuous tendency of firms to lower prices and eliminate accounting profits, computed in relation to investments carried at book value, reflected a defect in the competitive process of significant and previously unappreciated importance. Only with the benefit of hindsight is it possible to appreciate that the phenomenon was the result of an unprecedented and prolonged contraction in the money supply. Conversely, the present interest in regulation of this type seems to be a perverse response to a shift toward a policy of high expansion in the money supply. Regulation of this type is an embarrassment to the productivity hypothesis. It is so patently wasteful that the hypothesis must be either rejected or limited to courts rather than legislatures, or the regulation must be viewed as a random, accidental error.

It is interesting that this type of regulation has been associated with unusual shifts in the trend of the price level, either up or down. One accomplishment of such regulations is the tendency to increase the visible social harm that flows from these shifts in the price level. If the law tries to hold down prices in the face of rising demand, it will generate queues or complex rationing schemes that consume real social resources. If the law tries to restrain price decreases in the face of falling demand, it will accelerate the fall in volume and increase unemployment and idle capacity. Perhaps these perverse responses are, in fact, the way in which the political system generates opposition to the government's inefficient macro-policies. Absent constraints on price shifts, inflation or deflation would express themselves as shifts in the transaction price level and as shifts in wealth among particular individuals. With price and entry constraints, the disturbances express themselves in much more socially disruptive ways. Are the present movements to eliminate entry restrictions in airlines, trucking, and long-distance telecommunications part of the lagged process of recovering equilibrium after the large shocks generated by the Depression?

A contemporary form of the market-failure rationale has been protective legislation for consumer and worker. This legislation is founded on the assumption that ordinary persons, workers or consumers, are unable to represent their interests in the marketplace effectively because of lack of information. Because the consumer does not understand interest rates, the Truth in Lending Act was passed [15 U.S.C. §1602 et seq. (1976)]. Because the worker does not understand the safety risks of his workplace, the Occupational Health and Safety Administration was established [P.L. 91-596, 29 U.S.C. §651-78 (1976)]. Because warranties are too complicated, the Moss-Magnuson Warranty Act

came into being [Pub. Law 93-637, tit. 2, 88 Stat. 2193 (1975)]. The source of the information imbalance is said to be that the firm with which the consumer is dealing has an interest in mastering the subject matter but the consumer, who is in the market infrequently, does not. Or perhaps it is assumed that the firms have the services of high-income people, thought to be intelligent, while they sell to low-income people, thought not to be intelligent. What these arguments generally overlook is the extent to which particular consumers can profit from the market-policing activities of a minority and the extent to which competitive firms will have an incentive to displace high interest rates, worthless warranties, and unsafe working conditions.

One modern form of this regulation that has been much studied and clearly seems inefficient is government restraint on the marketing of new drugs (Peltzman 1973a, 1973b, 1975). This regulation does not simply require the disclosure of relevant information to the consumer; it further demands that the government itself determine whether a drug is suitable, and for what it is suitable, before it is made available. No matter how well informed a particular consumer is, he cannot legally obtain the drug. The government requires proof of safety and efficacy, setting high standards that are inappropriate in many cases. The regulation has raised the cost of introducing new drugs and has therefore reduced their availability. Nevertheless, there is a residual gray market, since those with the means and the will can obtain drugs from foreign countries or seek treatment at medical centers authorized by the Food and Drug Administration to conduct research. It seems odd that consumers should be considered particularly helpless in a setting where, by law, they are required to act with the advice of a specialized professional.

The inability to explain natural-monopoly and market-failure regulation in productivity terms has led to a search for explanations. Regulation can be viewed as a symptom of defects in the organization of political rights. All these explanations face the objection that an efficient solution would give the political system more wealth to allocate than would an inefficient solution. In these models cohesive industrial groups are often thought to have more power than do consumers in general. The point of the regulation is seen to be the transfer of wealth from one group to another in exchange for political support. In this view, trucking and airline regulation transfers wealth from big cities and big shippers to trucking firms, airlines, and small cities and small shippers; banking regulation transfers wealth from small savers to big savers and bankers; telecommunications regulation transfers wealth from users of long-distance service to users of local service; FDA regulation transfers wealth from victims of diseases that would yield only to new drugs to established drug companies; OSHA regulation transfers wealth from small companies to large companies; and so on.

These explanations present several problems. First, the political coalitions they suggest are somewhat odd and inconsistent. Second, there is no reason to think that the regulation generates the wealth to be distributed anywhere. Airline regulation may have held prices up on the dense, low-cost routes, but the principal response of the airlines was to compete those profits away through service competition. Bank regulation holds down interest rates paid to small savers, but the banks compete for these clients through service competition. FDA regulation increases the profitability of old drugs as compared with the profitability that would result if the old drugs faced more rapid obsolescence, but the firms that gain are probably the same firms that would introduce the new drugs if they could. The transfer from long-distance telecommunications users to local users may simply be a transfer from businesses using long-distance telephones to businesses using local tele-

phone service. The third major problem in this theory of economic regulation is its failure to explain why some industries are regulated while others are not. Under this view, all industries are equally good candidates for wealth redistribution.

The literature has accepted externalities as a legitimate reason for regulation. If the legal system is arranged so as to confer benefits or costs of an activity on someone who has either no duty to pay for the benefit or no right to be compensated for the cost, wasteful levels of the activity will occur.

Important modern examples of regulation based on explicit concern with externalities are land-use controls and air and water pollution regulation. The effects of these relatively new and clearly significant forms of regulation have not been closely studied. On their surface, they appear to violate principles of economic efficiency. They restrict the ability of property owners to transact in relation to their property, and they tend to be structured in terms of prohibitions rather than charges proportional to the harm. Yet, the results of these schemes are not really known. There is evidence that an unzoned city is very little different from a zoned city[21]—a fact that may reflect the way in which private parties are able to conduct transactions with the zoning authorities. It may be that zoning increases the relative wealth of those who can influence the zoning authorities—those who are persuasive in administrative proceedings or politically influential—but that they have little impact on the resulting land-use pattern as compared with the pattern that would emerge under an unzoned system. The new, ambitious, and complex pollution-control systems are even less well understood.

It is possible that these systems of regulation are a social response to modern shortages of space, air, and water and that the present systems are part of a process of transition from a system that does not grant property rights in these resources to a system that assigns them.[22] When a primitive tribe encountered a scarcity of hunting space, it is unlikely that the tribe moved instantaneously from a system of open use to a system of defined property rights. In the transition period, there would be efforts to assign hunting areas and to prohibit any hunting activities in violation of the assignments. Only over time would this system come to be understood as a permanent system of rights (Demsetz 1967). Thus, under the modern systems, it is not unlikely that, over time, certain areas will acquire the right to be dirty, and certain areas will acquire the right to be clean, and private property owners within those areas will have the right to transfer the continuing right to engage in similar activity. Then, if there is a system for shifting the allocation of uses at the margins in response to changing technological needs, the resulting systems would seem largely compatible with the needs of production, assuming that the implicit price attached to clean air and water and urban amenity is not too high.

Economists have long argued that a system of charges for polluting will yield superior results because it will permit each firm to equate marginal cost and marginal revenue (Mishan 1971, p. 15). This claim may be valid in the short run, but, unlike a system of standards, a system of charges cannot evolve into a system of property rights.

Two other explanations for government regulatory activity that merit evaluation have barely been considered in the literature. One holds that regulations aim to solve the

[21] Bernard H. Siegan intensively studied nonzoning in Houston and was able to detect a few minor differences (Siegan 1970, 1972).

[22] The line of argument here is independently developed and more fully explicated in Maloney and Yandle (1980).

problem of government–private contractual interface; the other would place their origin in the problem of appropriate incentives for technological innovation.

A notable feature of most of the older systems of economic regulation in the United States is that they involve the assignment to private firms of the right to use public property. The classic case is assigning to the distribution utilities the right to use public rights of way. The railroads acquired public lands and the power of eminent domain.

The connection between this problem and regulation was pointed out by Harold Demsetz (1968), who noted that the usual reason given for the regulation of the natural-monopoly distribution of utilities—lack of competition—was in error. Although only a single firm would provide the service, there would be competition among firms for the right to be the one. This competition could take place at the time the franchise was offered. The competition by firms for the franchise would dictate the terms and conditions of service under the franchise.

The difficulties are illuminated by considering the terms and conditions under which the competition will take place. What will the terms of the franchise be? How will the winning competitor be selected? One solution is to allow competitive cash bids for a perpetual-franchise term. The government sells the right to conduct the business to the entity that puts the highest value on the right. But this solution brings its own problems. If the franchise places no constraints on the pricing policies of the franchisee, it will charge monopoly prices. The franchisor will benefit through the franchise fee, but the misallocation effects of the monopoly prices will continue.

The perpetual term presents a problem because it binds all future governments to the assignment. But if governments are to retain their ability to correct errors, it may be important to their structure that subsequent administrations are able to undo the work of their predecessors. Laws are therefore generally subject to repeal, and governments are notoriously unreliable long-term contracting partners. The American Constitution attempted to solve this problem for the states by declaring that no state should pass any law that would impair the obligation of contracts, but the sense that perpetually binding commitments were inappropriate has been so strong that the courts have tended to assist the states in avoiding their contracts. If a renewable term of years is used instead, on the other hand, there are serious incentives to inefficiency as the franchise approaches the end of its term.

The second problem—which arises generally when competitive bidding is involved—is how the government knows how to define the rights and obligations of the franchisee. It is easy enough to see how one might efficiently acquire nails through competitive bidding—but what if the commodity or service is so complex that the government does not have a proper standard for setting the bid specifications? It may be that the very information and know-how essential to set the specifications efficiently is possessed only by the bidders. This problem can be solved by asking the bidders to compete not in terms of cash but in terms of specifications. But then the competition becomes multidimensional and complex to administer. For these reasons, major weapons acquisition programs in the Department of Defense have tended to rely not on purchases on bid but on a form of ongoing relationship closely resembling economic regulation (see the Renegotiation Act of March 23, 1951, 65 Stat. 7, 50 U.S.C. §1211 et seq., not presently in effect).

Another problem with a cash, front-end bid is that it presents the governmental unit with a lump of cash that disrupts regular budget flows and, because of the short time-

horizon of politicians, may be dissipated unwisely. However, other forms of payment, such as a per-unit tax, are more disruptive of the marginal revenue equilibrium. Efficiency considerations may therefore account for the frequently adopted solution of noncash competition, which takes place along a range of service parameters, followed by continuing regulation, which places a limit on profitability and attempts to affect the relationship between prices as they affect different customer classes. Although this regulation generates demonstrable inefficiencies in the product or service market, it may nevertheless be less wasteful than a one-time cash competitive auction.

A second explanation for some forms of economic regulation is that they create the correct incentives for development of new technologies. Railroads, electric power, telephones, radio, and aviation were all new and rapidly developing technologies in their time. Part of the investment required in the development of a new technology is the development of the business methods and commercial practices necessary to exploit the invention effectively. These investments tend to be poorly protected by the patent system. The early railroads, electric-power systems, telephone systems, and airlines had to develop in-the-field procedures to identify and meet the needs of their customers. Freedom of entry would have given competitors the opportunity to copy successful methods without bearing their cost. This circumstance suggests a pattern of "infant industry" protection, followed by an easing of entry restrictions as the industry matures. It is possible to understand contemporary airline, broadcast, and telecommunications deregulation in this framework.

In the case of radio regulation, Ronald Coase (1959) has demonstrated that an emerging system of private property rights was disrupted by administrative regulation, and it is now a widely accepted view that a system of property rights in broadcast frequencies would be better for society than the present arrangement. However, examining the problem from the perspective of 1926 leads to the realization that the problem was not simply one of establishing an exclusive right to use as between competing broadcasters in order to minimize frequency interference. There was also a relationship between the frequencies used by various types of broadcasters and the design and improvement of radio receivers. It would assist the designers of the commercial broadcast receivers to know on what frequencies commercial broadcast stations would operate, and it would help commercial broadcasters to know what frequencies the most generally available sets would receive. Purchasers of radios prefer reasonable assurance that their sets will not become obsolete through technological change, so that they can amortize the cost over a longer period. These problems could, of course, all be solved by a system of first-property rights and subsequent negotiations between broadcasters and set manufacturers. But the transaction costs would have been high, the dissipation of resources caused by the first-possession rule might have been considerable, and the instability of the arrangements would have decreased consumers' willingness to invest in the new technology. The radio conferences of the late 1920s, which laid the foundation for the ensuing radio regulation, might well be viewed as an effort to reduce the transaction costs by facilitating communication between the principal parties and eliminating hold-out problems. In such an environment, the short-term license would make sense because there might be the need to correct technological errors. Once the technology's development had slowed and the industry had matured, the system might then be expected to shift toward a system of explicit property rights.

THE STRUCTURE AND SCOPE OF GOVERNMENT

Two issues central to any legal system—the structure of governments and the scope of their activities—have been little examined in work that shares the perspective of this article. Unlike the situation that applies to property, contract, torts, antitrust, and regulation, the connection between these areas of public law and the economy is less apparent. From the perspective of a hypothesis of productivity maximization, however, these subjects are central. For it is the form of the government that will determine how the law reacts to the society. From a contemporary perspective, three major phenomena attract attention: the large expansion of the voting franchise in the Western industrialized nations during the last two centuries; the expansion of the scope of activities carried on by the governments of these countries in the twentieth century (Peltzman 1980); and the emergence of indigenously imposed socialist or anticontractarian legal regimes in numerous countries during the twentieth century (Popkin 1979).[23]

Durability

Some features of the structure of governments such as the elements in legal systems designed to raise the cost of changing legal rules are rather easily explained from a perspective of productivity. While written constitutions make formal provisions along these lines, the tendency is evident on other levels of the legal system as well. Congress will not regularly reconsider difficult and hotly contested matters. The subject of labor relations was considered in 1916, 1935, 1947, and 1959. Civil rights were addressed in 1790, 1869, and 1964. Tax reform bills have a shorter and more regular cycle. A number of institutional features in the judiciary, such as the heavy emphasis on precedent, are designed to increase the permanence of rules. A specialized legal profession increases the continuity and stability of the law.

From a productivity perspective, permanence has a number of advantages. It decreases the incentives for losers under a particular rule to invest in changing that rule. It reduces the frequency of the occasions on which the costs of adapting to changed rules must be incurred. It enables people to plan their affairs with reasonable confidence that the law will not change. And it assures that there will be meaningful experience with a rule before a change is again considered.

Voting Rights

The expansion of the voting franchise may be explicable on economic grounds. In a society where the elimination of conflict is an important welfare priority, it could make sense to give control to the best warriors. To give those warriors incentives to govern well, it could make sense to give them a large stake in the future value of the society, and this could be accomplished through the emergence of a theory of monarchy. But once

[23] The existence of these regimes is, of course, a challenge for the thesis of this article (as is the medieval period). Their existence is beyond my competence to explain. It is interesting that they seem to occur around the periphery of the developed world as modern technology comes into contact with primitive or feudal legal systems. The shock of that interaction may lead to a breakdown of customary systems of contract and property and their replacement by centralized systems of command and control. This hypothesis implies the prediction that these regimes will slowly decay back toward a property-and-contract system suitable to modern economic conditions.

installed, the king might find that he can maximize the value of his rights by ceding portions of them to others in order to give them incentives to increase their productivity. The emergence of the mass franchise in the nineteenth century may have been a consequence of the breakdown of a command-and-monitor labor-control system in the face of the production technologies of the Industrial Revolution. (It is interesting that the breakdown of slavery systems occurred during roughly the same period as the expansion of the franchise.)

The new technologies may have required incentive systems and the extension of political rights to place the recipients in a position to protect the property rights thus conferred. At the same time, the opening of national markets by new transportation technologies may have made the actions of national governments of concern to a much greater number of people, and they may have expended resources to acquire the right to influence the decisions of a government newly relevant to them.

Externalities and Economies of Scale

Externalities and economies of scale can explain many government activities. Interrelated examples are national defense and law enforcement. Both activities benefit everyone and can be more efficiently rendered by a single, coordinated entity. Other government services that can be plausibly explained by externality effects include education, transportation, and communications. Services that can be plausibly explained by economies of scale include various kinds of social insurance.

These rationales are indeterminate as to the choice among government provision of the service, government purchase of the service, or the use of specifically tailored property rights. A national-defense force can choose to manufacture its weapons or to purchase them, to provide its own housing or to purchase it, and so on. In those instances where a defense activity has significant potential uses in peacetime, social efficiency will be gained either by buying the services from a private firm (as is done in the United States with the reserve civilian airfleet or the provision of much defense telecommunications) or by permitting the defense component to engage in the peacetime economic activity (as is done with the construction potential of the Army Corps of Engineers). The first choice will contract the size of the government; the second will increase it. The fact that education services may involve externalities does not dictate whether the state should operate the school system directly or provide vouchers enabling families to purchase education.

The use of property rights to overcome problems of externality—once a common feature of British law—is now little considered. Economists have long used the lighthouse as an example of a service that must be provided by the government because of externalities. The beacon helps all passing ships, but none need pay; yet Ronald Coase (1974) has shown how, under the provisions of specially designed franchises, lighthouse services were privately provided in England for over two centuries. Various types of bounties can be used to create private incentives for law enforcement (Landes and Posner 1975b). Where economies of scale are present, the exclusive franchise can be used while, in many of these areas, the government may, alternately, itself provide the service. The electric and natural-gas distribution utilities in the United States tend to be exclusively franchised but privately owned, while the water and sewage distribution utilities are publicly owned. (The difference is, perhaps, accounted for by the fact that the efficient

size of the former tends to exceed municipal boundaries, while the efficient size of the latter does not.)

A plausible hypothesis is that changes in the nature of externalities and economies of scale across time and between countries, driven by changes in technology, account for differences in the activities of governments. For instance, the information-handling capabilities of the computer have greatly lowered the costs of transfer payment programs, partly explaining their rapid expansion since World War II. The discussion here will be confined to two topics—the provision of a medium of exchange and the criminal law.

The Medium of Exchange A medium of exchange need not be supplied by the government. It can be a commodity of convenience and value, such as gold or, as was true in colonial Virginia, tobacco. It can be a credit instrument, such as a bill of exchange or a banknote. Throughout most of recorded history, the medium of exchange emerged, like language, through custom. In the last two centuries, governments have increasingly monopolized the function of providing the medium of exchange. The issue is whether they have done so because they have a comparative advantage in the provision of exchange or simply in order to capture the returns from providing it.

The problem with a medium of exchange generated by convention, such as gold, is that real resources must be used to create the medium of exchange. To be attractive, the substance must have real value in the economy and must therefore be diverted from alternative economic uses. Fiat money, on the other hand, which has little economic value, can more cheaply provide the medium of exchange. But this is a social gain only if the fiat money is as good as the nonfiat money.

In postprimitive economies, the real choices have been between forms of conventional-commodity money and pure fiat money. A system of commodity money can be used as a basis for a system of money created by promises to pay, and in such a system the commodity money may be only a small portion of the total available medium of exchange.

The problem of a conventional-commodity money system has been closely tied to the problems of a fractional reserve banking system. A fractional reserve banking system can generate exchange far in excess of the underlying base. But such a system has tended to be unstable, leading to a complex regulatory regime for banks.

The scholarship on money has not focused on the question of what set of legal arrangements produce the socially optimum form of money or to what extent the numerous changes in the monetary arrangements that have been made reflect either improvements or responses to changing conditions. Instead, it has concentrated on the question of whether monetary policies or budget policies have the most important influence on the course of the national economy. This monetarist-Keynesian debate has tended to treat the question as one about the inherent nature of national economies, never considering that the issue may simply be one of the controlling legal or customary rule. That is, in an economy where the legal rules define money exogenously—that is, by the supply of gold—the government can have neither a monetary nor a fiscal policy. In an economy where the rules require the monetary authorities to stabilize the quantity of money, fiscal policy will be unimportant. In an economy where the monetary authorities are forced to stabilize interest rates, fiscal policy will be important.

Milton Friedman and Anna Schwartz wrote their *Monetary History of the United States* (1963) as a contribution to the monetarist-Keynesian debate. It has been recognized and

applauded in this context. What is not generally recognized is that it is a unique example of a study of the effects of changing legal rules over time. The book traces the various American legal arrangements concerning money from 1867 to 1960 and the effects of those changes on measures of the supply of money and upon the gross national product. There is no other area of law where sequential shifts in legal arrangements have been so carefully traced and related to the ensuing economic responses. Only the fragments exist, for example, of a comparable study of the shifting legal policies toward railroads and their effects upon the railroad industry and the economy—to suggest just one topic that might be manageable within the traditional framework of industrial organization (Scharfman 1931–37; MacAvoy 1965; Kolko 1965). Not even this much is available on the changing rules of torts and their impact on accident prevention and accident losses within the economy. It is possible to conceive of monetary policy as directed to a few variables—the quantity of money and the gross national product—while it is much more difficult to describe the output of other legal regimes with concepts that have so limited a number of vectors.

The richness of the insights such a study can provide for a student of law can only be suggested here. The basic legal structure of money in the second half of the nineteenth century was formal and nondiscretionary. Congress set the rules, and the rules determined the supply of money. From 1860 to 1869, the policy was inflationary; from 1869 to 1900, it was deflationary. Perturbations in the gold-based monetary system of the late nineteenth century were introduced by international economic fluctuation. The statutory rule of money creation beginning with the establishment of the Federal Reserve Board in 1911 was highly discretionary, although Friedman and Schwartz are able to reconstruct—from board documents, the record of board actions, and private papers—the actual rules that guided the board and the changes in those rules that took place over time. The study provides a good example of the way in which government bodies that claim to have no rules often in fact do have rules, and how those rules can be reconstructed by subsequent scholarship.

One important aspect of American monetary policy has been control of a fractional reserve banking system, which reduces the cost of producing money but introduces a source of instability into the system. A loss of confidence in the banking system will itself cause a reduction in the supply of money. An important motive for the creation of the Federal Reserve System was to give the private banking system access to a source of additional money during such periods. In the panic of 1907, which precipitated the creation of the Federal Reserve, the monetary contraction was arrested by private agreement among the New York banks to suspend payment (Friedman and Schwartz 1963, pp. 156–68). The agreement violated the banks' deposit contracts, but it worked; the panic passed, and the ensuing depression was sharp but brief. Under the Federal Reserve Act, this option was taken away from the bankers, since it was assumed that they would not need it. In 1929, the option was not available, and no substitute was discovered until President Franklin Roosevelt, in 1933, finally closed the banks.

The Depression of the 1930s is a tragic example of how an economy confronted with a new and untried set of legal arrangements can be seriously harmed. The mechanical monetary systems of the nineteenth century were self-righting. Contraction was counteracted by the international flow of gold. By breaking the link between the domestic monetary system and international reserve assets, the Federal Reserve Act destroyed the self-righting feature. The Federal Reserve System, insensitive to the fact that this

feature of the system no longer existed, and misled by the meaning of nominally low interest rates, continued to drain monetary reserves from the system long after the social symptoms had become acute (Friedman and Schwartz 1963, pp. 299–419). Such strong macro-systems, which restrict the ability of private parties to counteract their effects, can do enormous social harm. The rigid and sweeping regulatory programs enacted in the United States during the early 1970s have a similar potential.

On the fiscal side, little work has been done on the institutions that regulate government budgets (Dam 1977). The national budget process was customarily governed by a requirement of balance. This rule fell to the intellectual onslaught of the macroeconomists, who pointed out that the budget could be economically stabilizing only if it was balanced not over the year but over a cycle (Stein 1969). This may be a good example of how an analysis of rules that looks only to their economic effects in the particular market in which they operate can be seriously misleading. The complexity of the cycle-balance rule seems to have overloaded the political controls and brought an era not of cycle balance but of chronic deficits. The problem is that administration of a cycle-balance rule requires identification of the point in the cycle at which a particular budget year is located. Absent clear rules for this determination, the argument can always be made that "this" year appropriately requires a deficit and that the surplus years will be in the future. Unlike the case of a simplistic balanced-budget rule, it is never clear when the cycle-balance rule is being violated.

The Criminal Law Much of the criminal law can be understood as a system designed to reduce the costs of the property-and-contract system by replacing private enforcement with more efficient public enforcement (Becker 1968; Becker and Landes, 1974). This course has been followed in Anglo-American law for over 200 years. This perspective also explains the intense ambivalence that has attended the use of the criminal sanction in many societies.

A property-and-contract system consumes real resources. Its efficiency requires the owner of property to be secure in the enjoyment of its benefits and his transactions in relation to his property to be voluntary. A property owner will expend resources to protect his holdings; there are reasons to believe that a centralized authority can perform this function more efficiently. Efforts directed at the protection of particular property will benefit all property. Apprehension of a malefactor will reduce the risk of crime to others. There will be substantial economies of scale in patrolling functions and coordinating and exchanging relevant information. These advantages might also be obtained by private agreement among property owners. The government can be viewed as the result of just such an agreement.

Numerous problems arise in connection with the criminal law as a cost-saving device for administration of the property and contract systems. First, errors in its definition and administration—particularly errors of overreach—are not easily corrected. Private parties cannot contract out of criminal liability. Although prosecutors may recognize that aspects of the law are obsolete or inappropriate, they cannot confer immunity, and areas of intermittent enforcement are subject to grave abuse.

Second, the imposition of criminal penalties involves a loss for society. The criminal is removed from productive activities and maintained by the state. An economically optimum criminal-law policy would attempt to make the marginal losses from enforcement of the criminal law equal to the marginal gains. Penalties would be designed so that the

marginal social gain from the penalty equals the social marginal loss from imposing it. As in the usual monopoly case, it is possible that welfare can be enhanced by price discrimination. However, it may be impossible for judges and legislators to make the determinations necessary to achieve perfect discrimination. It is impossible to know the social gain that flows from a particular penalty imposed on a particular offender. Discriminations on grosser categories may run afoul of the social consensus necessary to support the criminal law system. For instance, it is likely that the level of penalty necessary to deter rich people is less than the level necessary to deter the poor. Propertied people are subject to the constraints imposed by the system of civil liability, and their own stake in the system makes them less likely to commit crime. The fact that they have high incomes means that the cost of their time is higher. Thus, a shorter criminal sentence may deliver more effective deterrence than will a longer one imposed on an unpropertied person. Yet, such categorization, subject to inherent error in particular cases, runs afoul of basic notions of equal protection.

CONCLUSION

Work in the area of law and the economic order would be enhanced if members of each of the two major traditions were willing to broaden the scope of their inquiry. The political economists have been quick to identify impediments erected by the law to the efficient functioning of the economy. They have seldom considered, however, the ways in which such impediments emerge out of the larger dynamics of legal development. The sociohistorians, on the other hand, have been all too quick to suspend inquiry as soon as they have identified wealth or power or shifts in prevailing ideology, without considering whether wealth and power represent returns to scarce inputs to production and changes in ideology—adaptations to changing circumstances.[24] A fuller consideration of both macro- and micro-perspectives would enrich the work of both.

For those who wish to explore the body of scholarship discussed in this article further, access to the law and economics literature is facilitated by Posner (1977) and by a series of readers: Ackerman (1975), Calvani and Siegfried (1979), Kronman and Posner (1979), Manne (1975), and Posner and Scott (1980). Two scholars, Hicks (1969) and North (1973, 1978), have sketched general theories of history along the lines argued here, but the state of the literature does not permit their effort to be more than suggestive. Good discussions of the problems of methodology and interpretation are to be found in Dahlman (1980, chap. 3) and Popkin (1979, chap. 1).

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[24]This work would also be improved by attention to elementary price theory, which is often ignored to the detriment of work in this school. Thus, Horwitz (1977) makes numerous elementary errors of inference (see Liebhafsky 1979; Goldberg 1979).

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4

ADJUDICATION, LITIGATION, AND RELATED PHENOMENA

Marc Galanter
University of Wisconsin–Madison

Still, litigation is the test; what distinguishes law from other forms of moral culture is the potentiality for measuring actions against its norms through some institutionalized process to determine their legitimacy or illegitimacy. It is with the possibility of litigation in mind that the law user, professional or amateur, thinks and acts.

***Fallers 1969*, p. 34**

It is a strange thing, the authority that is accorded to the intervention of a court of justice by the general opinion of mankind! It clings even to the mere formalities of justice, and gives a bodily influence to the mere shadow of the law.

***Tocqueville 1953 [1835]*, vol. 1, p. 140**

But is a blurred concept a concept at all?—Is an indistinct photograph a picture of a person at all? Is it even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?

***Wittgenstein* 1958, §71**

LOCATING ADJUDICATION

Adjudication is a blurred concept. Not surprisingly, for it invokes a cultural ideal which exists in several overlapping versions; it also points to a set of behaviors referring to and sometimes approximating this ideal. Ideal and behavior are components of larger systems of regulation and disputing. Much adjudication activity takes place in courts, although these institutions do other things as well. All of this is reflected in the experience and beliefs of varied participants and of wider audiences, popular and elite. This whole configuration of ideals, behavior, institutions, and experience is changing through time.

Thus, the subject matter of this essay resembles a grandiose and ungainly confection composed of distinguishable but interpenetrated irregular rings and layers of behavior, experience, beliefs, ideals, and institutional patterns. The general plan of the essay is as follows. After locating adjudication as a cultural model and a social structure, it proceeds to sketch the wider ecology of dispute processing of which adjudication is a core element. It then moves out through concentric rings to discuss the relation of this model to courts as institutions, to patterns of processing disputes, to personal experience, and to wider social patterns. Finally, it asks how the whole constellation is changing over time.

The primary focus of this essay is on formal governmental dispute institutions in the United States in the recent past. I have insistently if unsystematically sought to illuminate these observations by juxtaposing them with comparisons from other times, other places, and other kinds of legal institutions, both exotic and familiar. The resulting unevenness may have the redeeming value of protecting us from premature closure as well as reminding us how problematic these arrangements are.[1]

The terms "adjudication" and "litigation" overlap in their reference. Both refer to the encounter of "cases" with "courts." But each emphasizes different aspects of the process. Adjudication refers to something the court does—to the process of judging. It conjures up the ceremonious, stately, dignified, solemn, deliberative, authoritative. Litigation, on the other hand, refers to what the adversaries do: their activity may be noble or vindictive or frivolous. Litigation entails the possibility of adjudication, but they may become disassociated, so that there can be litigation without adjudication. They are fused, but the relationship is not invariate. They are two sides of a process, like education and

NOTE: I have been rescued from the worst consequences of my folly in attempting to encompass this topic by the friendly assistance of colleagues who generously commented and helped with sources. Without associating them with the gaps and flaws in this account, I would like to acknowledge the help I received from C. Ronald Ellington, Richard B. Hoffman, J. Willard Hurst, Herbert Jacob, Richard Lempert, Leon Lipson, Stewart Macaulay, Alan Paterson, Austin Sarat, and David Trubek. During its protracted gestation, this essay benefited from the capable research assistance of Susan Bissegger, Mark Lazerson, David Lerman, Joan E. T. Stearns, Reg Stites, Ann Ustad, Gary Wilson, and Laura Woliver. It also benefited from my concurrent involvement in projects supported by the National Endowment for the Humanities and the National Institute of Law Enforcement and Criminal Justice, and from my participation in the National Conference on the Lawyers' Changing Role in Resolving Disputes, held at Harvard Law School in October 1982. The views contained here are my own and should not be attributed to any of these benefactors.

The imperatives of closure oblige me to resist the inclination to incorporate more of the burgeoning literature on litigation, courts, and "alternatives" that has appeared since this essay was cast into its present form in 1983.

[1] The "we" and "us" that populate these pages are a company composed of author and reader. That company does not include the authors of the other essays in this volume or its editors.

school; they each drain meaning from the other. Hence, we can't understand that complex unless we look at both.

Adjudication refers to one of the core phenomena of the legal process. Though not one of the most frequent, it is important not only when it does occur, but also

1. as a potential recourse—a threat or escape;
2. hence, as a source of counters that can be used for bargaining or regulation in other settings;
3. as a model for other processes;
4. as a symbol exemplifying shared or dominant values and hence as a source of legitimacy for norms, offices, acts and so forth. (This aspect is compounded in common-law systems, where adjudication is the primary focus of legal scholarship and holds sway over legal thought vastly disproportionate to its prominence as a source of rules.)

Much of the meaning of other activities in the legal process is expressed in terms of this adjudication core. The making of claims, the arrangement of settlements, the assessment of official action—all these frequently involve reference to adjudication—to actual adjudication or to some imaginary adjudication that could take place.

The Adjudication Matrix

I began by viewing adjudication as a kind of third-party processing of disputes, in which disputants or their representatives present proofs and arguments to an impartial authoritative decision-maker who gives a binding decision, conferring a remedy or award on the basis of a preexisting general rule. I use this not as a set of essential qualities that define adjudication, but because it serves to plunge us in the midst of the set of phenomena to be examined. There is not a single discrete process which can be identified as adjudication. Instead we are addressing a family or cluster of processes that resemble one another and approximate this model in varying ways. Just which are to be accounted adjudication and which are something else is a fruitless question. I shall proceed by constructing a prototype of adjudication, attempting to identify various dimensions in our picture of it and to suggest the range of variation along these dimensions. I shall then attempt to present some instances of current understanding of that variation and of its connection with other aspects of the legal process and with wider social processes.

To identify the structural features and cultural commitments that we regard as adjudication and to understand the affinities and contrasts between different kinds of adjudicative processes, I suggest a series of contrasts or polarities. (These are not meant to indicate dichotomies; rather, they represent points on a set of continua.) In each, the first term is taken as a characteristic of adjudication (or at least of one type) as opposed to other dispute processes. These form a matrix of expectations that I find helpful to describe and explain adjudication and related phenomena.

The matrix is useful because there is a significant clustering among features on the left-hand side of Table 1, but not all these features are present in all real-world instances that we would call adjudication. Indeed, it is unlikely that they would be, in the light of the tensions between some of the characteristics associated with litigation. For example, adjudication involves a simultaneous commitment to decide according to general rules and to handle each case on its individual merits. This suggests that our list (and our

TABLE 1

Some Elements of the Adjudication Prototype

	Elements	Departures
Intake	Individuated	Routine, Random
	Case-by-Case	Programmatic
	Reactive	Proactive
Process	Participative	Nonparticipative
	Forum governance	Disputant Control
	Narrow Relevance	Wide Relevance
Basis of Decision	Formalistic	Result-Oriented
	General Rules	Particularism
	Preexisting Rules	Rule-Making
Decision	Arbitral	Mediative
	Award or Remedy	Therapeutic Reintegration
	All or None	Compromise
	Binding	Advisory
	Final	Continuing Readjustment
Differentiation	Remote	Accessible
	Professional	Lay
	Mediated	Direct Participation
	Recondite	Common Understanding
	Impermeable	Permeable
Connection to Power	Impartial	Allied
	Independent	Dependent
	Governmental	Private
	Coercive	Voluntary

commitments) embraces multiple and perhaps conflicting notions of adjudication. (I would expect even less clustering among the features represented by the right-hand end of each of these dimensions because deviations from adjudication may lie in very different directions. There are more than two kinds of things in the world.)

The items in the left-hand column reflect my sense of the "classical" picture of adjudication in the mid-twentieth century United States imparted to me in my legal education and embellished by subsequent reading and reflection. That this picture fuses descriptive and prescriptive elements is not without advantages. For the matrix enables us to locate competing visions of adjudication as an ideal. Certain of the features listed in the left-hand column are often taken as crucial elements of adjudication, and others as necessary means to achieve them. (Of course, there may be disagreement about which are ends and which are means.) Other observers commend departures from features listed on the left,

on the ground that adjudication would be improved by a greater admixture of result orientation, rule-making, wide relevance, mediation, and so forth. Prescriptive visions of adjudication need not be projected to the end points of our continua.

For convenience, I sometimes refer to the locations where adjudication is found as *courts* and the presiding personnel as *judges,* although adjudication takes place at other institutional locations and under the auspices of persons without that title. And, of course, courts and judges in the narrow sense do many other things besides adjudication.

Table 1 lists the dimensions discussed below. To portray the variation along these continua, I give a brief sketch of each of the elements of the prototype and then note *in brackets* some of the departures from the prototype frequently found to be cohabiting with its real-world embodiments.

Individuated, Case-by-Case Treatment In the adjudication process the units of action are discrete *cases.* The forum addresses delimited controversies between identified persons (or corporate entities) rather than general situations, patterns, problems, or policies. It is obligated to give individuated treatment to each case, not treating cases en masse or on a random or probabilistic basis, but deciding each according to its own merits or qualities.

A case is typically bi-polar. There is a complaining party and one who is the subject of the complaint. Both sides may complain against each other, and each side may be a composite, with disputes among its members. Courts vary in the extent to which they permit a cluster of disputes to be treated as a single case. They also vary in the extent to which they permit whole classes of controversies to be aggregated or decided vicariously and the extent to which general problems may be deliberately packaged in the form of a case in order to address a general condition or to elicit a generalized pronouncement from the forum (for example, the "test case"). And while adhering to bi-polar forms, courts may address complex polycentric disputes (cf. Fuller 1978, p. 394) in which a variety of contenders are arrayed around an issue (cf. Fiss 1979, p. 21).

[Courts develop routines that undermine the individualized response to cases, ignoring their distinctiveness and treating them as fungible (Mather 1973; Sudnow 1965). And courts may depart from case-by-case treatment to adopt a more programmatic focus, in which their response to individual cases reflects concern about a general policy (Galanter et al. 1979). Indeed, commitments to generality, consistency, and publicity may lend a case significance beyond the controversy at hand. Calculated pursuit of such significance—such as deterrence or prevention—pulls against the commitment to individuation.]

Reactive Mobilization of Cases The adjudicative forum is reactive in the mobilization of its agenda of cases (see Black 1973). The cases are brought to the forum by the initiative of the parties (including institutionalized public accusers); the forum does not reach out proactively to bring cases into itself. Thus a Federal District Court erred in notifying, on its own initiative, potential claimants in a mass accident and inviting them to join the proceedings (*Pam American World Airways* v. *United States District Court,* 1975, pp. 1077–81). [There are historical instances of tribunals with power to initiate cases on their own. Courts may be more closely linked to the initiation of cases. Thus, Haller (1979, p. 274) observes that "[t]hrough the colonial period, the [American] courts generally controlled their caseloads because they issued arrest warrants on complaint of aggrieved

citizens and because the rudimentary enforcement officers, such as constables, were generally agents of the courts." Contemporary courts find other ways of encouraging or discouraging particular kinds of cases; some try deliberately to affect the composition of their docket by means ranging from cues to attorneys (Galanter et al. 1979) to lobbying to exclude certain classes of cases from their jurisdiction (see, for example, Burger 1970, p. 933). Reactivity may also be limited by discretionary intake: in the past century, American state supreme courts have gained increasing discretion to choose which cases they hear (Kagan et al. 1978).]

Participation The disputants participate by presenting proofs and arguments. Often this participation is through expert intermediaries. Participation may be attenuated as, for example, where the forum undertakes responsibility for investigation and proof as is done by the Swedish Public Complaint Board (Eisenstein 1979), or it may approach management of the case by the disputants. [In fact, in a sizable portion of cases in American courts, the defending party is absent and the presentation of proofs and arguments is perfunctory, if not dispensed with entirely.]

Forum Governance The forum presides over (or consists of) a set of preexisting forms to which it is committed—in contrast, for example, to the Law of the Sea Conference or the Warren Commission. Once initiated, the case proceeds under the control of the forum, according to procedures prescribed by the forum. The forum cannot be dismissed by the parties—as can an arbitrator—nor can they amend its procedures. Important variations in the extent to which the forum delegates control over certain segments of the proceedings to the parties—or to intermediaries certified by the forum to act on their behalf—are discussed below under the rubric of "passive versus active courts."

Narrow Scope of Relevance The case is defined by claims that specific events, transactions, or relations should be measured by application of some delimited conceptual categories. The forum will hear only matters that are relevant to application of those categories. Frequently its willingness to admit proof and arguments is limited further by other policies—such as those crystallized in rules of evidence, and *res judicata.* Here the forum contrasts with other remedy agents like mediators and counselors who are open to a wide range of matters underlying and connected to the immediate dispute. [Adjudicative fora may have broad rules of relevance, as does the *kuta* of the Lozi of Northern Rhodesia studied by Gluckman (1955). Even the same forum may vary in the scope of relevance: thus, Gluckman (1955, pp. 67, 68) observed that where Barotse disputants were involved in multiplex relationships, the *kuta's* inquiry was broadened to take into account all aspects necessary to reconcile the parties and repair the relationship, while in disputes between strangers the court focused on narrow issues.]

Formal Rationality The discourse that goes on in connection with adjudication is not open and unbounded. There is a repertoire of legal concepts that is less inclusive than the whole universe of moral discourse or the whole array of sanctioned social norms. The claims of parties are assessed in the light of some bounded body of preexisting authoritative normative learning, to which the forum is committed in advance. Typically, the forum renders a decision by judging the conformance of the parties' claims to established

general categories or classificatory concepts (Dibble 1973; Levi 1961; Fallers 1969, p. 32). Application of these general standards precludes response to the unique particularity of the situation or to the external consequences of the decision (cf. Kennedy 1973) and proceeds without a fresh assessment of the wider consequences of the general norm that is being applied. Thus, adjudication approximates to "logically formal rationality" as postulated by Weber (and helpfully explicated by Trubek 1972, pp. 727ff).

[In fact, courts depart from this model of austere formalism in various ways. Appellate judges frame general rules in the hope of producing optimum results (to the dismay of the votaries of "neutral principles" such as Wechsler 1959). Judges at all levels are imbued with a sense that it is their mission to facilitate governmental policies of minimizing drunk driving, prostitution, or pollution (see Galanter et al. 1979). Or—in the style that Weber called "khadi justice"—judges feel impelled to respond to the particular circumstances rather than subsuming cases under general rules (see, for example, Levin 1972).

The inherent ambivalence of general standards requires that judges choose among alternative specifications of norms (cf. Gluckman 1955). In complex legal systems, choice is amplified by the inevitable conflicts and overlaps within a body of norms and among competing bodies—as, for example, in situations of "legal pluralism" (see Tanner 1970; Hooker 1975), where more than one system of legal concepts may be present and available to the disputants and the forum.

At least some adjudication involves parts of the law that are "open-textured," and judges have to choose among variant readings of the existing body of normative learning (Hart 1961; Llewellyn 1960; Levi 1961). Such open-ended rule-making authority may be acknowledged and cultivated or covert and confined. There may be more or less emphasis on the obligation to apply concepts consistently with earlier applications. One dramatic sort of unacknowledged change is the presence of legal fictions, in which fictitious recitals are employed to trigger a desired result without departing from the constraints of authoritative conceptual categories (cf. Fuller 1967).]

Decision and Remedy Rendering of some authoritative disposition is mandatory: the adjudicator, with her agenda assembled by the parties, is obliged to hear all those cases properly before her. She cannot (as can, for example, the legislature or executive) decline to render a decision. The judge renders her decision on the merits (ascertained in terms of the authoritative learning) rather than arranging an agreement acceptable to the parties. The forum renders an award or remedy to one party rather than engaging in therapeutic reintegration of the parties. The decision is all or none: the forum grants or denies the claim of one party. Indeed, there may be norms against compromise (Coons 1964). The decision is binding rather than advisory. The decision is final. Although there are procedures for trying to reopen it, there are also norms that render readjudication difficult. Typically, the forum cuts its links with the dispute and closes the case rather than undertaking a course of continuing supervision or readjustment of its decree.

[Institutions that are recognizably courts may depart from these features in various ways. In the United States, for example, courts do exercise control over the agenda of cases; there are courts which seek therapeutic reintegration of the parties (see, for example, Foster 1966); compromise decisions and arranged settlements are endemic (see pp. 199–202 below, on settlement); court decisions are often unenforced; continuing supervision and readjustment—traditional in a few areas like railroad reorganization and child custody and support—has expanded in modern "structural" or "public law" or

"extended impact" litigation so that judges have undertaken continuing supervision of prisons, mental hospitals, schools, and the like.]

Conversely, courts that avow to reconcile parties and repair relationships may, in fact, act very much like prototypical adjudicators, imposing all-or-none decisions on recalcitrant parties. Starr and Yngvesson (1975, p. 556), reanalyzing Gluckman's material (1955), find that even in cases involving multiplex relations among the disputants, the Barotse court usually "decided in favor of one litigant at the expense of the other, and [made] no further attempt at reconciliation. . . . " Reassessing this and other anthropological work, Starr and Yngvesson stress the need to distinguish the process from the announced goals of the forum, whose notions of compromise and balance may diverge from that of the parties, particularly where there are disparities of power.

Differentiation Adjudication is differentiated from other activities. (Cf. Bohannon's notion [1965] of law as reinstitutionalization of norms and Hart's notion [1961, p. 78] of law as involving secondary rules.) Abel (1973) provides an elaborate analysis of forum differentiation and its consequences. Typically, adjudication involves special locations, persons, roles, language, postures, costumes, and furniture. Often it involves moving to unfamiliar places and settings, movement that may represent substantial cost or an insurmountable barrier. Many reform schemes aim to dispel this remoteness and lower this cost.

Adjudication is, typically, conducted by professional specialists who have recourse to special forms of knowledge, discontinuous with everyday understandings, and not expressed in everyday language. This specialized learning may be generated in the adjudicative institutions themselves—as in common-law systems where the higher strata of judges produce the doctrinal literature—or there may be, as in contemporary Europe (continuing the Roman tradition), a division between the judge who decides the cases and the legal expert who cultivates and transmits doctrine (Dawson 1960, p. 34; Merryman 1969).

Participation is, typically, indirect and through specialist intermediaries who are attached to the forum or have a monopoly on such intermediation. Enforcement, too, is entrusted to specialized functionaries (bailiffs, jailers) rather than carried out by the parties, their allies, or the community through ostracism or direct physical imposition.

The whole process is insulated from general knowledge about persons and their histories and statuses. Justice is blind; the decision-maker excludes the perceptions and commitments of everyday life to render a decision based solely on those aspects identified as salient by applicable legal categories.

[There are many sorts of departures from this removed, insulated, and impermeable character. Juries, lay assessors, elected judges, short terms of office, and other devices link the process to community concerns and understandings. Permeation by considerations of community standing (Cohn 1959) or political correctness (Lubman 1967) may be deemed proper—or the whole process may be crudely manipulated to external political ends (Kirchheimer 1961). Apart from the deliberate utilization of such bases of decision, the structure of adjudicatory institutions may enable parties to import into the forum their advantages of power, wealth, and experience (Galanter 1974).]

Impartiality and Independence The forum is impartial. It is not predisposed toward any party. The decision-maker is not an ally of either (set of) disputant(s), but is

poised evenly between (or above) them. Unlike the manager or administrator, the adjudicator has nothing of her own at stake in the controversy. Nor is the judge an agent of any entity outside the forum, with responsibility to forward policies other than those crystallized in the applicable legal learning. Impartiality and independence are institutionalized in restrictions on contact with disputants and such devices as tenure and fixed pay to protect the judges against "command influence" and retaliation. [Eagerness to preserve a visibly independent judiciary may induce regimes to remove from regular courts classes of cases thought to require politically responsive judging (Toharia 1975b).]

Attempts to explain patterns of judicial decisions in terms of race or class bias have yielded sparse results (Hagen 1974). Thus, a study of felony dispositions found that little outcome variation could be explained by indicators of overt bias (Eisenstein and Jacob 1977). [However, studies of trial and appellate courts have established that judges give expression to their own policy preferences (for example, Rohde and Spaeth 1976), and their perceptions of public opinion (Gibson 1976). Apart from the carry-over of personal preferences into the judicial role there are structural factors which cut against impartiality. Despite his position as detached umpire, the judge is perforce an agent of the polity, committed to presiding over the administration of various public policies and not uncommonly concerned to effectuate these policies (Galanter et al. 1979; on the pull toward alignment with one of the parties, see the account of Frankel 1976). Governments are often not content with the alignment produced spontaneously, but resolutely enhance it by deploying their powers as employers over appointments, promotions, transfers, and so forth (Bayley 1964, p. 132).]

The forum, as many have observed, tends to develop its own distinctive views, interests, and needs (Starr and Yngvesson 1975; Kidder 1974; Abel 1973; Aubert 1967). The third party becomes another party. Its institutional needs become one of the determinants of the process that transpires there (Balbus 1973; Blumberg 1967). Differentiated and partly autonomous institutions of adjudication are achieved at the price of institutionalizing a distinctive outlook and interest that transforms disputes and colors the application of policy. (And, it should be noted, increasing autonomy and professionalism, typically thought conducive to improved performance, may sometimes be associated with corruption and pursuit of personal ambition [Kagan 1981, pp. 207–8].)

Connection to Organized Power The prototypical adjudicative institution is an organ of government: it is located in a public building, it is staffed by state officers who apply public norms, and its sanctions are imposed by the compulsory powers of the state. [Historically, the notion that adjudication is a state monopoly is a relatively recent one (Dawson 1960, pp. 5ff.; Weber 1954, pp. 140ff.). In practice, there is an immense amount of adjudication in the private sector—in tribunals embedded in various institutions (churches, universities, labor unions, exchanges, trade associations, and so forth) as well as specialized institutions for arbitration (Mentschikoff 1961). The line between public and private is not a sharp one. Public norms may be applied in private tribunals and enforced by private sanctions; conversely, public tribunals, officials, and sanctions may be utilized to enforce private norms.]

Courts are coercive rather than voluntary. They impose outcomes regardless of the assent of the parties. But, in fact, their decrees are often unenforced. The coercive powers of courts are important even when they are not utilized, for the threat of their use induces settlements between the parties—often, capitulation by one party. The degree of

compliance with settlements is higher than with verdicts (Community Service Society 1974; McEwen and Maiman 1984).

Adjudication in the Ecology of Dispute Processing

The adjudication cluster shades off into other kinds of "third-party" decision-making (mediation, arbitration, therapy, administration, political decision-making). All of these third-party processes may be elements in a complex ecology of dispute processes found in most societies. (On the plurality of dispute and remedy processes in all societies, see Abel 1973; Pospisil 1967.) The mapping of this ecology is only beginning and has proven extremely difficult (see Ladinsky et al. 1979). Table 2 provides a simple taxonomy of modes of dispute processing in terms of the basic numerical configuration—a simplification commended for its mnemonic virtues as well as for its (admittedly weak) evocation of the nature of the activity and experience associated with that mode. It is necessary to

TABLE 2

A Taxonomy of Modes of Dispute Processing

Three Parties	Adjudication
	Arbitration
	Fact-Finding
	Mediation
	Therapy
	Administrative Decision-Making
	Political Decision-Making
Intermediate Forms	Champion (e.g., ombudsman)
	Parental Dyad (i.e., one party decides)
Two Parties	Bargaining/Negotiation
	Under threat of resort to third party
	In presence of group norms
	Under threat of exit, or other unilateral action
One Party	Exit
	Avoidance
	Self-help
	Resignation ("lumping it")
No Parties	Failure to Apprehend Remedy
	Claim
	Violation

NOTE: Arranged by the number of principal persons/roles involved in the process of seeking a remedy or resolution. This classification omits various support roles (informer, adviser, advocate, ally, and surrogate) described by Black and Baumgartner 1983.

sketch this larger ecology because adjudication exists not in isolation, but in the context of many other kinds of dispute processing. The kinds of claims and defenses asserted and the arguments used in adjudication may be carried over to other modes. Possible resort to adjudication is an important resource in other arenas; finally, the working of these other modes affects the agenda and substance of the adjudicatory institutions.

Table 2 lists various modes of dispute processing. Each of the terms—arbitration, negotiation, and so on—could be subjected to the same kind of analytic disaggregation as the notion of adjudication. Each refers to a family of arrangements, whose characteristics overlap with members of other families. Since these modes are related along a number of different dimensions, there is no single correct arrangement of these constructs, but I hope that they provide useful landmarks.

Table 2 distinguishes several prominent varieties of third-party dispute processing. Like *adjudication*, each of the others can be thought of as a clustering of the characteristics displayed in Table 1. Thus, *arbitration* refers to a family of processes that share such features as an impartial decision-maker, who enters a binding final award on the basis of proofs and arguments presented by the disputants (or their representatives). It commonly departs from adjudication in that the forum is selected by the parties (either ad hoc, by contractual undertaking, or by adhesion to a standing procedure) and that the forum is nongovernmental. There is also variation as to whether the arbitrator is constrained to decide in accordance with a prefixed body of norms and whether the norms applied are public ones or indigenous to a particular setting. Arbitration may be present in an attenuated form of *fact-finding* in which the parties accept the decisional implications of a finding on the facts and delegate the latter to an agreed upon third party—such as the lumber grader or the patent office. (Fact-finding may have important effects on negotiating positions even where parties have *not* agreed to accept its decisional implications.)

Many kinds and styles of arbitration can exist within a single society. Among the common varieties in the United States are labor arbitration, in which the "law of the shop" is applied (Getman 1979); commercial arbitration in the standing bodies of self-contained trade associations applying norms of the trade; commercial arbitration by ad hoc arbitrators applying some version of governmental law (see Mentschikoff 1961); and the arbitration of tort cases or small claims under the auspices of a court that urges or requires that such cases be diverted to arbitration (Levin 1983).

Mediation refers to a contrasting cluster of dispute processes in which the forum, rather than imposing a binding solution on the parties, arranges a settlement that is agreeable to them. Mediators range from the mere go-between carrying messages, to one who actively devises a solution and persuades the parties to accept it. The mediator may be a specialized standing body or a notable mobilized ad hoc for the purpose (such as the shopping center manager in MacCollum 1967). Mediators may be reactive, or they may be proactive like the mediators in pre-Communist China (Cohen 1966, p. 1217) and Communist China (Lubman 1967, p. 1321). Judges or arbitrators often seek to mediate a dispute, holding in reserve their power of binding decision. Although this mixed form ("med-arb") has been attacked as compromising the integrity of each process (Fuller 1963), it is strikingly prevalent in American dispute processing in settings as varied as labor arbitration, arrangement of consent orders by administrative agencies, plea bargaining in criminal cases, and judicial arrangement of settlements in civil suits.

Mediation shades off into *therapy*—that is, modes of dispute processing that aim not to

secure agreement from parties as they are, but to change the parties by giving them insight into their situation or themselves (Gibbs 1967; Golding 1969). Therapy, too, may be mixed with other forms, as in counseling under court auspices (Foster 1966).

Like mediation and therapy, *administrative decision-making* is prospective. But the administrator (for example, the school principal or welfare official) exercises control over the subject matter or parties that extends beyond the immediate dispute; he is responsible for fulfilling the goals of his organization; his aims are not confined to the universe of claims posed by the parties. His inquiry is not restricted by limiting rules of relevance and admissibility; his decision need not apply preexisting general standards (Eckhoff 1966; cf. Fuller 1969, pp. 207ff. on the contrast between legal authority and managerial direction). Of course, agencies with administrative responsibilities may commit themselves to abide by adjudicatory forms.

With *political decision-making* we move away from the impartial and independent decision-maker to one who can be recruited as an ally. The permissible devices of persuasion are enlarged to include exchanges with the decision-maker (support, fealty) as well as proofs and arguments. We move away from the bi-polar case to the polycentric dispute and away from the obligation to decide by reference to a closed stock of preexisting rules to forthright fashioning of new rules—or away from general rules to individual ad hoc decisions. The same subject matters (divorce, incorporation, franchise, territorial dispute) may be handled by political, administrative, or adjudicative decision. Political decision-makers will often act as if they are subject to the constraints of an adjudicator and will engage in mock-adjudicative forms and justifications.

Although the most prestigious and visible third-party processes are governmental in location, sponsorship, personnel, norms, and sanctions, modern societies are honeycombed with third-party processes that are nongovernmental. These range from forums that are relatively independent in all of these respects (for example, religious courts) to those that are closely appended to governmental processes, dependent on them for norms and sanctions. These appended processes include private forums established to forestall governmental intervention in a trade (such as the Motion Picture Code Administration described by Randall 1968) as well as systems of negotiation or mediation that flourish in the anterooms and hallways of official adjudicatory or administrative decision-makers (see, for example, Ross 1970; Macaulay 1966, pp. 153ff.; Woll 1960).

Dispute forums may be separate institutions (a court, the American Arbitration Association, or the like) or embedded within the social setting (workplace, school, church, and so forth) where a dispute occurs. Embedded forums range from those barely distinguishable from the everyday decision-making within the institution to those such as grievance hearings specifically constituted to handle disputes that cannot be resolved by everyday processes.

These three-party processes stand in contrast to *bargaining* or *negotiation* between two disputing parties. Negotiation ranges from that which is indistinguishable from the everyday adjustments that constitute the relationship between the parties to that which is "bracketed" as an emergency or a disruption of that relationship. Negotiations among businessmen (Macaulay 1963), between injury victims and insurers (Ross 1970), among parties to an uncontested divorce (Mnookin and Kornhauser 1979), or in (some styles of) plea bargaining of criminal charges are alike in that no third party is present; but the course of the negotiations is importantly affected by the kind, feasibility, and cost of potential third-party intervention. The ability to invoke a third party of a particular sort

may be a crucial element in the bargaining, but such a threat may be insignificant compared with (usually tacit) threats to withdraw from beneficial relations or to cause reputational damage by circulating information to other interested parties. The bargaining parties may themselves have internalized the normative idiom of the third party. (Cf. Barkun's observation [1968, chap. 6] on shared values as effectuating implicit mediation and Eisenberg [1976] on the role of norms in dispute negotiations.)

The contrast between two- and three-party modes is further blurred by the presence of intermediate forms. The *champion*—neither an arbiter with authority to render a binding decision or a mere representative of one party—combines advocacy on behalf of one disputant with an element of investigative judging. The champion is familiar to us in his recent incarnation as the (government) ombudsman (Gellhorn 1966; Anderson 1969; Hill 1976) and in the media ombudsman such as "action line" columns (Palen 1979; Mattice 1980), the complaint bureau, the Better Business Bureau (Eaton 1980), and the elected official who intervenes on behalf of constituents (Mann 1968; Karikas 1980).

The champion is a third party who is something less than a decision-maker. In another intermediate form which I call the *parental dyad* one of the two parties serves as decision-maker as well as disputant. Thus, insurance companies decide the complaints of aggrieved policyholders (Ross 1975); automobile manufacturers decide the warranty claims of car buyers (Whitford 1968); architects serve as both arbitrators and owners' representatives in disputes between owners and building contractors (Johnstone and Hopson 1967, chap. 9). Such decision-makers may be obligated to observe some or many of the requirements ordinarily incumbent on an adjudicator—such as hearing arguments or deciding according to preexisting rules. When we recall administrators disposing of subordinates' complaints and parents deciding (their) disputes with their children, it is evident that the parental dyad is one of the most frequent dispute configurations.

So far I have been discussing modes of disputing that are discursive (what Hirshman 1970 calls "voice"). But there are also unilateral—hence, nondiscursive—modes of processing disputes. These include *exit*—that is, withdrawal from a situation or relationship by moving, resigning, or severing relations, as well as various lesser forms that might better be termed *avoidance* (Hirshman 1970; Felstiner 1974).

Exit and avoidance may be the goal, as well as the sanction, in the dispute process. A disputant may threaten resort to a court in order to effectuate a desired exit (Merry 1979, p. 894). On the other hand, the presence of exit as a credible sanction may be important to the working of other remedies; that is, the threat of resort to exit may create a "bargaining endowment" just as does the threat of resort to adjudication. A remedy for one party may be a sanction to the other, and the threat of sanction may induce remedial action. Exit options are not inherently incompatible with the pursuit of other remedies. The rights-assertion dimension may be usefully distinguished from the exit-versus-remain dimension: an aggrieved party can remain and acquiesce (lump it) or remain and assert his claim; similarly, he may simply leave or he may leave and assert his claim as well (Bruinsma 1979).

Exit and avoidance do not exhaust the possibilities of unilateral dispute processing. *Self-help* includes various forms of direct action—taking or retaining possession of property as well as physical retaliation, overt or covert. Direct physical violence may be the most prominent element in a system of disputing (Hasluck 1954) or it may play an interstitial role (as in the American neighborhood depicted by Merry 1979, p. 912).

Disputants may decline to pursue any of these options and may resign themselves to an

unfavorable situation: gains of the available dispute options may appear too low or the cost too high (including opportunity costs, the psychic costs, and physical risks of disputing). Such *resignation* ("lumping it") behavior may be a matter of allowing a single incursion to pass without protest or it may involve acquiescence in continuing predation. Merry (1979, p. 903) describes the frequency of endurance of continuing conflict where the costs of avoidance are too high. Such inaction on the part of individuals has its counterpart among institutions and official disputants such as police, prosecutors, and agencies. (See below, p. 185.)

Resignation—"lumping it"—shades off into *failure to apprehend* a violation or grievance (or underestimation of its seriousness) or the possibility of remedy. Vast numbers of warranty violations, exposures to dangerous substances and conditions, acts of malpractice, and so forth remain undetected. With these cognitive barriers we eliminate the last of the parties and with it the dispute. (The construction of disputes from perceptions of injury is discussed below [pp. 183–186].)

ADJUDICATIVE INSTITUTIONS AND THEIR TRANSFORMATIONS

The first part of this essay portrayed adjudication as a family of dispute mechanisms displaying certain resemblances. Specific members of this family exist as elements in an ecology of mechanisms for constructing, processing, and suppressing disputes. The next part sketched some of these other mechanisms. Adjudication is characteristically located in specialized institutions called courts.[2] Examining these may reveal some of the concomitants of variation in adjudication and may display some of the connections of adjudication to other modes of dispute processing within and outside the courts.

Specialization

Specific adjudicative institutions do not exist in all human societies (Wimberley 1973; in coding a sample drawn from the Human Relations Area Files, he defined courts as "institutions of one or more judges possessing authority to make binding decisions recognized by society," p. 79). Mediation is more widespread and possibly presents an earlier stage in the evolution of legal institutions (Schwartz and Miller 1964). In any event, some adjudication seems to be present in all nation states, and many societies that are not so constituted have institutions in which adjudicative functions are concentrated in separate organs. Such institutions may combine their judicial functions with administrative ones, like the Lozi *kuta* (Gluckman 1955), or may be exclusively judicial, like the Soga court (Fallers 1969). This pairing suggests that a less specialized tribunal is not necessarily less explicit or less elaborate in the performance of its judicial function. Common-law courts have often performed nonadjudicative functions: Dawson (1960, p. 8) describes English local courts of the thirteenth to seventeenth centuries as "mi-

[2]Not all such institutions may be called courts in local parlance, and those who preside in them may not enjoy the honorific title bestowed on those who preside over a court. For example, in the United States there are many "courts" located outside the "judicial branch" of government. The status of their officers as "judges" is ambiguous. In 1979, the federal government had a body of "Administrative Law Judges," as Hearing Examiners were renamed in 1972, approximately the size of the judiciary staffing the federal courts (Mans 1979).

crocosms of government organized under judicial forms." Courts may resist the allotment of tasks they view as nonjudicial and observers may fear that institutional integrity is compromised by courts' performance of nonjudicial functions. Nevertheless, most American courts retain an admixture of responsibilities other than adjudication such as naturalization, incorporation, name changes, marriages, and appointment of public officials. (On "the other things that courts do," see Schwartz 1981.)

Courts may not only devote themselves exclusively to adjudicatory functions, but they may specialize in specific sorts of cases. Most courts have jurisdiction over less than all the legal controversies in their societies. Jurisdiction may be limited by territory, by parties (like citizens), by amount or seriousness, or by type of case. The typing may be by some large division such as civil versus criminal, or by finer divisions: courts may be confined to cases involving housing, taxes, domestic relations, claims under government contracts, or the like. Specialized courts tend to occupy the lower reaches of judicial hierarchies, but there may be several tiers of specialized courts, including specialized appellate courts. Higher courts tend to be less specialized, but their jurisdiction is confined in other ways (by foreclosing appeal on many issues, confining review to issues of law rather than fact, and so forth).

Specialized courts may produce different results than do general courts. A study of the United States Court of Customs and Patent Appeals, found evidence that "specialization tends to increase the influence of litigation groups over judicial decisions, and that increased influence may lead to policies that differ significantly from those made by generalist courts" (Baum 1977, p. 846). Assignment to a specialized housing court was found to elicit more programmatic and mission-oriented judicial behavior (Galanter et al. 1979).

Density: The Number of Courts and Judges

Notwithstanding the formidable difficulties of identifying courts and judges for purposes of comparison, the sketchy data available suggest that great disparities exist among societies in the quantitative presence of adjudicative institutions, disparities which have not attracted attempts at systematic explanation. Among industrialized democratic countries, there is a striking variation in the number of judges per million population, as noted in Table 3.

Table 3 displays the dramatic disparities in the presence of judges[3] and the very different ratios of judges to the total number of legal practitioners. Of course, these dramatic contrasts have to be qualified by noting the problem of counting who are judges and what are courts. Similar bodies may be deemed courts in one place and administrative tribunals in another. Are zoning boards and licensing bodies courts? And what of all the counterpart institutions in the private sector—grievance committees, review boards, arbitrators, and the like?

Notwithstanding the vagaries of identification and measurement, Table 3 suggests the presence of important variation. Some of the variance may be associated with differences between civil-law and common-law systems. Common-law adjudication delegates to lawyers tasks performed by the judges themselves in civil-law systems. But the variation

[3]These disparities seem to predate modern conditions. In the eighteenth century the number of royal judges in France was over 5,000, compared with about 15 in England, which had about one quarter the population of France (Dawson 1960, pp. 70–72).

TABLE 3

Judges and Lawyers in Selected Countries

	Judges			Lawyers		
	Year	Number per Million[1]	Source	Year	Number per Million[1]	Source
Australia	1977	41.6	c	1975	911.6[2]	e
Belgium	1975	105.7	d	1972	389.7	b
Canada	1970	59.3[4]	g	1972	890.1[3]	f
Costa Rica	1970	64.8	j	1970	293.1	j
England-Wales	1973	50.9[4]	g	1973	606.4[5,6]	g
France	1973	84.0[4]	g	1973	206.4[5]	g
India	1971	10.9[7]	n	1981	323.6[8]	n
Italy	1973	100.8[4]	g	1973	792.6[5]	g
Japan	1974	22.7	i	1975	91.2[9]	o
				[1982]	[807.1][10]	r
Netherlands	1975	39.8[4]	d	1972	170.8	b
New Zealand	1976	26.8	m	1975	1081.3[11]	l
Norway	c.1977	60.8[12]	o	c.1977	450.0	o
Peru	1970	23.6	j	1970	318.4	j
Poland	1975	93.6[13]	o	1975	92.1	o
Spain	1970	31.0	j	1972	893.4	b
South Korea	1975	14.5	o	1975	23.5[9]	o
Sweden	1973	99.6[4]	g	1973	192.4[5]	g
United States	1980	94.9[14]	a,h,k	1980	2348.7[15]	q
West Germany	1973	213.4[4]	g	1973	417.2[5]	g
Yugoslavia	1979	481.1[16]	p	1979	177.2[17]	p

SOURCES:
[a]Administrative Office of the United States Courts 1980[a]. [b]American Bar Foundation 1973. [c]Barwick 1977, Appendix A. [d]Council of Europe 1975, pp. 33, 114. [e]Disney et al. 1977, p. 79. [f]Egan 1972, p. 384. [g]Johnson et al. 1977. [h]Judicial Conference of the United States 1981, p. 25. [i]McMahon 1974, p. 1379. [j]Merryman and Clark 1978, pp. 486, 497, Tables 7.1, 7.13. [k]National Center for State Courts, 1982. [l]New Zealand Department of Statistics 1976. [m]New Zealand Department of Statistics 1978. [n]Oommen 1983, pp. 19, 20. [o]Rhyne 1978. [p]Savezni Zavod za Statistiku 1981; Tables 103-14, 103-15, 103-16, 103-17, 133-5, 133-9, 133-10, 133-12, 133-13, and 133-14. [q]U.S. Department of Labor, Bureau of Labor Statistics 1982, Table 13-20. [r]Brown 1983, pp. 479, 484.

NOTES:
[1]Unless noted otherwise, all population data taken from *World Population 1979* (Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, 1980).
[2]Disney et al. (1977:78) define lawyers as practicing barristers, principal solicitors in private practice, solicitors employed by principal solicitors, and persons admitted as lawyers who are employed by government, by corporations, or by other private organizations primarily for the purpose of providing legal services. This definition excludes judges, court officials, law professors, and law book publishers.

within each is very large. Numbers may reflect political decisions about the role of courts. Haley (1978) asserts that maintenance of a small judicial plant in Japan reflects a government policy of restricting access to judicial remedies:

> . . . the number of judges in Japan has grown but little for the entire period from 1890 to the present. Thus as the population has grown the ratio of judges to the population has declined from one judge to 21,926 persons in 1890 to . . . one judge to 56,391 persons in 1969. [p. 381]

Haley credits this policy, rather than a cultural aversion to litigation, with the diversion of disputes into mediational modes (see p. 198 below).

The number of courts reflects access in another way, since it affects distance. Analysis of a century of records from a single Chinese district, reveal that "while 60 percent of the civil cases where the plaintiff resided in the city containing the court were litigated to result, only 20 percent of those in which the plaintiff resided 71 to 80 *li* from the city were litigated until the matter was determined" (D. C. Buxbaum 1971, p. 274).

Similarly, the rate at which Zinacantecos took disputes to a ceremonial center was found to be inverse to the distance from that center (Collier 1973, p. 66). Employing size of jurisdiction—the inverse of number of courts—as a surrogate for both costs and absence of familiarity, Abel (1977) found increase in geographic jurisdiction of courts

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[3] Law Society membership includes retired, nonactive, those in business, government, court officials; some may be members of more than one society.

[4] Johnson et al. (1977) attempt to measure "career judges." They explain that "the functions of a judge vary considerably among the judicial systems embraced in this Study. . . . While part-time judges and 'honorary judges' (generally law assessors) are common in some of . . . [the nations studied], they are rare in the United States. As much as possible, every attempt has been made to control for these particular variations by deleting 'honorary judges' from our manpower totals, and by combining part-time judgeships into equivalent full-time positions."

[5] Johnson et al. delete the judiciary and certain members of the profession not performing an advocacy or representational function, such as government and corporate employees whose possession of a law degree is only incidental. Counted are the private lawyers available to represent clients for a fee, the state prosecutors, salaried lawyers, or private attorneys paid by government to handle criminal cases or to assist individual citizens with noncriminal legal problems.

[6] Includes 27,379 solicitors and 2,485 barristers.

[7] Includes judges and magistrates; unclear whether honorary judges included or not.

[8] India's population in 1981 was 683,810,051, as reported by the preliminary census report, reported in *The Statesman's Yearbook, 1982–83.*

[9] Lawyers registered with the bar association.

[10] The figure in brackets is for all the various legal occupations, as computed by Brown 1983, pp. 479, 484.

[11] Members of New Zealand Law Society holding practicing certificates.

[12] Does not include members of mediation councils, which exist in each municipality. Disputes must be brought before the councils before going to court. Council members are often not lawyers.

[13] Does not include Labor and Social Insurance Courts.

[14] Based on state and federal totals including 354 associate or assistant state judges; does not include 263 part-time federal magistrates, 22 combination federal magistrates, 6,022 part-time state judges and magistrates, and 105 nonjudicial state magistrates. When these judges are included, the figure is 123.25. U.S. Census of 1980 reported a population of 226,504,825.

[15] U.S. Census of 1980 reported a population of 226,504,825.

[16] Includes judges of Ordinary Courts of Law, Economic Courts, and Courts of Associated Labour. When the 54,693 Lay Assessors of the Ordinary Courts and Economic Courts are added, the figure is 2951.6. The total of 5,880 judges of the Associated Courts of Labour is from 1980.

[17] Includes 2,846 lawyers, 210 articled clerks, and 874 "social attorneys of self-management."

inversely related to litigation rates. But the implications of increasing remoteness are not unmixed. If courts are less responsive to everyday disputes, the remoteness from local influence and enhanced accountability to central authority entailed by larger jurisdictions may mean that courts can be used to challenge the locally powerful.

While the number of judges has not been traced over time, there is a hint that, with increasing professionalization, the number of judges has declined. Thus, in France there were from 70,000 to 80,000 judges in the seignorial courts immediately before the revolution (Dawson 1960, p. 79) as opposed to 4,375 in 1973 (Johnson et al. 1977, p. 9–2). It was observed that British rule decreased the number of tribunals available to Indians (Shore 1837, vol. 2, p. 189). The number of judges in Norway doubled in the century and a half after 1814 while the population increased by a factor of four and lawyers by a factor of fifteen (Aubert 1976, pp. 5, 10). In 1925 in Allegheny County, Pennsylvania (population 1.268 million), there were 391 officials with some judicial powers (23 judges, 242 justices of the peace, 46 aldermen, 4 mayors, 68 burgesses, and 8 police magistrates)—that is, one "judge" for every 3,243 residents (Schramm 1928, p. 22) or one judge for every 3,218 if we include the 3 federal judges then sitting in the Western District of Pennsylvania. Fifty years later the population had grown to 1.518 million, but there were only 132 "judges" in the county. This number included 39 active Common Pleas judges, assisted by 4 senior (that is, semiretired) judges, 4 hearing officers, and 1 master; 55 district justices; 8 magistrates; 13 active federal judges assisted by 4 senior judges and 4 magistrates, 2 full time and 2 part time. (The federal court's jurisdiction extended far beyond the county.) [This information is based on telephone interviews conducted by Mark Lazerson.] This otherwise generous count omits the many administrative bodies and officers who perform courtlike functions. The growth of such forums and the increase in full-time positions may have more than offset the observed reduction. Changes in transportation and communication patterns make difficult any conclusion about accessibility of courts. But the point here is that the number of persons exercising regular or ordinary judicial functions has shrunk dramatically. In 1975 there were 11,500 residents per judge, more than three times the ratio in 1925. Whether or not there has been an increase in judicial power, it seems to be concentrated in relatively fewer hands.

The Structure of Courts: Hierarchy and Appeal

Typically, courts are arranged in layers of higher and lower courts, in which the higher courts have greater dignity, wider jurisdiction—territorial, subject matter, seriousness—and exercise some kind of hierarchic control over lower courts. Hierarchy may be rigorous, involving precise delineation of official responsibilities, sharp separation of the office from the incumbent, and rigid differentiation among judges at various levels. On the other hand, positions of superordination and subordination may be less clearly delineated, office and incumbent less clearly separated, and officials at different levels "essentially . . . all homologues with similar authority inherent in their position" (Damaska 1975, p. 510). The hierarchy may be steep, with only a tiny fraction of cases being decided by the highest organs, or it may be flattened out, like the Italian system, where there are no legal limits on appeal to the Court of Cassation, which hears 4,500 civil and 20,000 criminal cases each year (Di Federico 1976, p. 126).

Lower courts may have plenary powers of decision, as in modern common law, or they may make a recommendation to a central and superior decision-maker. Court decisions may

be taken to higher courts for correction, as distinct from a rehearing by the same body. The superior court may be staffed by the same body of judges—(as in Roman Catholic matrimonial courts, where the court of one diocese doubles as an appellate court for a neighboring diocese (*Columbia Journal of Law and Social Problems* 1971) or it may be a distinct hierarchic stratum. The second proceeding may be de novo, the entire array of proofs and arguments being explored anew in a fresh proceeding, or like most modern appeals it may be a review limited to examination of alleged errors lodged in the written record of the case. A successful appeal may result in the superior court's decreeing the appropriate outcome or instructing the lower court to do so or returning the case to the lower court for a fresh proceeding. Although the punishment of the erring judge is not the explicit object of appeal, as it once was (Dawson 1960, p. 54), appeals remain a method for the administration of discipline in judicial hierarchies.

In the Anglo-American family of judicial systems hierarchically superior courts are, for the most part, appellate courts, although they may exercise original jurisdiction in restricted categories of cases. The authoritative literature is largely a by-product of this appellate process. Legal propositions enunciated there are binding on lower courts and on subsequent courts under the doctrine of *stare decisis* (see p. 174 below). The learning about the binding authority of decisions may be tacit and conventional or elaborated as a set of formal rules.

Apart from appeal in individual cases, there are other mechanisms to make lower courts accept legal propositions promulgated by superior courts: advisory legal opinions, internal recommendations and circulars (Damaska 1975, p. 496), coupled with inspection and audit procedures, as well as control over assignment and promotion.

Nevertheless in practice lower courts often depart from the pronouncements of superior courts—not only from general prescriptions (Wasby 1970) but also from decrees in specific cases remanded to them (Murphy 1959; *Harvard Law Review* 1954; for a recent review, see Baum 1978). The strictures of hierarchic authority are loosened by a variety of techniques of discretion, interpretation, and evasion which afford courts leeway where they appear bound. On the other hand, inferior judges may strive to emulate their superiors even when they are formally bound to pronounce judgment independently (Di Federico 1976, p. 127).

The Size of Courts: Agreement and Dissent

We may distinguish between "the Court" as an establishment with a certain institutional identity (for example, the Circuit Court of Dane County) and "the court" as the forum in which a particular case is heard. A court in the former sense may consist of an individual judge, but it may also (like most American municipal courts, for example) have dozens of judges of coordinate status. In Anglo-American and many European courts of first instance, each proceeding is heard by a single judge, but some special proceedings may be before panels of judges. Where lay judges sit with professional ones, benches are larger. Two lay assessors along with one professional judge is a typical configuration. (Compare the common-law jury of twelve.)

In the ancient world, courts of far larger size were common: the Courts of the Second Jewish Commonwealth included Sanhedrins of 23 and 71 judges (Mantel 1972); courts of 50 or more were familiar in Rome (Dawson 1960, pp. 17–19). Gluckman's Lozi *kuta* (1955, pp. 9–15) consisted of 20, 30, or more. In India, the traditional *panchayat*

nominally consisted of 5 but in practice might include many times that number. Large courts are not unknown in modern settings; in Italy, except in minor cases, judges sit in benches of from 3 to 15 (Di Federico 1976, p. 124).

Judges may be surrounded by other court staff and by auxiliaries to whom fact-finding and decision-making powers may be delegated, either on a standing basis (like probation officers or the judicial magistrates in the American federal courts) or as temporary delegates (special masters, referees, and so forth, see Weinberg 1983; Brazil 1983). There appears to be a recent increase in the size of American court staff and in the use of auxiliaries. For example, growth of staff of the federal judiciary has far outpaced the growth in the number of judges (Clark 1981, pp. 87–88).

Typically, appellate proceedings are before groups of judges—usually, but not always, odd numbers in order to employ majority decision among judges of equal weight. Llewellyn (1960, p. 31) regards sitting in benches as a "steadying factor: stabilizing judicial work, reducing idiosyncrasy and innovation." Compare Di Federico's observation (1976, p. 131) that innovation among Italian judges is greatest in minor courts where they sit alone.

In modern professional courts, multijudge benches typically decide by majority vote. (Some preliminary matters might require a specified minority—for example, four [of nine] justices are required and sufficient to exercise the discretionary appellate jurisdiction of the United States Supreme Court.) Other courts have employed a rule of unanimity (as, with some recent exceptions, the common-law criminal jury) or have assigned different weights to different members. Thus, the Barotse counselors declare themselves in ascending order and the judgment of the senior counselor, as confirmed by the king, is the judgment of the court (Gluckman 1955). Compare the Indian caste panchayat described by Hayden (1981) where later speakers could lower the penalty but not enhance it, an arrangement reminiscent of American military appeals.

For purposes of weighting votes, the judges of modern professional courts are viewed as equals. But courts may contain hierarchic superiors, as the presiding judge of an Italian court, who screens and corrects the work of his colleagues (Di Federico 1976, p. 124). Compare Danelski (1978) on the influence of the chief justice of the United States Supreme Court. Conventions of seniority are common even where formal hierarchy is attenuated—for example, in assignment of opinions, composition of benches, deference, and promotion (see Paterson 1983). In India, departure from a convention of promotion by seniority was widely viewed as a cataclysmic intrusion on the integrity of the judiciary (Gadbois 1982; Dhavan and Jacob 1978).

The deliberations of multijudge courts may be public or secret. (The secrecy may in fact be more or less penetrable, as attested by recent publications on the United States Supreme Court.) On the dynamics of persuasion and bargaining on multijudge courts, see Murphy (1964) and Ulmer (1971). Disagreements may be confined to the interior of these deliberations with the eventual decision an expression of the whole court (as in Italy; Di Federico 1976, p. 124). Or they may be publicly expressed as dissenting votes, in separate opinions, even in opinions dissenting from the judgment of the court.

Dissents may be commonplace: in 1970 there were dissenting votes in 81 percent of all the cases that the United States Supreme Court decided by full opinion (Grossman and Wells 1972, p. 165). On other courts, even courts exercising extensive powers of judicial review, dissents are relatively unusual events: in its first twenty years (1950–70) the Indian Supreme Court decided unanimously all but 7.4 percent of its cases (Dhavan

1977, p. 34). Dissent rates in American state Supreme Courts vary widely, but most have rates lower than 10 percent (Glick and Vines 1973, p. 79). On lower collegial courts (which sit in smaller benches), dissents are even rarer: on California's intermediate appellate courts, dissents were filed in only 1.6 percent of matters disposed of by majority opinion (Wold 1978, p. 64).

The Selection, Recruitment, and Socialization of Judges

The judge may be chosen for the job on the basis of general personal qualities (such as wisdom and integrity) which commend him for the task of resolving disputes—as among the Zapotec (Nader 1969) or in Somalia (Jolowicz 1975, p. 238) or the lay judges still prevalent in many American jurisdictions. (There were 14,000 lay judges in the United States in 1979 [Institute of Judicial Administration 1979, p. 25]. This is many fewer than there had been earlier, but they may be in the process of being reintroduced under other names.) More frequently, judges are selected on the basis of possession of certain special qualifications thought to be acquired by professional training and experience.

Judges may constitute a separate branch of the legal profession with their own distinctive training preceding a career leading from minor to major judicial posts, as in much of the European continent. Such career judges are civil servants and display the typical cautious ambition, concern for job security, and political self-effacement (Luhmann 1976, p. 103). Alternatively, judges may be recruited from within the legal profession—in practice often from an elite segment of it—on the basis of professional distinction. These principles of selection may be mixed, as in India where the higher judiciary combines career judges promoted from the subordinate judiciary and distinguished advocates elevated from the bar.

Where judges are elevated from the legal profession, formal socialization is attenuated and consists mostly of on-the-job training informally administered by fellow judges and lawyers. Because of the threshold of high educational and professional attainments, judges in such a system tend to be recruited from more elite social groups than are other segments of the political elite (Paterson 1983; Schmidhauser 1979; Gadbois 1968–69; Becker 1970, p. 84). Those judiciaries that play a large role in political life and that insert themselves to criticize or overturn governmental policies tend to be staffed by these *honoratiores* judges rather than by civil servant judges.

In the United States a great deal of research has been devoted to the avowed merits of the various formal devices for selection of judges: these include partisan elections, nonpartisan elections, gubernatorial appointment, and initial appointment with subsequent ratification by voters. In spite of heated debate about the effects of these alternatives, selection systems have not been found to be associated with significant differences in the education, legal experience, provenance, or prior experiences of those who occupy the bench. Only minor differences have been found between elected and appointed state supreme courts: neither different role perceptions nor different decisional patterns nor different levels of partisanship have been detected (Flango and Ducat 1979). The work of numerous investigators (reviewed in Ducat and Flango 1975) converges on the conclusion that there is no evidence that formal recruitment procedures have any independent influence on state judicial systems. The absence of findings of difference is rendered less surprising by the fact that selection systems differ far less in practice than on paper: even in elective systems, initial selection is by appointment, elections are rarely contested, and incumbents are almost always retained.

Virtually all of this research has focused on appellate judges who sit on collegial courts. Perhaps greater differences might be discerned among trial judges whose relatively isolated and highly discretionary work situation gives scope for greater impress of their individual characteristics. But it seems doubtful that selection devices operate in isolation from other factors. Analyzing contrasting styles of judging in two cities, Levin (1972, p. 213) argues that different sentencing patterns are the "indirect product of the political systems of their respective cities" which "influence judicial selection, leading to differential patterns of socialization and recruitment that in turn influence judges' views and decision-making processes." He suggests that although selection mechanisms themselves may have little independent explanatory power, they are part of a chain of factors that makes judiciaries reflective of and responsive to local political cultures.

Courts as Bureaucracies

Courts are, of course, bureaucracies in the loose use of that term to describe any organization with a division of labor, some hierarchic direction, and standardized work routines for serving clients or customers according to specified formulas. Many courts also exhibit some features of bureaucracy in a stronger descriptive sense: explicit apportionment of tasks, delimited spheres of responsibility, rules specifying the powers of officeholders related impersonally in a hierarchic grid of offices, centralized administrative control, and so forth. In civil-law systems, the emphasis on career service, explicit hierarchy of posts, precise application of codes, the elaboration of files, and correction and supervision by superiors matches the bureaucratic model fairly closely. But the fit is looser in the common-law judiciaries with their less articulated hierarchy, judges who are not career specialists (but either laymen or lawyers appointed late in life as a reward for professional eminence or political loyalty), who enjoy broad discretion and are subject to little supervision. Nevertheless, bureaucracy is frequently invoked—not unmindfully of the term's pejorative connotations—as a code word to refer to the slide from individualized treatment into stereotyped routines, and from adversary combat to collaborative negotiation. "Bureaucracy" becomes a shorthand expression for the various ways in which other commitments are tempered by the ambitions and fears of incumbents and by the imperatives of institutional maintenance.

The labeling of courts as bureaucracies strikes others as unpersuasive. Jacob (1983) points out that judicial hierarchies lack many of the salient features of bureaucratic control:

> Appellate courts are usually not true hierarchic superiors to trial courts . . . [t]hey may overrule trial court decisions [but t]heir review . . . is initiated by litigants. It is not motivated by a policy focus of the higher court, nor does it constitute a systematic quality control of the work of the trial courts. . . . Supreme courts often promulgate procedural rules that govern trial courts, but they exercise no continuous supervision over day-to-day trial work and almost none over the flow of cases that trial courts process. They almost never hire, transfer, or fire trial judges or other trial courtroom personnel. They have little or no influence over trial court budgets. [p. 193]

As Dill (1977, p. 10) puts it, "courts are loosely connected units enjoying substantial autonomy from each other and from units at higher levels of the system." The judges who preside in the decentralized American court systems that these observers have in mind are

invested with personal authority emanating from their offices, not by delegation from the top (Damaska 1975, p. 515).

Nor do individual courts strike observers as conforming to the bureaucratic model. "Courts are networks of organized activities rather than bureaucratically integrated formal organizations" (Heydebrand 1977, p. 765). Larger courts are clusters of parts or courtrooms that each enjoy some autonomy. In spite of the presence of a chief judge and perhaps a professional court administrator, central direction and accountability are attenuated. "Despite its outward appearance of a bureaucracy, the court possesses many of the aspects of a loosely organized feudal order, with an emphasis on fiefs, patronage and personal loyalties" (Sykes 1969, p. 331).

Nor are the individual courtrooms within courts usefully viewed as bureaucracies. The judge is formally superior to the other participants, but they are not his subordinates in the sense that their powers derive from or embody his. He neither supervises their work nor controls their careers. Standard routines and procedures are not imposed by the judge as a hierarchic superior; but emerge from coping by participants (including the judge) who are accountable to principals or constituencies outside the courtroom itself.

This does not imply that courts are in fact separate and autonomous. As one analyst puts it, courts are

> . . . highly enmeshed in a *vertical and horizontal interorganizational network.* For example, courts are *vertically* tied into higher levels of the judicial-professional hierarchy and authority structure, such as appeals courts, judicial councils and conferences, and congressional committees. *Horizontally,* courts are interacting with other trial courts and jurisdictional domains, with police and prosecution, the bar, prisons, probation and parole, and various administrative and social agencies from which cases are received or to which they are transferred, "removed" or "diverted." [Heydebrand 1977, p. 770]

Common-law courts have traditionally lacked many of the formal bureaucratic devices for securing coordination and uniformity. But recently there have been attempts to develop centralized systems of judicial administration separate from the traditional hierarchy of appeals. Such systems involve the formation of judicial conferences, the assignment of "administrative judges," the engagement of professional court administrators, and the application of modern management methods to expedite the flow of business, eliminate idiosyncratic behavior, engage in planning and otherwise increase the effectiveness of the courts (see Gazell 1975; Friesen et al. 1971).

The Court as Decision-Maker

Legal norms frame judicial activity and influence it importantly, but they do not provide single determinate answers to the questions that judges must answer. The multiplicity of norms implies choice among them; their generality requires specification; their ambiguity requires (temporary and partial) resolution. Discretion may be wide or narrow, explicit or implicit. The presence of legal norms and faithful adherence to them does not exclude the operation of other influences on the actions of the judge.

One way of summarizing the judge's responses to the possibilities is in terms of the style or role of being a judge. By this I mean the prescriptions, supplied by the wider legal culture (as embodied in its local variant), that supply the judge with models, methods, and techniques for being a judge, along with standards for assessing judicial activity. The

judicial role may include notions of dignified reticence, solemn decorum, passivity and aloofness, responsiveness to community concerns, crusading zeal, and so forth. (Like all such models, it is embodied in practice only imperfectly—much as models of teacher and researcher are.)

Prominent among the components of the judicial role are commitments to certain methods of working with legal materials and combining them with evidentiary and procedural ones. For example, the judge should allow herself to be educated about the contested factual aspects of a case only through certain restricted channels (for example, witnesses) and by materials of certain restricted types, putting to one side both her general knowledge and sources that would be considered reliable in everyday fact-gathering. (These limitations, combined with the supposed superior scope and resources of legislative fact-finding, underlie the argument that American courts lack the capability to assess the complex factual situations in contemporary institutional litigation. On the basis of an interesting comparative analysis of educational reform cases Rebell and Block [1982, p. 209] conclude that courts are "better equipped than legislatures to evaluate social fact evidence systematically and to render analytically reasoned decisions.")

Another common commitment of the judge role is to regard herself as bound to render a decision according to a specified body of legal norms that represents only part of the normative universe. (Other norms that are approved and embraced may be regarded as too unimportant, too delicate, too intricate, or too profound to be fit subjects of legal enforcement.) The judge may be committed to apply this authoritative material in a certain style—for example, by justifying the selection of normative principles in terms of some large general ground, rather than in terms of specific results or consequences that would ensue from their application to the case at hand—or to all similar cases. (Such commitments to formal rationality may carry in their train a tilt toward individualistic substantive norms [Kennedy 1976].)

The normative material recognized as authoritative and binding may include constitutions, decrees, treaties, statutes, customs, and decisions of (hierarchically superior or earlier) courts—as in the common-law principle of *stare decisis.* That principle may be viewed as defining the boundaries of judicial power (as in England where from the late nineteenth century until 1966 the House of Lords regarded itself as without power to overrule its earlier decisions) or as stating a rule of practice from which departures may be justified—as in its American and earlier English variants (Cross 1961, p. 18). Precedent cannot flourish in the absence of recording and communicative apparatus and appropriate cognitive dispositions (Kaplan 1965). But precedent may be influential even where there is little overt communication about binding normative standards (as among the Soga; Fallers 1969, p. 32).

Of course, precedent may count heavily in judicial decision-making even where the judge is not formally obliged to follow it. Thus, continental judges may regard it as a major source for decision-making (Wenner et al. 1978; Wetter 1960; Di Federico 1976). Similarly, the circulation of decisional material that is not formally binding may serve to coordinate responses among scattered decision-makers who are organized not in hierarchies but in looser networks (Shapiro 1971).

"The sharpest role conflicts in American appellate courts" concern the role of judges as lawmakers (Howard 1977, p. 919). The federal appeals judges he studied ranged from enthusiastic innovators to "strict constructionists," with most taking a middle position.

Howard points out that "they differed over issues of degrees within a relatively narrow range of creative opportunities" for most agreed that no more than a tenth of their cases offered any opportunity to fashion new rules.

The formal commitment to precedent enters directly in only a limited segment of judges' decision-making; it applies directly to identification of authoritative rules. In assessing facts, setting calendars, sentencing, and so forth, precedent supplies wide outer limits. Where it applies, the strictures of precedent (like those of hierarchic authority) may be loosened by a variety of techniques of interpretation (ascertaining the rule of the earlier case, characterizing the issues in the present case, drawing analogies) that afford courts considerable leeway to shape doctrine in the course of following it (Llewellyn 1960; Levi 1961). These techniques enable doctrine to change in particulars while the framework remains stable: it is a "moving classification system" (Levi 1961, p. 4; cf. Shapiro 1965, p. 151).

Doctrinal continuity does not rely on the extent to which courts are fettered by formal obligations to adhere to precedent. Lawyers and judges are socialized to a limited range of legitimate techniques of manipulating doctrinal material. They tend to perceive issues in terms of received categories. That appellate courts face issues "already drawn . . . by lawyers, drawn against the background of legal doctrine and procedure, and drawn largely in frozen, printed words . . . tends powerfully both to focus and to limit discussion, thinking, and lines of deciding" (Llewellyn 1960, p. 29). This kind of cognitive channeling is reflected in the courts' decisional output. Shapiro (1965) depicts judicial lawmaking as a series of incremental judgments in which marginal variations from the status quo are selected on the basis of examining a restricted range of factors—in contrast to a rational style in which all relevant data are arrayed to serve systematic pursuit of fully articulated goals. Presumably, judicial decision-making deviates from this incremental prototype more in some fields, more in some phases of the proceedings, and more in some eras.

In his study of appellate judging, Llewellyn (1960) refers to the "period style":

> . . . the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowhow, the kind of thing the men of law are sensitive to and strive for, the tone and flavor of the working and of the results. [p. 36]

This helpfully alerts us to the fact that the repertoire of legitimate techniques, the thoroughness with which they are internalized, the constancy with which they are adhered to, and the adeptness with which they are employed should be expected to vary from time to time, as well as from field to field, from court to court, and from judge to judge. Wetter (1960) substantiates the dramatic changes over time in an individual court. He sketches the range of styles prevalent in the appellate courts of various industrial societies and the way these reflect the education and career lines, the organization of judiciaries and their relation to organs of government, the kinds of cases the come before them, and so forth. Whether there is a single dominant style of appellate judicial work in a society at any one time is a question that awaits the accumulation of further data. Horwitz (1977, p. 255), for example, observes a "sharp contrast between the utilitarian and instrumentalist character of early nineteenth century private law and the equally emphatic antiutilitarian, formalistic cast of public law." Leaving the realm of appellate

courts with their greater visibility, more deliberate pace, orientation to literary sources, and enduring collegial groups, we might expect that variations in style would be even greater in other localities and strata of the judicial system.

Much effort has been expended on attempts to explain the decisions of judges in terms of the propensities they bring to the cases by virtue of their personal histories and characteristics. Great ingenuity has been displayed in the development of measurement techniques to apprehend deep structures of consistency in decision-making viewed as reflecting underlying values or attitudes, or as reflecting various facets of the judges' life experience, and so forth.[4] (Since these techniques rely heavily on the comparison of recorded votes in nonunanimous cases on multijudge courts, most of this literature concerns appellate courts, especially the Supreme Court.) For the most part attitudes and values are inferred from the votes themselves. Since the attitudes are not measured independently of the behavior, the patterns of consistency that are displayed invite rather than supply explanation. In other fields, sustained critical assessment has cast serious doubt on the sufficiency of explanations of actions by attitudes (Wicker 1969; Bentler and Speckart 1981). Where judicial attitude has been measured independently of decisions, a similar dissociation of action and attitude may be found. For example, Gibson (1978) found that neither their political views nor their views about crime had much influence on the sentencing behavior of Iowa trial judges. The influence of attitudes was found to be mediated by the role orientations of the judges.

Attempts to anchor the judge's decisional predispositions in his background or career have not proved very satisfying. The studies concur that for American appellate judges, party affiliation is associated most consistently and strongly with decisional outcomes, age and religion less consistently. But background characteristics are, on the whole, weak predictors of the decisional propensities of judges (Grossman and Tanenhaus 1969, p. 15; Murphy and Tanenhaus 1972, p. 107). Thus, a careful study of nonunanimous decisions of United States Courts of Appeals found that party affiliation, age, religion, candidacy for public office, and previous judicial experience each explained some of the variance in decisions in some categories of cases, but concluded that "the background variables tested . . . cannot account for much of judicial voting behavior" (Goldman 1975, p. 504; cf. Bowen 1965, quoted in Flango and Ducat 1979, p. 34). This study and others suggest that background variables may have more explanatory power in some regions than in others and at some times than at others (Giles and Walker 1975). The tie between background, attitudes, and outcomes is complex. It is mediated by the politics of the court itself, by the persuasion and learning that takes place there (Howard 1968), and by the role conceptions that incline judges to base decisions on specific sectors of their beliefs (Gibson 1978).

In the wake of the rather unsatisfying efforts to explain the decisional propensities of judges in terms of their personal characteristics, a recent and promising line of research seeks to explain decisions in terms of responses to various features of the larger political

[4]The literature is vast and has been much discussed elsewhere, so I content myself here with the mere mention of its presence at the periphery of the present inquiry into the adjudication-litigation complex. Pritchett (1948) is accounted the paradigmatic work. Among the many noted studies are those of Schubert (1963, 1964, 1974); Nagel (1961); Ulmer (1960, 1974, 1978); Rohde and Spaeth (1976). Synthesis and assessment can be found in Grossman and Tanenhaus (1969); Murphy and Tanenhaus (1972). A useful selection from research in this tradition, accompanied by helpful analysis, appears in Goldman and Sarat (1978).

environment: judicial decisions are seen as reflecting the local political culture (Levin 1977; Eisenstein and Jacob 1977; Kritzer 1978), currents of public opinion (Cook 1977, 1979; Gibson 1976), and so forth. Unlike the attitude and background research on decision-making, these studies focus on trial courts; typically the dependent variable is sentencing. The portrayal of judges as responding to their perceptions of changing circumstances is akin to the kind of environmental explanation favored by historians (Hurst 1956; Friedman 1973; Horwitz 1977) and to the notion of judges as enmeshed in specific local legal cultures. (See below, pp. 181–182.)

Presiding Over the Process: Passive Versus Active Courts

One durable stereotype depicts the common-law judge as a passive umpire, in contrast to the civil-law judge who actively manages the case before him. In the adversarial common-law system, identification of claims and defenses and presentation of proofs and arguments are controlled by the parties (or their representatives) and the judge presides as impartial umpire. In contrast the inquisitorial system fosters the judge who is "responsible for determining the subject matter of the proceedings, and for securing all evidence needed for ascertainment of the truth. During the proceedings, he not only presides over the taking of proof, but also originates the bulk of questions" (Damaska 1975, p. 525). The contrast is a serviceable one, although contemporary common law and civil law courts hardly represent polar opposites. The spectrum of forum passivity and activity runs from the sort of complete disputant control found in many mediative processes to the total control by the forum familiar in commissions of inquiry (such as the Warren Commission or congressional committees).

The civil-law judge stands at some remove from the pure inquisitor. Like his common-law counterpart, the civil-law judge has power to undertake inquiries on his own, but

> . . . civil law judges seldom exercise this power . . . in the great mass of civil litigation in both traditions the rule is that the parties have considerable power to determine what will take place in the proceedings. Where the civil law judge puts questions to the witness, he does so at the request of counsel, and he ordinarily limits his questions to those submitted by the lawyers. [Merryman 1969, p. 124]

Merryman concludes that ". . . the prevailing system in both the civil law and the common law world is the 'dispositive' system, according to which the determination of what issues to raise, what evidence to introduce and what arguments to make is left almost entirely to the parties" (p. 124). (Cf. Jolowicz 1975, p. 209.) One pair of contemporary observers describe judges in criminal cases in Europe as "more passive and reactive" than their counterparts in the United States (Goldstein and Marcus 1977, p. 282).

Common-law judging lies at some distance from the passive end of the spectrum. The "passive posture of the judge" is, as Damaska (1975) notes, not only "historically novel" but even in theory it is "far from being a general description of the judicial office."

> Instead it applies only to a limited number of procedural contexts and to a restricted class of issues. [In the criminal case] judicial passivity is the rule only during the guilt-determining phase of the trial, and there serves as the norm only with regard to the framing of the subject matter of the proceedings, the collection of evidence, and the presentation of proof. [p. 524]

That other responsibilities curtail or circumscribe judicial passivity is confirmed by the observation of a prominent proceduralist that "the common law tradition is strong that the judge who conducts a trial should play an active part in directing it . . ." (James 1965, p. 5). As one respected American judge (Wright 1962, p. 141) put it: "The administration of justice means administration; a judge has to get into these cases and administer them. The lawyers are likely, in their advocacy, to run off in different directions; it's the judge who shows them where the point of the case is, where the issues are." Or, as Judge Sirica (1979, p. 127) explained, he took the initiative to break through the early resolution of the Watergate break-in arranged by the parties because "I had no intention of sitting on the bench like a nincompoop. . . ."

What is more striking about the common-law judges than their purported passivity is their tendency to delegate and supervise rather than to engage in continuous and detailed work on the case. This is illuminated by Engel and Steele's discussion (1979, p. 311) of "three typical modes of judicial processing [in the American setting], all characterized by substantial de facto delegation of the judge's power of decision and disposition." The first of these is "routine processing with nominal judicial intervention" as in granting relief in default cases or ordering dismissals where the plaintiff has not pursued matters. The second is placing the imprimatur of judicial approval on the actions of the parties, as in confirmation of a typical divorce or plea bargain. Third, where matters move to trial, the judge typically delegates much of the substantive "work and thought" to the lawyers who formulate arguments, prepare orders, and so forth. In each instance there is massive delegation—to clerks, parties, lawyers—who do the work under the supervisory scan of the judge. This tendency for common-law judges to be management rather than production workers is connected with the lower ratio of judges to lawyers (see Table 3), the higher status enjoyed by common-law judges, and their relative freedom from hierarchic control.

The tendency toward a more active judicial role has been noted by various observers (James 1965, p. 7; Chayes 1976; Cappelletti and Garth 1978, pp. 228–29; Galanter et al. 1979; Resnick 1982). Indeed, with their broad powers and weaker hierarchic supervision, common-law judges frequently take far greater initiative in shaping cases and arranging outcomes than the stereotype suggests. Thus, Damaska (1975, p. 525) observes that "in many phases of the criminal process, such as pretrial hearings, *in camera* examinations, and the sentencing stage, passivity and aloofness come to an end. Indeed, at these junctures in the proceedings Anglo-American judges occasionally assume outright inquisitorial postures that are without counterparts in modern continental systems."

Nevertheless, there is a residual loyalty to the ideal of judicial passivity, especially during the trial phase, and particularly likely to be aroused where there is a jury. Thus, the New York Court of Appeals in 1979 reversed two manslaughter convictions on grounds that the "unwarranted, persistent intrusion of the presiding [judge] deprived defendants of [a] . . . fair trial. . . ."

> Not only did the court ask over 1,300 questions of the witnesses, which constituted more than a third of the total number of questions propounded during the entire trial, he also usurped the authority both of the prosecutor and of defense counsel to determine the content, course and manner of their presentations. His elicitation from expert witnesses of extended elaboration of their testimony, his solicitation of objection by the prosecution to interrogation being pursued by defense counsel, and his extraction from a prosecution witness during

> cross-examination of a drawing made on the witness stand on the court's instruction and then received in evidence as an exhibit of the People, coupled with the nature and extent of questions addressed to alibi witnesses by way of cross-examination which clearly conveyed the Judge's skepticism as to those witnesses' credibility, compounded the unfairness that marked the judicial proceeding. [*People* v. *Mees*, 1979, p. 215]

As the dissenting judge pointed out, it was the "incisiveness and not the prejudice of the court's questions" that was the basis of the objection to them (id. 216).

Similarly, judicial initiative in managing case presentation, promoting settlements, devising remedies, and supervising enforcement is familiar in American civil courts. (Judicial embrace of the mediator role is discussed below, pp. 201–202, in connection with the deflection of adjudication into negotiated settlement.) In a pioneering examination of complex public law litigation in federal district courts, Chayes (1976) identifies the emergence of an activist, goal-oriented, "public law style" of judging that moves away from the traditional concept of the trial judge as passive arbiter. Chayes (1976, p. 1284) contrasts "public law" litigation with traditional lawsuits in which there are two discrete and opposed interests, in which the process is party-initiated and party-controlled, in which the judge is a neutral arbiter, and in which the court's involvement ends with the entry of judgment. In the new model, "[t]he judge is the dominant figure in organizing and guiding the case. . . ." Instead of deriving relief from established rights by received formulae, "the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation." (For an analysis which emphasizes the continuities of this style with earlier litigation, see Eisenberg and Yeazell 1980.)

This managerial, goal-oriented style is commonly described as "activist," but reflection suggests that activism is not a single trait but a cluster of kindred styles that can be described on a number of independently measured dimensions. Table 4 summarizes seven dimensions along which judges may (and frequently do) deviate from the prototype of the passive common-law judge.

In the appellate court setting, the "activist" label has referred to judges who are doctrinally innovative and assertive vis-à-vis other decision-makers.[5] Among trial judges

[5]This notion of judicial activism is found in the protracted debate among Supreme Court justices and legal scholars over the proper mix of judicial assertiveness with deference to precedent and to other decision-makers. See, for example, *Baker* v. *Carr* (1961, p. 266; Frankfurter, J., dissenting). Similarly, in the discussion of judicial activism in political science literature, the primary motif is that of assertiveness vis-à-vis other decision-makers. Thus, Abraham (1977, p. 184) defines activism as belief "in a more affirmative, some would say aggressive judicial policy, and [activists] are more ready to say 'No' to governmental enactments and actions. . . . [U]nlike the 'self-retrainters,' the 'activists' would be inclined to 'legislate,' to 'make policy.' " Cf. Shubert's identification (1974, p. 210) of activist decisions as those conflicting with policies of other major decision-makers. Samonte (1969, pp. 157, 172) defines activism as "willingness . . . to decide issues affecting the status, decisions, or activities of the executive, legislative, and administrative branches of government and to uphold . . . and expand judicial power. . . ."

This assertiveness involves the pull of favored policies as well as mere lack of deference. Goldman and Jahnige (1976, p. 206) characterize activism as "the position that courts should not hesitate to foster policies beneficial to society." Restraint, in contrast, is deference to "popularly elected branches of government in *their* determination of suitable public policy." Activism entails a willingness to make a decision where one might be avoided or to decide on broad rather than narrow grounds (1976, p. 112).

In earlier formulations, absence of deference to other decision-makers was clearly linked to what we call

TABLE 4

Some Dimensions of Judicial "Activism"

Precedent-Bound	Doctrinally Innovative
Deferential to Other Decision-Makers	Assertive vis-à-vis Other Decision-Makers
Passive Umpire	Managerial
Arbitral	Mediational
Universalistic	Particularistic (khadi justice)
Formalistic	Mission-Oriented (substantive policy)
Case-Focused	Programmatic

involved with larger "public law" or "extended impact" or "structural" cases, "activism" is likely to include departure from the passive umpire role to participate actively in managing the case, devising the remedy, and so forth. But there are other "activist" styles that are perhaps even more prevalent: the departure from the arbitral stance to aggressive mediation and brokering of settlements (discussed below, p. 201) is perhaps the most common among American judges. Or, the constraint to decide according to general rules may be displaced by a drive to respond to the unique particularities of the case (along the lines of the khadi, in Max Weber's idealization of him; Weber 1958, pp. 216–21). Thus, Martin Levin (1972) describes judges in Pittsburgh as

> typically oriented toward the defendant rather than toward punishment or deterrence. Their decisionmaking is particularistic and pragmatic. . . . Most nonjury trials in Pittsburgh are informal . . . and abbreviated. Most of the judges prefer this arrangement and they also prefer informal procedures for obtaining information concerning defendants. . . .
>
> The Pittsburgh judges' closeness to and empathy with the defendant cause them to stand apart from the law and act as a buffer between it and the people upon whom it is enforced. Most of them act as if they view the law primarily as a constraint within which they have to operate to achieve substantive justice for the defendant. . . .
>
> The Pittsburgh judges tend to reject legalistic criteria in favor of policy considerations derived from criteria of "realism" and "practicality." . . .
>
> They seem often to base their sentencing decisions on frankly extra-legal standards. . . .
>
> Sixteen of the eighteen judges base their sentencing decisions on a very wide range of individual and personal characteristics. . . . They feel that "everything counts"; it is the "whole system" and the "complete picture" that must be considered. They describe their decisionmaking as "intuitive," "impressionistic," "unscientific," and "without rules of thumb." [pp. 192, 203, 210–12]

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substantive rationality. Thus, Pritchett (1954, p. 198) suggests that the broad, activist view of judicial power flows from a sense of substantive responsibility for the outcome: "For the judicial activist, the *result* is the test of a decision. The validity of formal concepts depends upon whether their use gives the right answer."

Or, pursuit of substantive policy goals may be combined with adoption of a programmatic focus in what has been called the "entrepreneurial" style of judging (Galanter et al. 1979).

There are innumerable possible combinations of these elements of judicial style. Which are accounted as "activist" will depend in large measure on the expectations about judges provided by the local legal culture. Indeed, unbending adherence to legal formality may be accounted "activist" where it departs from shared understandings about the proper mix of formalism with substantive and administrative concerns (Galanter et al. 1979, pp. 728ff.). Such a culture prescribes a set of acceptable styles of being a judge. Some of these local styles, taken as a whole, may be more activist along one or another of the dimensions of activism that have been identified. That is, the modal and accepted style of trial-court judging may be more mission-oriented or managerial in one locality than in another. It is to these patterns of variation among localities that we now turn.

The Persistence of Variation: Local Legal Cultures

Systems of courts are equipped with various devices to minimize idiosyncrasy and to eliminate variation in the way that cases are processed and decided (cf. Shapiro 1980). Yet, local variation in courts remains a striking feature of less centralized systems. In the United States there are multiple bodies of law and the formal institutional arrangement of the tasks, jurisdiction, powers, accountability, and other aspects of courts differs from state to state and often from locality to locality. But there are, in the United States, patterned and persistent differences in what courts do and how they do it that are not attributable either to differences in the substantive law or to differences in the formal structure of courts. Such variation is found between "identical" courts (and agencies) applying the "same" law: uniformity of rules and institutions may be accompanied by significant variation in practice. These persisting and patterned differences may be thought of as giving expression to the "local legal culture"—that is, a set of norms, understandings, concerns, and priorities shared by the community of legal actors and significant audiences. The local legal culture defines the appropriate style of playing legal roles, including that of judge. Thus, it may prescribe the uses of the pretrial conference and the preliminary hearing, the role of the judge in settlement negotiations and in plea bargaining, appropriate dispositions for particular sorts of offenses by particular sorts of offenders, appropriate relations with press and politicians, and so forth (Eisenstein and Jacob 1977; McIntyre and Lippman 1970; Levin 1977; Church et al. 1978; Watson 1975, p. 13). It finds expression in the proclivity of lawyers to file suit, raise certain defenses, invoke procedural forms, speed or delay matters (Jacob 1969a; Zeisel et al. 1959, pp. 223–40). Thus, a study of delay in the courts of twenty-one cities concluded that

> the speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than it can be explained by court size, caseload, or trial rate. Rather, both quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the "local legal culture." Court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it. It also has an

> accompanying backlog of open files in attorneys' offices. [Church et al. 1978, p. 54]

Comparable local cultures have been found in styles of police work (Wilson 1968) and in the work of other enforcement agencies (Goldstein and Ford 1971). Do all the settings in a locality share in a single coherent legal culture? Church et al. (1978, p. 56) find a strong association between disposition time in state and federal courts in a given locality in spite of their different personnel and different caseloads. We await a thorough description of such a local legal culture. To the extent that they are anchored in and transmitters of the local political culture (Jacob 1969a; Wilson 1968; Levin 1977; Kritzer 1978) we would expect strong common themes and family resemblances among the cultures manifested at various settings in the locality. The presence and tenacity of these local legal cultures means that courts will respond very differently to crises (cf. Balbus 1973) and that general reforms will produce very different results in different settings, often quite contrary to the expectations of those who imposed them (Nimmer 1978).

I do not mean to imply that local legal cultures are independent of and distinct from the authoritative "higher law." Although their substantive concerns include some that are not fully recognized in the "higher law" (such as the exclusion of undesirable neighbors [Babcock 1969] or unwanted sojourners [Foote 1956]), they are better understood as "variant readings" in which elements of the authoritative tradition are reordered in the light of parochial understandings and priorities. Generally, see Matza (1964, pp. 59–67); for some examples, consider the understanding of criminal procedure by the police (Skolnick 1966, pp. 219–29) or of air pollution laws by health departments (Goldstein and Ford 1971, pp. 20–23). These variant cultures can exist with little consciousness of principled divergence from the higher law.

Legal culture does not imply that all actors are unanimous in their judgments, but only that they share a common orientation and a common idiom (cf. Church 1982). Local legal cultures are not monolithic. There may be a range of permissible styles of judging in a single locality or even in the courtrooms of a single court (cf. Galanter et al. 1979). Individual variation is facilitated by the wide discretion accorded the common-law judge and the weak controls over him (compared, for example, to his civil-law counterpart; Damaska 1975).

Variations in style may be situational as well as local or individual. The same court that routinely encourages and assists counsel to "work something out" in the run of cases will shift on occasion to a style of exacting and ceremonious formality (Mohr 1976, p. 639). The local legal culture is not a single style of being a court, but a repertoire of styles and of shared understandings about when it is appropriate to switch from one to another.

PATTERNS OF ADJUDICATION

The most striking research findings about adjudication in contemporary industrial societies can be summed up in the observation that full-blown adjudication is rare, expensive, and avoided assiduously. This may seem paradoxical in the light of current concern about the "litigation explosion" and court overload (for example, Barton 1975; Rosenberg 1972; Manning 1977; but cf. Galanter 1983b). In comparison to many simpler societies, there is relatively little use of full-blown adjudication. Equally striking is the corollary finding that in those instances where adjudicative proceedings are invoked or threatened, there is a gravitation to other forms of dispute processing. The central role of

adjudication is mediated and symbolic rather than the direct and authoritative disposition of disputes. In the American setting this pattern of avoidance and diversion is combined with a central symbolic role and a sense that adjudication is omnipresent.

The Mobilization of Disputes

Disputes are not some elemental particles of social life that can be counted and measured. They are not discrete events like births or deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them. Disputes are drawn from a vast sea of encounters, collisions, rivalries, disappointments, discomforts, and injuries. The span and composition of that sea depend on the broad contours of social life. For example, the introduction of machinery brings increases in nonintentional injuries; higher population densities and cash crops bring raised expectations and rivalry for scarce land (Abel 1979b). Construction of disputes entails the perception of injuries, the identification of persons or institutions responsible for remedying them, location of forums and acceptable presentation to them, investment of appropriate resources and resistance of attempts at diversion. The disputes that arrive at courts can be seen as the survivors of a long and exhausting process by which the dispute has crystallized out of this sea of proto-disputes—a process mediated both by general cultural dispositions and by differential distribution of knowledge, experience, and opportunity among various groups within a society. As part of a larger system of disputing, the institutions of litigation are shaped by this process of construction and selection that provides it with cases. And litigation in turn profoundly affects what happens at other locations in the system by providing cues, symbols, and bargaining counters which actors use in constructing (and dismantling) disputes. To understand what courts do, it is necessary to know about the "earlier" stages of this process.

These early stages may be visualized as the successive layers of a vast and uneven pyramid. Only recently has there been any attempt to examine systematically the lower layers of the pyramid. A pioneering inquiry by Felstiner, Abel, and Sarat (1980–81) provides a useful conceptual map of the lower reaches of the pyramid. They begin, in effect, with all human experience which might be identified as injurious, a starting point that should alert us to the subjective and unstable character of the process, for what is injurious depends on current—and ever-changing—estimations of what enhances or impairs health, happiness, character, and other desired states. Knowledge and ideology constantly send new currents through this vast ocean.

Some of these experiences are perceived to be injurious. (Felstiner et al. call these *perceived injurious experiences.*) Again, there is an ambivalence here—perceived by whom? The temperance worker or safety crusader may have different perceptions than the drinker or the driver—Felstiner et al. apparently confine this category to perceptions by the injured. Among these perceived injurious experiences, some are seen as deserved punishment, assumed risk, or fickle fate; but a subset are viewed as violations of some right or entitlement caused by a human agent (individual or collective) and susceptible of remedy. These, in the terminology of Felstiner et al., are *grievances.* Again, characterization of an event as a grievance will depend on the cognitive repertoire with which society supplies the actor and his idiosyncratic adaptation of it. For example, he may be equipped with ideological lenses to focus blame or to diffuse it. Some of these grievances may be

voiced to the offending party. These are *claims*. Many will be granted. Those that are not granted are *disputes*. That is, "a dispute exists when a claim based on a grievance is rejected in whole or in part" (Miller and Sarat 1980–81, p. 527).[6] Using this terminology let me attempt a crude sketch of the lower layers of the pyramid.

First, a very large number of injuries go unperceived. Breaches of product warranties and professional malpractice may be difficult to apprehend and go undiscovered. Or, if the injury is discovered, the injured may not perceive that an entitlement has been violated, the identity of the responsible party, or the presence of the remedy to be pursued.

The perception of grievances requires cognitive resources. Thus, Best and Andreasen (1977, pp. 707, 722–23) find that higher income (and white) households perceive more problems than the poor (and black) with the goods they buy and complain more to both sellers and to third parties. It seems unlikely that this reflects differences in the quality of the goods purchased. Similarly, Curran (1977, p. 126) reports that more educated respondents experience more problems of infringement of their constitutional rights. (On the differential ability to define and evaluate injurious circumstances, see Boyum 1983.)

Where injuries are perceived, one common response is resignation ("lumping it"). In the most comprehensive study[7] available, Miller and Sarat (1980–81) report that over one quarter of those with reported "middle range" (that is, involving the equivalent of $1,000 or more) grievances did not pursue the matter by making a claim. This proportion was fairly uniform across subject matters, with the striking exception of discrimination problems in which almost three quarters did not move from grievance to claim. (Of course, these figures are not measures precisely of lumping it because they may include those who took other forms of unilateral action—like exit or avoidance or self-help.) These estimates for middle-range disputes fit closely with those provided by several studies of consumer problems, mostly smaller. Ladinsky and Susmilch (1985) specifically measured the rate at which Milwaukee consumers with problems "lumped it": they found that roughly a quarter did. This comports with some 28 percent who did not make claims in King and McEvoy's national sample (1976) of consumer problems and 20 percent who did not make claims in Ross and Littlefield's study (1978) of problems with major household appliances. Curiously, the rate is even higher with serious criminal offenses. Ennis (1967) reported that roughly half of those who reported being victimized by index crimes did not make a complaint to the police. Allowing for some admixture of other responses (self-help, complaints to others) this is a rate of lumping it higher than found in "civil" problems. Also, there are some populations with a higher proclivity to lump it: for example, the low-income consumers studied by Caplovitz (1963) made claims in only 40 percent of instances of grievances with their purchases.

[6] A slightly different terminology is employed by other researchers: Mather and Yngvesson (1980–81, p. 776) use the term "dispute" to refer to "conflict between two parties (individuals or groups) [that] is asserted publicly—that is, before a third party." (Cf. Gulliver 1979, pp. 75–76; Nader and Todd 1978, p. 15.)

[7] The study analyzes data compiled from a telephone survey of approximately one thousand randomly selected households in each of five federal judicial districts: South Carolina, eastern Pennsylvania, eastern Wisconsin, New Mexico, and central California. Respondents were asked whether their household had experienced any of a long list of problems in the preceding three years. Only "middle-range" problems were recorded—those estimated to involve a value of more than $1,000. This method of starting with a finite list of troubles conventionally associated with civil litigation produces a conservatively biased underestimation of the extent of troubles and grievances (Marks 1971).

"Lumping it" is done not only by naïve victims who lack information about or access to remedies, but by those who knowingly decide that the gain is too low, or the cost too high (including the psychic costs or pursuing the claim). On the contours of inaction, see Macaulay (1963), Ennis (1967), Mayhew and Reiss (1969), Hallauer (1972), Best and Andreasen (1977). Inaction is familiar on the part of official complainers (police, agencies, prosecutors), who have incomplete information about violations, limited resources, policies about *de minimis*, schedules of priorities, and so forth. See Rabin (1972), Miller (1969), Myers and Hagan (1979) (prosecutors); LaFave (1965), and Black (1971) (police).

Exit or avoidance—withdrawal from a situation or relationship by moving, resigning, severing relations, and so forth—are common responses to many kinds of troubles (see Hirshman 1970). Like "lumping it," exit is an alternative to invoking any kind of organized remedy system—although its presence as a sanction may support the working of other remedies. The use of "exit" options depends on the availability of alternative opportunities or partners (and information about them), bearable costs of withdrawal, transfer, relocation, development of new relationships, the pull of loyalty to previous arrangements—and on the availability and cost of other remedies. Felstiner (1974) suggests that the same social developments that enlarge opportunities for exit erode devices for mediation. The inverse association of exit and resort to third parties is neatly displayed in Baumgartner's study (1980) of resort to courts in an American town. Less frequent use of courts in interpersonal disputes by middle class than by lower class residents is explained by the greater mobility of the former, which prevents the accumulation of disputes and provides exit remedies.

Disputes are pursued by various kinds of self-help (physical retaliation, seizure of property, removal of offending objects, and so forth). The extent of self-help in contemporary industrial societies has not been established. But its occurrence is evidently very frequent. Two recent and revealing studies portray self-help as a major component of disputing in American neighborhoods (Merry 1979, p. 912; Buckle and Thomas-Buckle 1981). (Some variables accounting for the amount and forms of self-help are discussed in Black and Baumgartner 1978.) Adjudication and self-help are not mutually exclusive: courts may regulate and authorize self-help (for example, repossession of property).

In the contemporary United States the most typical response to grievances—at least to sizable ones—is to make a claim to the "other party"—the merchant, the other driver (or his insurer), the ex-spouse who has not paid support, and so on. Thus, Miller and Sarat (1980–81) found that over 70 percent of those who experienced "middle-range" grievances made claims for redress. Aggrieved consumers make claims in about the same proportion (Ladinsky and Susmilch 1985; Ross and Littlefield 1978; King and McEvoy 1976). Some claims may be granted outright, but a large number are contested in whole or part. It is this contest that Felstiner et al. label a dispute. Miller and Sarat found that about two thirds of claims lead to disputes. A large portion of disputes are resolved by negotiation between the parties. Almost half of the disputes in the Miller and Sarat survey (1980–81, p. 537) ended in "agreement after difficulty," which I take as indicating the occurrence of negotiation.

Some disputes are abandoned by their initiators. Ladinsky and Susmilch (1982), who coined the term "clumpit" for those who make a claim but don't persist, found that more than one quarter of all consumers with problems abandoned their claims. Similarly, a study of medical malpractice claims found that 43 percent were dropped without claimants receiving any payment (Danzon and Lillard 1982, p. 4).

These data from surveys of individuals (or households) tell us about the grievances, claims, and disputes of individuals. Our picture of patterns of disputing of businesses, organizations, and units of government is even dimmer. A first glimpse of organizational disputing is afforded by the Civil Litigation Research Project (CLRP) study (Trubek et al. 1983, I-95ff.). A sample of 1,516 organizations in CLRP's five localities (17 percent of these organizations were large in the sense of having over 100 employees) were asked about (non–labor-management) disputes with other nongovernmental organizations during the preceding twelve months involving at least $1,000. Only 17.5 percent of these organizations reported having such a dispute, but larger organizations had considerably more: 49 percent of organizations with over 100 employees had disputes, compared with 16 percent of smaller organizations. Interorganizational disputes are larger than those of individuals—44 percent involved more than $10,000. Like the disputes of individuals, most of these organizational disputes were settled bilaterally, without the invocation of a third party.

A dispute may be heard in some "forum" that is part of (and embedded within) the social setting within which the dispute arose—the school principal, the shop steward, the administrator, and so forth. Some "embedded forums" are hardly distinguishable from the everyday decision-making within an institution ("I'd like to see the manager"); others are specially constituted settings—separate from the normal stream of activity in time, place, personnel, formality or applicable norms. We know that a tremendous number of disputes are processed by such forums. We have no count of them, but we do have some idea of the conditions under which they flourish. Resort to embedded forums is encouraged where there are continuing relations between the disputants. Continuing relations raise the cost of exit; they increase the likelihood of some shared norms and they supply opportunities for application of sanctions—for example, by direct withdrawal of beneficial relations or by reputational damage that reduces prospects for beneficial relations.

Such embedded systems of dispute processing may be relatively independent of the official system in norms, sanctions, procedures, and personnel—like those of religious groups (*Columbia Journal of Law and Social Problems* 1970), gangs, the Chinese community in American cities (Doo 1973). Others are normatively and institutionally dependent upon the official system—like the settlement of automobile injuries (Ross 1970) or bad checks (Beutel 1957). This distinction between free-standing and appended remedy systems should not be taken as sharp dichotomy, but as marking points on a continuum (see Galanter 1974, pp. 124ff.). The indigenous regulatory activity of universities and of groups of businessmen (Macaulay 1963; Mentschikoff 1961; Moore 1973) is neither independent of official norms and sanctions nor entirely dependent upon them. Generally the more inclusive and the more enduring the relationship between a set of parties, the more likely it is that their disputes will be regulated in some indigenous forum (see below at pp. 206–8).

The Invocation of Courts

The pyramid imagery imparts to the process of dispute construction and transformation a stability and solidity that are illusory. Changes in perceptions of harm, in attributions of responsibility, in expectations of redress, in readiness to be assertive—all of these affect the number of grievances, claims, and disputes. New activities (based on new tech-

nologies) and new knowledge may change notions of causal agency. Some parts of the pyramid are more crystallized. In matters like automobile accident claims and post-divorce disputes, Americans have ample cues on how to perceive the problem; it is "common knowledge" how to proceed; social support for complaining is readily forthcoming; there are occupational specialists ready to receive the matter and pursue it on a routine and standardized basis. Other parts are more shifting and volatile. Over time, we can imagine a moving frontier of perceived grievance. As the span of human control expands so do attempts to extend accountability. Claims of damage from rainfall caused by cloud seeding or "wrongful life" claims are examples of the growing edges of the world of dispute, where the borders between fate, self-blame, and (specific or shared) human responsibility are blurred and disputed. These areas of blurring and contest are eventually resolved. But it should be noted that the area of recognized disputes contracts as well as expands. Claims may become subject to routine reimbursement and removed from disputing. Other sorts of claims may lose their standing—for example, claims to honor or racial superiority, claims to privacy by officials.

As disputes move up the pyramid (and laterally from one forum to another), they undergo many transformations. (Cf. Emerson and Messinger 1977 on the role of third parties in defining and organizing the "trouble.") The disputes that come to courts originate elsewhere and may undergo considerable change in the course of entering and proceeding through the courts. Disputes must be reformulated in applicable legal categories. Such reformulation may entail restriction of their scope: diffuse disputes may become more focused in time and space, narrowed down to a set of discrete incidents involving specified individuals. Or, conversely, the original dispute may grow, becoming the vehicle for consideration of a larger set of events or relationships. The list of parties may grow or shrink; the range of normative claims may narrow or expand; the remedy sought may change; the goals and audiences of the parties may change. In short, the dispute that emerges in the court process may differ significantly from the dispute that arrived there, as well as from disputes in other settings (Engel 1980, p. 434; Mather and Yngvesson 1980–81; Felstiner et al. 1980–81).

Lawyers are often viewed as important agents of this transformation process. They help translate the disputes of clients into applicable legal categories (cf. Cain 1979). But lawyers may also act as gate-keepers, screening out claims that they are disinclined to pursue. Macaulay (1979), studying the dissemination of consumer law to Wisconsin lawyers, found that lawyers tended to defuse consumer claims, diverting them into mediative channels rather than translating them into adversary claims. Just how lawyers perform this translation depends, of course, on the way that the profession is organized. The organization of legal services delivery powerfully affects which disputes come to the attention of lawyers and which get through the filters imposed by the lawyer's case selection process (cf. Mayhew 1975). Thus, Macaulay (1979) found that the organization of legal services in Wisconsin was such as to deliver information about opportunities under consumer legislation to businesses and to wealthy consumers but not to ordinary consumers.

Those disputes that are not resolved by negotiation or in some embedded forum may be taken to a champion or a forum external to the situation. Recourse to any such "third party" is relatively infrequent across the whole range of disputes. In the Milwaukee Mapping Study, Ladinsky and Susmilch (1985) found that only 3 percent of problems were taken to *any* third party. This is in the same range as Best and Andreasen's finding

(1979, p. 713) that third parties were resorted to in only 1.2 percent of all cases in which consumers perceived problems (3.7 percent of all instances in which they voiced complaints). This included what we have called embedded forums, such as professional associations and the Better Business Bureau; lawyers and courts were only one sixth of the total.

As the stakes increase, so does resort to third parties. In the CLRP study—recall these are grievances involving more than $1,000—23 percent of those with disputes consulted a lawyer (Miller and Sarat 1980–81, p. 537). In two areas the range was much higher: postdivorce disputes, for which involvement with a court was unavoidable; and tort, where the contingent fee system provided ready access. In the interorganizational disputes studied by CLRP (Trubek et al. 1982, I-95ff.) lawyers were used in 35 percent; use increased little in the larger disputes (to 39 percent in disputes involving more than $10,000).

Sixty-four percent of American adults have had at least one professional contact with a lawyer (on matters other than those connected with their business) (Curran 1977, p. 185). (This was not confined to disputes, but included matters like purchasing property and preparing wills.) Slightly more than half of these had used lawyers more than once, with an average of slightly more than two uses per user (1977, p. 190). Use was higher by whites and by the more educated and wealthy. There was a dramatically higher rate of multiple use by those with higher education (1977, p. 193). Yet for a very large portion of the population (47 percent of nonusers, 40 percent of multiple users) the use of lawyers is regarded as a last resort that should not be approached until one has "exhausted every other possible way of solving his problem" (1977, p. 235).

Some of those who consult lawyers (and a few who don't) get to court. Miller and Sarat (1980–81, p. 543) report that about 11 percent of disputants (9 percent when those with postdivorce problems are excluded) took their middle-range disputes to court. This comes to about 7 percent of all households in the survey. In the (mostly smaller) consumer disputes covered by Best and Andreasen (1977) and by Ladinsky and Susmilch (1985), courts virtually disappear from sight. Overall 9 percent of American adults report having had experience in a major civil court and 14 percent in a minor civil court (this includes parties, witnesses, jurors, and observers). Fewer acknowledge experience in criminal courts (major, 6 percent; minor, 9 percent; juvenile, 7 percent) and more with traffic court (26 percent). Only 1 percent report experience with a highest appellate court (Yankelovich, Skelly and White 1978, p. 15). An earlier study found that almost two thirds of North Carolinians claimed personal experience with the courts: 10 percent had brought suit, 7.4 percent had been sued, 25.7 percent had been witnesses, 24 percent had served on juries, and 48.1 percent had been spectators to court proceedings (Walker et al. 1973, pp. 71–72). These scattered data suggest that a sizable minority—probably less than one fifth—of American adults have sometime in their lives been a party to civil litigation.

What is at stake in the cases that get to court? The Civil Litigation Research Project studied a sample of 1,649 cases in five federal courts and state courts of general jurisdiction in five locations: cases involving less than $1,000 were eliminated from the sample. The stakes involved in the median state court case was $4,500. Only a quarter of state cases involved over $10,000. The median federal court case involved $15,000 (Kritzer et al. 1982, p. 82). ("Stakes" was defined as the lawyer's view of what the client would take or give to settle the case; Kritzer et al. 1982, p. 42.)

In the CLRP study of interorganizational disputes (Trubek et al. 1982, I-95ff.), respon-

dents were asked to estimate the percentage of their organization's disputes that went to court: the median estimate was 5 percent but the mean was 17 percent, suggesting that there are a small number of frequent users of the courts. The median response on use of arbitration was two tenths of a percent—about one twenty-third the estimated use of courts. Again, the higher mean response (6 percent) suggests that there are a number of frequent users of this device. But the great preponderance of disputes are dealt with bilaterally, without resort to a third party. The median estimate of no third party involvement was 90 percent. Thirty-one percent of respondents reported that none of their disputes went to court, and 68 percent reported that none went to arbitration.

Even in a society regarded as highly rights-conscious and litigious, there may be very little use of litigation to adjust relations among whole classes of major organizational actors, such as large manufacturing corporations, financial institutions, educational and cultural institutions, and political parties. Macaulay (1963) found manufacturers reluctant to intrude litigation into relationships with their customers and suppliers. Owen (1971, pp. 68, 142) found that in two Georgia counties "opinion leaders and influentials seldom use the court except for economic retrieval." Analyzing patterns of court use, Hurst (1980–81) remarks on

> the absence of sizeable numbers of legal actions in which individuals or firms of substantial or large means appear on both sides of lawsuits. Such potential suitors can afford, and are likely to make extensive use of, skilled professional help to channel their affairs so as to prevent trouble. Similarly, when trouble emerges, they are likely to be equipped to make sophisticated choices of alternatives to litigation to resolve difficulties through bargaining, mediation or arbitration. Apart from these influences of resources available, they are likely to find their own interest deeply engaged in maintaining continuing relations with their potential opponents in litigation, so that the structure of the situation directs them away from the courts. Moreover, the larger the business firm and the more dependent its interests on long-term confident, harmonious relations with a network of others in the community—investors, credit sources, suppliers, customers, elected officials—the more likely that it will shun the publicity that may attend lawsuits. [p. 422]

In some settings, the use of courts has been found to be more frequent among marginal than among central actors (Todd 1978) or among lower-status than among higher-status actors (Baumgartner 1980). These findings comport with the observation that, because the limiting forms of adjudication exclude the deployment of many political resources, courts are particularly attractive forums for those who cannot prevail in more politically responsive forums (Dolbeare 1967, p. 63; Howard 1969, p. 346; McIntosh 1982b; cf. Merry 1982, p. 27).

Like other kinds of remedy-seeking, litigation requires information and skills. Complaints to all third parties come disproportionately from better educated, better informed, and more politically active households (Best and Andreasen 1977; cf. Hill 1976 on the greatly disproportionate rate of complaints by professionals to the New Zealand ombudsman). Those consumers who participated in a massive class action recovery against manufacturers of antibiotics were the responsible, informed nonalienated mainstream (Bartsche et al. 1978). The resources that enable courts to be used may be provided by means other than education and status. Thus, Merry (1979, p. 913), detailing use of a court in an American slum, found that "those who turn to the court generally had some

special inside knowledge of court operations, either through a close friend or relative on the police force, or past encounters of kin with arrests and court appearances."

In many American courts, plaintiffs are predominantly businesses or governmental units, while the defendants are overwhelmingly individuals (Galanter 1975, Table 1). Wanner's study (1974, 1975) of civil courts of general jurisdiction in three large American cities found that business and governmental units were plaintiffs in 58 percent of the cases filed in these courts, but defendants in only 33 percent. The modal lawsuit pitted an organizational plaintiff against an individual defendant. A comparable pattern is found in Owen's study (1971) of two county courts (see computation in Galanter 1975, p. 352). The same configuration of organizational plaintiff versus individual defendant is typical in small-claims courts (which handle a substantial proportion—perhaps half [see fn. 8, on p. 193]—of the total civil caseload in the United States. See Yngvesson and Hennessey 1975; Galanter 1975). There is reason to think that this pattern is not uniquely American. An analysis of 489 civil cases in the Amtsgericht (lower civil court) Freiburg (Germany) shows a remarkable resemblance to the American data (Blankenburg et al. 1972). Some fragmentary British data again reveal a similar pattern (Galanter 1975, Table 1).

However, studies of other general jurisdiction courts suggest that the preponderant configuration is individual plaintiff versus individual defendant. In four of the five state courts in the CLRP study individuals were some 75 percent of the plaintiffs. In the Arthur Young & Co. study (1981) of courts of general jurisdiction in five diverse counties, most suits in 1976–77 were by individual plaintiffs against individual defendants. Suits by individuals against businesses (11.4 percent) and businesses against individuals (9.9 percent) were pretty evenly matched. Similarly, McIntosh (1982a) found that, in the most recent period (1940–70), 70 percent of cases in St. Louis Circuit Court were individual versus individual, 17 percent individual versus organization, 4 percent organization versus individual, and 9 percent organization versus organization.

In order to understand the distribution of litigation in a society, it is necessary to go beyond the characteristics of individual parties to consider the relation between them. Are the parties strangers or intimates? Is their relationship episodic or enduring? Is it single-stranded or multiplex? In the American setting, litigation is typically between parties who are strangers. Either they never had any mutually beneficial continuing relationship (as in the typical automobile injury case) or their relationship—marital, commercial, or organizational—is ruptured. In either case, there is no anticipated future relationship (see Merry 1979, p. 895; Sarat 1976). In the American setting, unlike some others, resort to litigation is typically viewed as an irreparable breach of the relationship (see Galanter 1974, p. 113, n. 44).

Black (1971, p. 1097) suggests that invocation of official remedies increases with the relational distance between the parties. This connection between litigation and strangers clearly does not hold for all societies. Morrison (1974) and Kidder (1973) describe to us a pattern of litigation with intimates in India. Consider Morrison's report (1974, p. 57) of the North Indian villagers who "commented scornfully that Netaji [a chronic litigant] would even take a complete stranger to law—proof that his energies were misdirected."

Relations may be so intimate and unbreakable that the built-in sanctions of reciprocity and withdrawal, ordinarily supplied by continuing relations, are neutralized. In such cases intimates may seek outside help. Hence, where parties are locked into relationships, litigation may proceed side-by-side with the continuation of that relationship.

Yeazell (1977, pp. 881–82) describes seventeenth-century English class actions among parson and parishioners, lord and tenants, who were so securely tied to one another that the litigation did not threaten severance. Perhaps this accounts for the immense amount of litigation among inescapable trading partners in the Soviet Union, where it is reported that there were over one million *arbitrazh* cases annually (Loeber 1965). Consider, for example, the earlier report that the Ural Rolling Stock Factory brought 15 cases against the Central Power Equipment Construction Enterprise, which in turn brought 26 cases against it (Bakhchisaraitsky [1937] in Zile 1970, p. 192).

Similarly, the absence of other remedial channels may explain why litigation is more frequent in disputes with geographically distant antagonists than with those near at hand. Engel (1978, p. 143) reports that "at distances where interaction may be presumed most frequent, the rates of litigation are the same as—or even lower than—the rates of litigation at distances where interaction is relatively rare." (Cf. Starr and Pool 1974; Konig 1979, p. 79; Witty 1978, p. 308.) Litigation is also associated with disputes across ethnic lines (Engel 1978, p. 144). Litigation occurs where it is less costly in terms of its disruption of valued relations—particularly multiplex and affective ties. And the absence of such ties makes it less likely that alternative remedies—either mediators or reputational networks with shared norms and sanctions—are available. (Cf. Nelson 1981, pp. 58ff., on the predominance of Quakers as litigants in eighteenth-century New England towns.) But where disputes are about control of irreplaceable resources (land, power, reputation), disputants may be willing to sacrifice valued relationships and pursue the drastic remedies of litigation rather than resort to indigenous remedies (Starr and Yngvesson 1975; Forman 1972; Mendelsohn 1981).

Just as the stakes may affect proclivity to litigate, so the goals of disputants may affect the course the litigation takes. Litigants vary in the extent to which they seek justice or moral vindication instead of, or in addition to, a satisfactory resolution of their immediate discomforts. Although the high rate of litigation has led some observers to characterize Americans as "rights-minded" (Henderson 1968; Hahm 1969), there is evidence that the appetite for justice and vindication in terms of authoritative norms is limited. Thus, Mayhew (1975, p. 413) found that the proportion of respondents reporting serious problems who sought "justice" or legal vindication (as opposed to a satisfactory adjustment) was tiny in all areas other than discrimination: only 4 percent of those with serious problems connected with expensive purchases sought "justice," as did 2 percent of those with neighborhood problems; but 31 percent of those reporting discrimination problems sought "justice."

Another reading of public appetite for justice is provided by Steele's study (1975, p. 1140) of complaints to the Illinois State's Attorney's Consumer Fraud Bureau, which found that the desire for "public-oriented remedies" as opposed to private relief varied directly with income level. Only 4 percent of those with incomes of less than $11,000 requested a public remedy, but 28 percent of those with incomes over $17,000 did so. The complainants to this bureau were isolated individuals. There is some reason to think that individuals complaining in a setting of group activity will be more interested in public-oriented remedies than are unorganized individuals (Mayhew 1968; cf. FitzGerald 1975).

Although disputing in America has a predominantly instrumental character, litigation is sometimes regarded as a vehicle of moral action involving matters of principle over which compromise would be unseemly or unthinkable. (Cf. Aubert's distinction [1963]

between conflicts of principle and conflicts of interest.) FitzGerald (1975) portrays the temporary marriage of litigation to an intense moral crusade in the case of the Contract Buyers League, a group of Chicago blacks victimized by a discriminatory system of housing sales. After a period of unsuccessful individual attempts to secure relief, intervention by outsiders precipitated formation of a group which, over a period of several years, engaged in picketing, withholding payments, and resisting attempts at eviction. FitzGerald describes "the intense experience of belonging and acting together," and the "intense feeling of altruism . . . and . . . intense loyalty to those who had joined the group which was 'fighting for justice'" (1975, pp. 184–85). This collective activity generated a powerful sense of communion that "overshadowed their instrumental and economic aim of having the contracts renegotiated" (*id.*, 184) and attracted considerable support from outsiders, including elite lawyers who mounted an innovative and ultimately unsuccessful campaign of litigation on behalf of the League.

The example illuminates by contrast the relatively restrained, narrowly focused, impersonal, and professionalized character of most American litigation. Several very striking accounts of major injury litigation from Japan (Upham 1976; Ino et al. 1975) portray victims, who are ordinarily disinclined to pursue legal remedies in a calculating instrumental fashion, engaging in group litigation which becomes the focus of an all-out struggle of great moral intensity. Consider the following entry from the diary of one of the plaintiffs' lawyers for the Japanese thalidomide children (Ino et al. 1975):

> The ceremony of signing the [settlement] confirmation instrument was held at Prefectural Assembly Hall . . . some 100 people representing 56 families including 30 deformed children were present. The whole function was conducted by the plaintiffs themselves, as the attorneys' team watched the proceedings.
>
> The senior representative of the group, Mr. Terasaka Kanematsu, in an appeal about the pain shared by the children and parents alike, which wrenched the hearts of those present, pleaded for the defendants' fullest and most sincere execution of the provisions. No applause followed, nor any smiles. President Miyatake [of the offending manufacturer] and the Minister of Health and Welfare, both hanging their heads low, apologized before the children. The Minister pledged that like compensation would be provided for victims who had not brought suit. [p. 185]

It is instructive to compare these examples with the more modulated or segmented struggle of the Buffalo Creek disaster victims. Six hundred victims of a flood caused by the collapse of a faulty mine dam sued the coal company. An intense, and ultimately profitable, *pro bono* effort by a major Washington law firm involved a massive deployment of legal resources, the development of innovative theories of recovery, strenuous and elegant legal maneuver—and ultimately a substantial settlement (Stern 1977, cf. Erikson 1976; Gleser et al. 1981). In spite of the number and proximity of the plaintiffs, there was no direct encounter with their antagonists, or any form of collective action, or any sense that plaintiffs were caught up in a struggle outside the bounds of the lawsuit.

Comparative Incidence of Litigation

The apparently simple inquiry of how much adjudication there is turns out to involve formidable complexities of measurement. Local differences in recording practices and differences in the jurisdiction of courts add to differences in substantive law to make

comparison of litigation across societies extremely treacherous. Problems of ascertaining what is a case and who are the participants (Cartwright 1975) are compounded by problems of comparison across time and space. If comparison is facilitated by the formation of a world of cognate institutions (see p. 222–23), it is hampered by the multitude of particular ways in which these institutions are related to their social and political environments. The figures given in Table 5 must be taken with appropriate caution. They suggest great variation in litigation rates. These are rates for the ordinary courts, so the variation they show may be amplified or diminished by controlling for the handling of similar disputes in other forums. To varying degrees, most modern states have curtailed the jurisdiction of ordinary courts, diverting routine and/or sensitive matters into special courts or tribunals (Brand 1971; Toharia 1975b; Haley 1978). Since the proceedings in such tribunals are often analytically indistinguishable from litigation in court, these figures may tell us about the location rather than about the amount of adjudicative disputing in society. At the least we get an indication of the very different uses to which the ordinary courts are put in various societies.

Table 5 also suggests the absence of any gross association of litigation with modernity, wealth, or industrialization. Court figures in industrial societies may be inflated by use of courts to ratify or administer noncontested proceedings like divorces or debt-collection. But adversary contests seem less frequent in industrial societies than in some others. For example, Fallers (1969, p. 22) reports that among the Soga something like one in ten adult males is likely to appear in courts as a principal every year. Dubow (1983) studying another East African society reports that in the Arusha District of Tanzania "about one out of ten adults appeared in court as litigants in a single year." (Cf. Abel 1979b on the decreasing frequency of civil litigation in modern Africa, discussed below, p. 221.) The United States rate of per capita use of the regular civil courts may be roughly estimated at about 44 per thousand[8]—in the same range as England, Australia, Denmark, and New Zealand; somewhat higher than Germany or Sweden; far higher than Japan, Spain, or Italy. It is difficult to know what to make of these rates until we supplement them with data about recording practices and about the other forums and tribunals which handle disputes in each of these societies.

It should be recalled from Table 3 that contrasts in other parts of the legal system are as striking as differences in litigation rates. The United States has many more lawyers than any other country—more than twice as many per capita as its closest rival. And it has a relatively small number of judges. The ratio of lawyers to judges in the United States is

[8]The rate given here for the United States is a crude estimate arrived at by the following procedure. The most complete—and admittedly very rough—compilation of data on cases filed in state courts of general jurisdiction (based on data from 44 states) enables us to derive a rate of 21.6 cases per thousand in 1975 (U.S. Dept. of Justice 1979, p. 41). Reassuringly, this rate falls roughly in the middle of range of rates for the counties we know from the surveys of individual scholars (Friedman and Percival 1976; McIntosh 1980–81, 1982a; Daniels, 1981, 1982; Arthur Young et al., 1981). But this figure includes only filings in courts of general jurisdiction. Just how large a portion of all American litigation is in courts of limited jurisdiction is not known, but we can make a guess on the basis of the following computation. For the 14 states for which data are available, the median percentage of the state's total civil caseload handled by courts of limited jurisdiction is 52 percent (Silbey 1979, Table 26). If we assume that roughly half of American state civil litigation is filed in courts of limited jurisdiction, we should double the 21.6 rate to obtain a comprehensive estimate of the rate of civil litigation in state courts. To this we should add the 1975 rate of civil filings in federal courts (0.55 per thousand; U.S. Department of Justice 1977, p. 613). If we do this, the United States rate of per capita use of the regular civil courts in 1975 was just below 44 per thousand. More recent rates for some states with apparently comprehensive data are given in Table 5.

TABLE 5

Case Filings per 1,000 Population[1] in Selected Jurisdictions

	Civil			Criminal		
	Year	Rate	Source	Year	Rate	Source
Australia (Western Australia only)	1975	62.06[2]	c	1975	112.49[3]	c
Canada (Ontario only)	1981–82	46.58[4]	p	1981–82	44.95[5]	p
Chile	1970	12.97[6]	m	1970	12.72[7]	m
Columbia	1970	9.46[6]	m	1970	18.07[7]	m
Costa Rica	1970	24.50[6]	m	1970	28.80[7]	m
Denmark	1971	41.40[8]	d	1970	17.55[8]	d
England/Wales	1973	41.15[9]	i	1973	41.5[9]	i
France	1975	30.67[10]	n	1975	9.31[11]	o
India	1977	4.24[12]	g,l	1977	11.38[13]	g,l
Israel	1978	30.76[14]	b	1978	23.66[15]	b
Italy	1973	9.66[9]	i	1973	65.9[9]	i
Japan	1978	11.68[16]	w	1978	9.40[17]	w
Kenya	1969	4.4[18]	a	1969	23.3[18]	a
New Zealand	1978	53.32[19]	e	1978	35.58[20]	f
Norway	1976	20.32[21]	x	1973	6.16[22]	d

SOURCES:
[a]Abel 1979b. [b]Central Bureau of Statistics 1978, Table Nos. 3 and 5. [c]Commonwealth Bureau of Census and Statistics 1976, Tables 44 and 45. [d]Council of Europe 1975, pp. 33, 114. [e]New Zealand Department of Statistics, 1980a, Tables 4, 29, 58, and 4. [f]New Zealand Department of Statistics, 1980b, Table 22. [g]Dhavan 1978, p. 124. [h]Engel 1978. [i]Johnson et al. 1977. [j]Judicial Council of California 1982, Tables I, VI, XVII, XVII-B, XXX. [k]Judicial Council of Florida 1980, pp. 40, 59. [l]Law Commission of India 1979, pp. 71, 97. [m]Merryman and Clark 1978, pp. 486, 497; Tables 7.1 and 7.13. [n]Ministère de la Justice 1979 [France]. [o]Ministère de la Justice 1978 [France], p. 16 annex II. [p]Ministry of Attorney General [Ontario] 1982. [q]National Bureau of Statistics 1981, Table No. XII-24. [r]Office of State Courts Administrator n.d., Tables Nos. 14 and 15, p. 21. [s]Office of the Chief Court Administrator 1981, pp. B26–27, B31, B32–35, and B41–45. [t]Savezni Zavod za Statistiku 1981, Tables Nos. 103-14, 103-15, 103-16, 103-17, 133-5, 133-9, 133-10, 133-12, 133-13, and 133-14. [u]Starr and Pool 1974. [v]Statistisches Bundesamt 1980, Tables 15.4.1, 15.4.5, 15.7.1, and 15.9. [w]Statistics Bureau, Prime Minister's Office [Japan], 1982, Tables 482–484. [x]Statistik Sentralbyra [Norway], n.d., Table N-10. [y]Supreme Court of Minnesota n.d., Tables 2, B-7, B-8, B-9, B-10, B-13, C-1, C-3, and C-6. [z]Sveriges Officella Statistik 1977, p. 224.
NOTES:
[1]Unless noted otherwise, all population data taken from *World Population 1979* (Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, 1980).
[2]Based on filings in local courts, district court, and first-instance bankruptcy, divorce, and other proceedings filed in the Supreme Court of Western Australia. Western Australia's population in 1975 was 1,146,700, as reported in *Year Book Australia: No. 66, 1982.*
[3]Based on *charges* recorded excluding minor offenses not subject to court process. See note 2 for population data.
[4]Based on filings in the family courts (contentious cases only), county and district courts, small-claims courts, and supreme court. Ontario's population in 1981 was 8,664,600, as reported in *The World Almanac and Book of Facts, 1983.*

TABLE 5

(Continued)

	Civil			Criminal		
	Year	Rate	Source	Year	Rate	Source
Peru (Lima Province only)	1970	25.20[6]	m	1970	3.20[7]	m
South Korea	1978	2.01[23]	q	1978	2.43[23]	q
Spain	1970	3.45[6]	m	1970	8.68[7]	m
Sweden	1973	35.0[24]	i	1974	12.19[24]	z
Thailand (Chiangmai Province only)	1974	.69[25]	h	1974	3.56[25]	h
Turkey (Bodrum District only)	1967	26.20[26]	u	1967	16.40[27]	u
United States						
California	1980–81	69.15[28]	j	1980–81	38.05[29]	j
Connecticut	1979–80	57.08[30]	s	1979–80	35.12[31]	s
Florida	1978–79	46.38[32]	k	1978–79	32.01[33]	k
Minnesota	1976	41.54[34]	y	1976	17.48[35]	y
Missouri	1980–81	41.64[36]	r	1980–81	19.53[37]	r
West Germany	1977	23.35[38]	v	1977	9.68[39]	v
Yugoslavia	1980	63.02[40]	t	1979	8.12[41]	t

[5] Based on *charges* received under the criminal code and narcotics code in the provincial courts, cases received in the county courts and cases disposed of in the supreme court. The provincial court data accounts for over 97 percent of the total. See note 4 for population data.

[6] Based on first-instance civil cases filed.

[7] Based on first-instance penal cases filed at the investigative stage.

[8] Based on cases brought before the district courts and high courts as courts of first instance.

[9] Based on judicial filings per 1,000 population.

[10] Based on civil cases, family matters, landlord-tenant cases, garnishments, and orders to pay filed in the tribunaux d'instance and tribunaux de grande instance. France's population in 1975 was 52,655,800, as reported in the *Annuaire statistique de la France, 1981*. Figure based on continental French data only.

[11] Based on cases before the tribunaux correctionnels (418,728) and juridictions d'instruction (investigative judges; 71,253). No separate filing data available for cours d'assises and tribunaux de police. See note 10 for population data.

[12] Based on filings in the district level courts (district/additional judges courts, senior subordinate judges courts, Munsif courts and small cause courts), high courts, and first-instance filings before the supreme court. Because the data for the high court were not separated into first-instance cases and appeals, the rate is somewhat inflated. The high court filings account for 17 percent of the total civil filings.

[13] Based on filings in the sessions courts, magistrate courts, and first-instance cases in the supreme court.

[14] Based on first-instance cases filed in magistrate and district courts, excluding motions.

[15] Based on first-instance cases filed in magistrate and district courts, excluding traffic offenses not resulting in an accident.

[16] Based on ordinary litigation cases, administrative cases, conciliation cases, domestic cases, executions, auctions, bankruptcies, provisional attachments, collection and compromise cases received by the summary and district courts, but does not include nonpenal fines. Including the latter brings the rate to 13.18. Japan's population in 1978 was 114,898,000, as reported in the *Japan Statistical Yearbook, 1982*.

TABLE 5

(Continued)

[17] Based on defendants newly received in the summary and district courts. Because no data for newly received Road Traffic Law cases were available, Road Traffic Law disposals were subtracted from the total of newly received cases. Figure is slightly inflated due to inclusion of appeals from summary courts to district courts, which accounts for about 3 percent of district court total (which itself is 9 percent of total new cases received). See note 16 for population data.

[18] Based on cases filed in primary courts. Kenya's population in 1969 was 10,942,705, as reported by Abel.

[19] Based on cases filed in the magistrate courts, the supreme court as a court of first instance, domestic proceedings, and divorce petitions.

[20] Based on total *charges* excluding traffic summonses.

[21] Based on cases *disposed of* by conciliation boards (71,490) and city and district courts (10,318).

[22] Based on cases brought before the ordinary county and town courts and those same courts functioning as examining and summary courts.

[23] Based on first-instance cases received. South Korea's population in 1978 was 36,969,000, as reported in the *Korea Statistical Yearbook, 1981.*

[24] Based on cases entered in the district courts.

[25] Based on first-instance cases processed in provincial and magistrate courts. Population data provided by provincial office, as reported by Engel.

[26] Based on cases accepted by the district lower civil court and higher civil court. The estimated population of Bodrum District in 1967 was 25,000, as reported by Starr and Pool.

[27] Based on cases accepted by the district lower criminal court and middle criminal court, but does not include the few cases from the district accepted by the regional higher criminal court. See note 26 for population data.

[28] Based on first-instance filings in the supreme court, courts of appeal (usually writs of mandamus), superior courts (including juvenile cases, and excluding probate, guardianship, and mental health cases), and lower courts. California's population in 1980 was 23,668,562, according to the U.S. Census.

[29] Based on first-instance filings in the supreme court, courts of appeal, superior courts, and lower courts, excluding traffic cases. When "Group C" traffic violations—hit-and-run property damage, misdemeanor drunk driving, driving under influence of drugs—are included, the rate is 52.18. See note 28 for population data.

[30] Based on cases added to the superior court's civil division, family division (juvenile and contentious cases only), and housing session dockets. Connecticut's population in 1980 was 3,107,576, according to the U.S. Census.

[31] Based on cases added to the superior court's criminal and housing session—criminal dockets. See note 30 for population data.

[32] Based on filings in the circuit and county courts, including juvenile and excluding probate, incompetency, guardianship, and testamentary trust cases. Florida's population in 1979 was 9,202,000, as reported in the *Twenty-Fifth Annual Report: Judicial Council of Florida.*

[33] Based on felony and misdemeanor filings in the circuit and county courts, excluding traffic cases. See note 32 for population data.

[34] Based on filings in the district courts, municipal courts, county courts (including juvenile cases and excluding probate cases), and conciliation courts (small claims). Minnesota's population in 1976 was about 3,965,000, as reported in the *CBS News Almanac, 1978.*

[35] Based on filings in the district courts, municipal courts, and county courts, excluding traffic cases. See note 34 for population data.

[36] Based on filings in the circuit courts and associate circuit courts, excluding probate cases. Missouri's population in 1980 was 4,917,444, according to the U.S. Census.

[37] Based on filings in the circuit courts and associate circuit courts. See note 36 for population data.

[38] Based on cases received in the municipal, district, and administrative courts. The latter court has jurisdiction over cases with a public authority as defendant.

[39] Based on criminal cases brought to trial, excluding all traffic cases. When serious traffic offenses (hit and run, bodily injury, drunk driving, and so forth) are included, the rate is 14.99.

[40] Based on petitions to "social attorneys of self-management" on violations of self-management rights and social property in 1979 (115,914), cases received by courts of associated labour in 1980 (69,956 including some appeals), administrative litigation in 1980 (31,481 disposals), civil suits (including petitions for order to pay and appeals from those petitions) in 1980 (1,128,000), and cases decided by the economic courts in 1979 (63,378). The Yugoslav Census of 1981 reported a population of 22,354,219.

[41] Based on criminal charges (160,955) and "charge sheets" submitted on "responsible persons" accused of economic violations (20,541). Data are for 1979. Figure is slightly deflated because the population figure used was from 1981 (see note 40).

among the highest anywhere; the private sector of the law industry is very large relative to the public institutional sector. (Perhaps this is connected with the feeling of extreme overload expressed by many American judges.)

FitzGerald's Australian replication (1983) of the Civil Litigation Research Project's household survey—the basis for the analysis of Miller and Sarat (1980–81)—affords a remarkable opportunity to compare the whole dispute pyramid in two societies, not just imponderable litigation rates. FitzGerald asked Australians about the same types of problems and found them to be overall "more frequent perceivers of 'middle range' grievances than their American counterparts" (1983, p. 25). He found an overall similarity in the shape and structure of the disputing pyramids in the two countries—that is, the extent to which different kinds of grievances gave rise to claims, to which claims gave rise to disputes, and disputes to consultation of lawyers (1983, p. 30). Overall, the Australian pyramid was more bottom heavy "with more claims and fewer appeals to the courts per 1000 grievances" (1983, p. 30). In other words, "Australians are substantially more likely to complain about their troubles than are their U.S. counterparts and somewhat more likely to engage in an actual dispute" (1983, p. 30).

But Americans are twice as likely to take these middle-range grievances to court (1983, p. 35). But going to court may mean something different in Australia. From what we have seen about settlement rates in the United States, we know that filing suit is often part of negotiation, the meaning of this difference in filings is not clear. But it at least suggests that the way the negotiation game is played in Australia is different and that lawyers can conduct it without playing the court card. It also may reflect differences in the state of law (more settled), in the organization of the profession (divided), and in fee arrangements (no contingency).

FitzGerald's research reminds us of the disassociation of litigation from other levels of disputing, so that we cannot take the former as representative of the larger whole. It points to the need to explore the way in which grievances are transformed into disputes and lawsuits. It also suggests that these processes are not global and pervasive cultural traits or even characteristics of individual disputants. As in the American study, education, income, occupation, and ethnicity seem to explain little of the variation in grievance rates (1983, p. 28). In both countries "by far the most powerful explanatory factor" for the history of the dispute was the type of grievance involved (1983, p. 39). In other words, what happens depends on institutionalized ways of handling different kinds of disputes, not on broader cultural propensities to dispute.

Cultural Proclivities to Litigate

The construction and mobilization of claims involves shared interpretations of experience. It reflects cultural judgments about offensive behavior, injury, responsibility, the self and its extensions, as well as beliefs and attitudes specifically about remedial procedures. Observed variations in resort to courts may be viewed as reflecting "rights consciousness" or an appetite for seeking vindication in terms of official norms. Thus, Zeisel et al. (1959, chap. 20) attribute striking variations in the rate of making several kinds of tort claims in a number of American localities to differences in the "claims consciousness" of their populations.

The disparagement of litigation and of those who resort to it is found in many cultures. Engel (1978, p. 98) reports that litigation is associated with aggression, self-assertion,

overt conflict, and lack of subtlety which are strongly offensive to Thais, whose low estimate of litigation is summed up in the adage that "it is better to eat dogshit than to go to court" (1978, p. 98). An extensive literature on East Asian societies (for example, see Kawashima 1963; Hahm 1969; Cohen 1966) attributes the low rates of litigation in those societies to cultural disapproval of the assertiveness and contentiousness that are associated with litigation.

Attempts to explain use of courts by correspondence with cultural valuation of litigation are unable to exclude structural explanations for wide variations across space and time. Examining the files from a Chinese district from 1789 to 1895, Buxbaum concluded that disinclination to litigate was strongly affected by distance from the court (1971, pp. 274–75). More generally, Haley has argued that the much-cited preference for conciliation in Japan reflects the deliberate constriction of adjudicative alternatives by successive Japanese regimes. Summarizing Henderson's research (1965), Haley (1978) recounts that

> . . . Tokugawa officialdom had constructed a formidable system of procedural barriers to obtaining final judgment in the Shogunate's courts. The litigant was forced each step of the way to exhaust all possibilities of conciliation and compromise and to proceed only at the sufferance of his superiors. . . . Conciliation was coerced . . . not voluntary. Yet . . . litigation still increased. [p. 371]

Modern statutes providing for formal conciliation were not "the product of popular demand for an alternative to litigation more in keeping with Japanese sensitivities." Rather "they reflected a conservative reaction to the rising tide of law suits in the 1920s and early 1930s and a concern on the part of the governing elite that litigation was destructive to a hierarchical social order based upon personal relationships" (Haley 1978, p. 373). Mandatory conciliation brought about not a decrease in litigation, but an even greater increase in the number of cases channeled into the formal process, now enlarged to include additional remedial tracks.

The real check on Japanese litigation is the deliberate limitation of institutional capacity. Courts have limited remedial and sanctioning powers (Haley 1982); the number of courts (see p. 167 above) and advocates is kept small, making litigation protracted and costly. The small number of advocates reflects not an aversion to law, but a severe constriction of opportunities to enter the profession. There is a single institute from which graduates may enter bench, bar, or prosecution. Places are limited to five hundred per year. Haley notes (1978, p. 386) that the number of Japanese taking the judicial examination in 1975 was slightly higher *per capita* than of Americans taking a bar examination; in the United States, 74 percent passed, compared with 1.7 percent in Japan. (The numerous law graduates who are not admitted to the Institute may join one of the various other legal occupations in Japan [Brown 1983].) In sum, the low rate of litigation in Japan evidences not the popular aversion to law but deliberate policy choices by political elites.

In assessing "cultural" explanations for litigation rates, we should recall (from Table 5) that the Dutch, Spanish, and Italian rates may be even lower than Japan's. Few observers have associated Italian society with lack of contentiousness! Litigation rates may reflect public preferences, but these are expressed in a setting of political decisions about the channeling of disputes into forums. Matters may be removed from courts to make recovery certain, limited, and calculable (as with workmen's compensation in the United States; Friedman and Ladinsky 1967). Or they may be removed because of a desire to

have politically sensitive matters handled by tribunals responsive to government directives, while leaving undisturbed the "independence" of the regular courts as in Franco Spain (Toharia 1975a) or in India during the 1975–77 emergency.

Nor are cultural ideals always reflected in popular behavior. As noted above, where scarce resources (land, power, reputation) are at stake, violation of norms against conflict may be seen as a painful necessity. Populations which embrace ideals of harmony and conciliation may use courts at high rates while disparaging litigation (Kidder 1973; Morrison 1974; cf. Haley 1978). Lack of fit between the dispute-settlement ideologies of courts and populace may make courts an arena to be manipulated to serve ambitions and concerns not contemplated in the formal law (Cohn 1959; Kidder 1973, 1974).

The processes of courts do not necessarily reflect their own institutional ideologies. Courts that ostensibly repair relationships by effectuating compromises may in practice impose all-or-none decisions (Starr and Yngvesson 1975). And, as we shall see, courts which ostensibly produce clear-cut, all-or-none decisions may characteristically bring about compromise outcomes.

The Litigation Process: Attrition, Routine Processing, Bargaining, and Settlement

In America, the great majority of those disputes that are taken to an adjudicative forum are disposed of (by abandonment, withdrawal, or settlement) without full-blown adjudication and often without any authoritative disposition by the court. In fact, of those cases that do reach a full authoritative disposition by a court, a large portion do not involve a contest. They are uncontested either because the dispute has been resolved (as in divorce) or because only one party appears (Cavanagh and Sarat 1980; Friedman and Percival 1976). Over 30 percent of cases in American courts of general jurisdiction are not formally contested. The predominance of uncontested matters in American courts is long-standing (Laurent 1959; McIntosh 1982a; Arthur Young et al. 1981).

Many cases are withdrawn or abandoned because invocation of the court served the initiator's purpose of harassment, warning, or delay. Police may make an arrest or file charges for reasons of control with no intention of pursuing prosecution. Similarly, Merry (1979, p. 902) reports that it is the issuance of the complaint and holding of the preliminary hearing that are the crucial goals of court use among residents in a poor neighborhood. The invocation of official adjudicatory institutions does not necessarily express either a preference or an intention to pursue the dispute in official forums, to secure the application of official rules, or to obtain an adjudicated outcome. The official system may be invoked (or invocation may be threatened) in order to punish or harass, to demonstrate prowess, to force an opponent to settle, or to secure compliance with the decision of another forum (see below, p. 222).

The master pattern of American disputing is one in which there is invocation (actual or threatened) of an authoritative decision-maker, countered by a threat of protracted or hard-fought resistance, leading to negotiated or mediated settlement in the anteroom of the adjudicative institution. Adversary conflict is replaced by maneuver with an eye to negotiation; the imposition of arbitral judgment is replaced by mediation.

Plea Bargaining The best-known instance of this pattern is the processing of criminal cases in the United States. The term "plea bargaining" is employed popularly

and here to refer to a whole family of patterns of processing criminal cases. These may involve protracted explicit bargaining or tacit reference to established understandings. Feeley (1979) observes that

> discussion of plea bargaining often conjures up images of a Middle Eastern bazaar, in which each transaction appears as a new distinct encounter, unencumbered by precedent or past association. Every interchange involves higgling and haggling anew, in an effort to obtain the best possible deal. The reality of American lower courts is different. They are more akin to modern supermarkets, in which prices for various commodities have been clearly established and labeled in advance. [p. 642]

Compare Ryan and Alfini's description (1979, p. 502) of a setting in which the expectations of participants are grounded in the known upper and lower sentencing limits of the judges.

Agreement may take the form of submission to an abbreviated trial in which formal rules of evidence are suspended and a finding of guilt is foreordained (cf. Mather's "slow plea" [1973, p. 190] and Heumann and Loftin's "walk through" waiver trials [1979, p. 426]). Or, more commonly, it takes the form of an agreement about the charges brought against the accused, about the sentence to be imposed, about subsequent behavior, restitution, or the like. Such patterns have been documented in Canada (Ericson and Baranek 1982; Klein 1976), England (Baldwin and McConville 1979), and Israel (Harnon and Mann 1981), as well as the United States. Goldstein and Marcus (1977, 1978) view the early, simpler, and more lenient disposition of criminal cases in continental European systems through accommodations based on "tacit understandings or patterns of reciprocal expectation" closely analogous to American plea bargaining, a characterization challenged by Langbein and Weinreb (1978).

These nontrial dispositions account for some 80 or 90 percent or more of criminal dispositions in almost every American jurisdiction. Local styles differ as to the stage of the process (McIntyre and Lippman 1970) and the role of the judge. The judge may be passive, merely ratifying deals arranged by the parties; he may actively participate in plea discussions; or he may be dominant, orchestrating the whole process—in effect, imposing the "going rate" as in the Chicago system described by McIntyre (1968). About one quarter of American judges report that their typical role is one of active participation in plea-bargaining discussions. About two thirds report that they do not participate but only ratify dispositions reached outside their presence (Ryan and Alfini 1978, p. 486).

Attempts to eliminate the negotiation element demonstrate the vital role of these processes to the local criminal justice culture. Abolition of the prevalent species of negotiated disposition lead to a shift to others. Thus, Church (1976) describes how a ban on bargaining by prosecutors was followed by a new pattern of sentence discussions with judges. Heumann and Loftin (1979, p. 425) describe how sentence bargaining became common in the wake of a mandatory charging statute.

Where plea bargaining was once viewed as disreputable it has won considerable respectability, because of its perceived contribution to facilitating the work of the courts (cf. Burger 1970). It is also credited with leading to dispositions preferable to the outcomes produced by trial. Thus, the Supreme Court has observed that plea bargaining "can benefit all concerned" (*Blackledge* v. *Allison*, 1976, p. 71). Similarly, judicial participation in

the process has become more respectable and there are calls for more judicial supervision to ensure "equal plea bargaining opportunities" (*California Law Review* 1971).

Civil Settlement Similarly, most civil cases in American courts are settled. That is, they terminate in an outcome agreed upon by the parties, sometimes formally ratified by the court, sometimes only noted as settled, and sometimes (from the court's viewpoint) abandoned. The settlement process may begin and end before filing of suit. A great majority of automobile injury claims, for example, are settled before filing (Ross 1970; Conard et al. 1964; Franklin, Chanin, and Mark 1961). Of claims that become lawsuits, settlement is the prevalent mode of disposition of most commercial cases as well as tort cases (Zeisel, Kalven, and Buchholz 1959, p. 333) and in the overwhelming majority of family cases (although in family cases, the result takes the form of a decree in which one party apparently prevails over the other). Settlement has been the prevalent pattern in the United States for at least half a century (Nims 1950; Clark and Shulman 1937). Similar patterns have prevailed in England: for example, in 1908 only 3 percent of cases in the High Court were tried before either judge or jury (Friedman 1976, pp. 35–36). Similarly, Engel (1978, p. 111) found that in a Thai district most suits alleging private wrongs were settled.

Just as "plea bargaining" on close inspection encompasses a cluster of distinct patterns, the umbrella term "settlement" encompasses a whole family of related but distinct phenomena. It includes bilateral negotiation among the parties (as described by Ross 1970; Stern 1977) before or after filing, more or less articulated to moves in the judicial arena. It also includes participation by third parties—outside mediators, officials, even judges. In recent decades American judges have increasingly accepted the notion that courts should actively promote settlements.

Judges may participate pursuant to a formal judicial responsibility to supervise the settlement (as in class actions, stockholders' derivative suits, bankruptcy reorganization cases, where minors are parties, and so forth). There is a growing body of legal doctrine about the way in which courts are obliged to exercise these responsibilities (*Harvard Law Review* 1976; *Vanderbilt Law Review* 1979). Judges may also participate indirectly where the form of the proceeding requires that the bargain struck by the parties be ratified by the court and embodied in a decree—as in divorce cases (Mnookin and Kornhauser 1979). Judges may also participate in settlement negotiations in the absence of any formal requirement that they supervise the settlement or ratify its results. American trial judges employ a variety of techniques to promote settlement, including voluntary and mandatory conferences, meetings, and consultations with the parties individually, together, and serially. The proffering of settlement formulas and various other techniques of active brokering are utilized by at least some judges.

The participation of American judges in active promotion of settlements is increasing and increasingly respectable. The primary rationalization (like that for endorsement of plea bargaining) is that this departure from the adjudicative model is necessary to preserve the forum from unbearable pressures of caseload. But judges also justify active participation on the ground that such efforts provide greater satisfaction to litigants, repair relations between contesting parties, and avoid untoward results in particular cases. Thus, one federal judge in Pittsburgh, trying a suit that threatened the existence of

the Westinghouse corporation, sought to avoid a decision based on contract norms and pressed the parties to settle, explaining:

> The fiscal well-being, possibly the survival of one of the world's corporate giants is in jeopardy. Likewise, the future of thousands of jobs.
>
> Any decision I hand down will hurt somebody and because of that potential damage, I want to make it clear that it will happen only because certain captains of industry could not together work out their problems so that the hurt might have been held to a minimum. [*New York Times*, February 11, 1977, pp. D-1, D-10]
>
> Solomon-like as I want to be, I can't cut this baby in half. [*New York Times*, February 17, 1977, p. 57; quoted in Macaulay 1977, p. 516]

Indeed, many judges accept the notion that settlement promotes more just results than would be produced by full-blown adjudication. Thus, one veteran federal judge told a training session for new federal judges that "one of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement" (Will in Will et al. 1977, p. 203). The commendation of settlement is connected with the ascendance of a view of the judicial role that departs from that of courtroom arbiter. This is put boldly by another federal judge who counseled new judges: ". . . I urge that you see your role not only as a home plate umpire in the courtroom, calling balls and strikes. Even more important are your functions as mediator and administrator" (Lacey 1977, pp. 4–5).

There appears to be some increase in the portion of cases that are settled, but this is a surmise and remains to be explored, controlling for types of cases. There is no evidence that increased judicial participation in the settlement process brings about more settlements. In their study of state courts of general jurisdiction in twenty-one cities, Church et al. (1978) found that dedicating judicial resources to active participation in settlement neither speeded dispositions nor increased the productivity of judges (measured by the number of cases they disposed of annually). Indeed, a detailed examination of five courts revealed that "the most settlement-intensive courts are the slowest courts" (1978, p. 33). Similarly, studies of federal courts by Gillespie (1976) and Flanders (1978) found no positive relation of settlement involvement with terminations—and some hint of an inverse relation. A controlled experiment on the effect of appellate settlement conferences found no reduction in the number of cases that were to be briefed and argued (Goldman 1979). But we cannot conclude that these judicial efforts do not have other effects. Is it the same cases that get settled? At the same stage? And on comparable terms? With what effects on the currency of endowments or bargaining counters to be used in other cases? And what perceptions of the process by the participants?

This displacement of formal proceedings into mediation and bargaining in the anterooms and corridors is found in the administrative process as well as in the regular courts. The vast majority of matters brought to federal administrative agencies are addressed in "informal administrative hearings" (Woll 1960; cf. Macaulay's description [1966, pp. 153ff.] of the "formal informal settlement system" of the Wisconsin Motor Vehicles Bureau).

Which cases manage to survive the winnowing process and end up being fully adjudicated? (1) Perhaps the single most common type is the case where a party needs the judicial declaration—as in divorce or probate proceedings. In such cases there is typically

no contest or, if there was a contest, it has been resolved by the parties before securing judicial ratification.(2) Another very frequent kind of fully adjudicated case is the "cut and dried" case that can be processed cheaply and routinely, as in most collection cases, where frequently the defendant does not appear. In both these types the element of contest is minimal.

Other cases are adjudicated because of a premium placed on having an external agency make the decision. (3) Thus, an insurance company functionary may want to avoid responsibility for a large payout (Ross 1970, p. 72). A prosecutor may prefer that charges against the accused in an infamous crime be dismissed by the court rather than by his office (Newman 1966, p. 72). (4) Or there may be value to an actor in showing some external audience (a creditor or the public) that no stone has been left unturned. (5) Or external decision may be sought where the case is so complex or the outcome so indeterminate that it is too unwieldy or costly to arrange a settlement (cf. Ross 1970, p. 221).

(6) Settlement may be unappealing because the "settlement value" is insufficient. Ross (1970, p. 218) describes the personal injury case in which damages are high but liability sufficiently doubtful to preclude a large settlement. Similarly, criminal accused facing mandatory sentences may find the available bargains unattractive. (7) Even when the bargain is acceptable in itself, it may be spurned because of the effect that accepting it would have on the bargaining credibility of a player in future transactions. A litigant or lawyer may want to display his commitment and thus enhance his credibility as an adversary in future rounds of play (Ross 1970, p. 220; cf. Belli [1957, p. 44]: ". . . I have to maintain my advocacy in court on trial in order to keep up settlement value").

Finally, a party may want to adjudicate in order to affect the state of the law. (8) Some parties—typically recurrent organizational litigants—are willing to invest in securing from a court a declaration of "good law" (or avoiding a declaration of "bad law") even where such a decision costs far more than a settlement in the case at hand (Macaulay 1966; Ross 1970, p. 213; Galanter 1974), since such a declaration will improve its position in series of future controversies. (9) Or parties may seek not furtherance of their interests, but vindication of fundamental value commitments—for example, the organizations which have sponsored much church-state litigation in the United States (Sorauf 1976). Players whose conflict is about value differences rather than about competing interests are less likely to settle. (10) Related to this is the special case of government bodies whose notion of "gain" is often problematic and may seek from courts authoritative interpretations of public policy (that is, redefinitions of their notion of gain) (Galanter 1974, p. 112).

The Elaboration and Decomposition of Adjudication

This prevalence of bargaining and mediation is curiously juxtaposed with a refinement and elaboration of adjudication. Compared with earlier periods, litigation is more complex, more expensive, more protracted. It is more rational in the sense that it is free of antiquated and arbitrary formalities. It is open to evidence of complicated states of fact and responsive to a wider range of argument.

Thus, criminal trials have evolved from rough perfunctory proceedings, in which the accused was summarily tried without benefit of counsel, into an elaborate ballet in which the accused enjoys a guaranteed right to counsel and extensive procedural protections. (See generally, Fleming 1974.) Trials take much longer (cf. Langbein 1979 and Friedman

1979 with Alschuler 1979, p. 239). Not only is the trial itself more elaborate, but it is surrounded by a penumbra of formal proceedings at other stages—arraignments, motions to quash evidence, hearings to determine fitness to stand trial, presentence hearings, and the like.

There is a similar increase in complexity on the civil side. Cases are more complicated. A study of Los Angeles Superior Court found an increase in the number of motions and appearances, a higher proportion of cases utilizing discovery, and longer (though proportionately fewer) trials (Selvin and Ebener 1984, pp. 46, 49). Collateral issues proliferate: there is more formal law and with it a multiplication of decision points which spawn "lawsuits before lawsuits" (Frank 1969, pp. 85ff.)—for example, in proceedings about the composition or notification of a class or about lawyer's fees. With the elaboration of remedial means and procedural safeguards, the original disputes spawn what Damaska (1978, p. 240) calls "companion litigation" which proceeds alongside or supersedes the original substantive controversy.

Contrasted with the serial proceedings of the civil law, the common law has as its centerpiece the presentation of proofs and arguments concentrated in a trial—a single discrete plenary episode at which all the major participants come together. With this burgeoning of "pretrial" and "posttrial" activities—motions, discovery, hearings, conferences, probation reports, reports of special masters, postconviction proceedings, hearings about lawyers' fees, and so on—the trial is no longer the center of gravity of common-law litigation. This diffusion is marked by the fact that an American lawyer might describe himself as a "litigator" in contradistinction to a "trial lawyer" (cf. Grady 1978).

Full-blown adversary adjudication becomes more rare as it becomes more refined and elaborate. In its appointed precincts, we find vast amounts of negotiation "in the shadow of the law," routine administrative processing, abbreviated forms of adjudication (the "trial on the transcript" [Mather 1973], the settlement conference, the "preliminary hearing" [McIntyre 1968], "informal administrative hearings" [Woll 1960]), and active mediation on the part of officials clothed with arbitral powers.

How can we account for the attenuation and abandonment of adjudicative modes? The most prevalent explanation is that these distortions result from massive caseloads that prevent institutions from conducting affairs the way they are supposed to. Plea bargaining then is the result of the immense crush of criminal cases; and settlements of civil and administrative matters are induced by the long delays and high costs.

A series of incisive analyses have demolished the notion that nontrial dispositions in criminal cases are a recent response to pressures of caseload. Heumann (1975) has shown that the proportion of nontrial dispositions has been fairly constant in Connecticut courts since the late years of the nineteenth century. The finding that dispositional practices are not much different in high-volume and low-volume courts (Feeley 1979; Heumann 1975) holds up when controls for available personnel are introduced (Nardulli 1979). A natural quasi-experiment on an occasion when some courts had their workload substantially reduced revealed no shift toward more trials (Heumann 1975).

Of course, caseload pressures may have been connected with the origins of plea bargaining patterns and they certainly affect the process. Heavy caseloads may make it less leisurely in style (Feeley 1979). Caseload pressures made appellate courts write shorter opinions with fewer citations and fewer references to other literature, but were not associated with any significant difference in reversals or in dissents (Kagan et al. 1978, p. 971). And caseload may affect the bargains that are struck. For example, Feeley (1979, p.

254) found heavy caseload strongly related to charge reductions in felony cases. Extremes of congestion may be associated with more lenient disposition (Balbus 1973). Similarly, more crowded dockets and consequent longer delay presumably increase the discounts that defendants can command in settling civil claims.

Caseload may be connected with settlement in another way. A higher volume of transactions creates channels of communication among regular participants. The occurrence of more occasions for establishing trust, exchanging reciprocities, and communicating about what cases are worth and what factors are to be taken into account may rationalize dealings by reducing the amount of learning needed on any single occasion.

A rival explanation attributes the gravitation to settlement to fundamental strategic considerations rather than to temporary institutional conditions. In this "strategic" view, all of the participants, seeking to achieve their goals while avoiding risks, find full-blown adjudication inexpedient. Judges want to achieve "appropriate" dispositions while managing the flow of cases. Most lawyers find trials distasteful: they may bring little financial gain; they disrupt their practice, require extensive preparation, and expose them to risks of losing or revealing lack of expertise (Wessel 1976; Rosenthal 1974, pp. 98–99). If trial offers parties hope of complete victory or vindication, it involves additional cost, protracted delay, and a risk of losing all. For the criminal defendant, choosing trial means more time until resolution and a substantial probability of more severe sentencing (Nardulli 1978, pp. 213ff.; Alschuler 1979). One recent study showed "that individual judges, regardless of sentencing philosophy, systematically sentenced jury defendants more heavily than . . . defendants who had pled guilty or elected a bench trial" (Uhlman and Walker 1980, p. 339). The pull of these strategic inclinations is suggested by the tenacity with which systems of arranged dispositions survive attempts to abolish them (Church 1976; Heumann and Loftin 1979). Where "bargaining" is eliminated (as in Callan 1979) it is by standardizing the terms of arranged disposition, not by increasing the number of trials.

Reports from other settings point to the centrality of the striving of participants to maintain control and avoid untoward risks. Engel (1978, p. 103) depicts the efforts of Thai litigants to retain maximum control over the course and outcome of the lawsuit. This process of control may take very different forms. Kidder (1973) contrasts litigation in India between unspecialized opponents who are locked into permanent multiplex relationships with litigation in America conducted by business specialists in transient single-stranded relationships. In the latter, where the stakes lend themselves to rational calculation and the parties can absorb temporary losses, settlement can be reached by explicit negotiation. In the Indian setting, where the stakes include imponderables like prestige and self-definition, the settlement range is inaccessible through rational calculation and can only be approached tacitly through successive tactical maneuvers.

The decomposition of adjudication into bargaining may be accompanied by the simplification and vulgarization of authoritative legal learning. Refined legal standards are replaced by formulae like "three times specials" (Ross 1970, pp. 107ff.) or by the typifications employed by the criminal court regulars who deal with "heavy hitters," "pros," and "nuisance cases" (Buckle and Thomas-Buckle 1977, p. 158) or with "light" or "dead bang" cases (Mather 1973, pp. 197–98; cf. Sudnow 1965). These typifications of people and events, which cut across legal categories and emphasize qualities relevant to disposition, suggest that bargaining may extend, as well as attenuate, the range of issues considered relevant. Bargaining about criminal dispositions may apply norms about first

offenders, youth, seriousness, family responsibility, and so forth, that are institutionalized in the local legal culture, but not in the higher law. Similarly, negotiation in civil cases may take into account a range of norms that are excluded from authoritative decision by the court (Eisenberg 1976).

Changes that make law more elaborate and more "rational" (for example, turning on questions of fact, which can be ascertained by experts or by discovery) require higher investments, create new possibilities of maneuver (using discovery to run up the expenses or disrupt the operations of the other side, for example), and involve new risks. As the cost and complexity of trial increase, the possible outcome of the trial becomes a source of bargaining counters that can be used at other phases of the process. An enlarged right of appeal, for example, is not only a possibility that is encountered at a late stage of the proceedings; it is a source of counters and stratagems throughout the process (Engel and Steele 1979). But as the process becomes more complex, these possibilities can be used effectively only by players who can deploy the resources to play on the requisite scale.

The authoritative legal learning becomes more massive and elaborated. There are more statutes and more administrative regulations and more published judicial decisions. But rules propounded by legislatures, administrative bodies, and appellate courts do not carry a single determinate meaning when "applied" in a host of particular settings. Variant readings are possible in any complex system of general rules. Damaska (1975, p. 528) observes that "there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decision-maker's freedom. Contradictory views can plausibly be held, and support found for almost any position." (Cf. Feeley 1976, p. 500.) As the authoritative learning produced at the top of the system becomes more complex and refined, decision-makers and other actors are both constrained and supplied with resources for innovative combination. Of course, whether they will use them depends on their other resources.

> [T]he discovery of a unique issue is likely to be a function of the amount of time that lawyers devote to a case, and thus of the amount of money that the client spends on lawyers. If the stakes are high, the problems can become very complex; if the client lacks money, his problems are likely to be routine. [Heinz and Laumann 1978, p. 1117]

Adjudication Outside the Courts

Courts (and other official institutions) are not the only settings in which adjudication (and related modes of disputing) take place. The patterns of litigation in courts that we have examined must be understood in the context of the array of rival and companion institutions in which disputes are processed. Societies are composed of a multitude of partially self-regulating spheres or sectors, organized along spatial, transactional, or ethnic-familial lines, ranging from primary groups in which relations are direct, immediate and diffuse to settings (for example, business networks) in which relations are indirect, mediated, and specialized. Disputes and controls are, for the most part, experienced not in courts (or other forums sponsored by the state) but at the various institutional locations of our activities—home, neighborhood, school, workplace, business deal, and so on—including a variety of specialized remedial settings embedded in these locations. The enunciation of norms and application of sanctions in these settings may be more or less organized, more or less self-conscious, more or less removed (in personnel,

location, norms, and so on) from everyday activity. In some of these settings we can recognize counterparts or analogs to the institutions, processes, and intellectual activities that characterize the "big" (national, public, official) legal system. Alongside the "big" legal system are a patchwork of lesser normative orderings which we comprehend by such rubrics as "semi-autonomous social fields" (Moore 1973), "private government" (Macaulay: this volume), or "indigenous law" (Galanter 1981).

There is an immense profusion and variety of such "semi-autonomous social fields." The existing literature includes reports, for example, on self-regulatory activity in a variety of business settings such as shopping centers (MacCollum 1967), trade associations (Mentschikoff 1961), heavy manufacturing (Macaulay 1963), textiles (Bonn 1972a, 1972b), the garment industry (Moore 1973), movie distribution and exhibition (Randall 1968), and auto dealers' relations with manufacturers (Macaulay 1966) and with customers (Whitford 1968). In addition, there are reports on self-regulation within religious groups (for example, *Columbia Journal of Law and Social Problems* 1970) and ethnic communities (Doo 1973), intentional communities (Zablocki 1971), professional associations (Akers 1968), athletics (Cross 1973), and workplaces (Blau 1963).

In these settings are found the range of styles of disputing discussed above (pp. 160–64). Exploration of "indigenous law" should help us to understand why particular styles of disputing emerge at particular locations. For example, it provides a set of observations that enable us to speculate about the dynamics of dyadic and third-party controls. Thus, it might be hypothesized that parties whose roles in a transaction or relationship are complementaries—husband-wife, purchaser-supplier, landlord-tenant—will tend to rely on dyadic processes in which group norms enter without specialized apparatus for announcing or enforcing norms. Precisely because of the mutual dependence of the parties, a capacity to sanction is built into the relationship. On the other hand, parties who stand in a parallel position in a set of transactions, such as airlines or stockbrokers *inter se,* tend to develop remedy systems with norm exposition and sanction application by third parties. This is because the parties have little capacity to sanction the deviant directly. This hypothesis may be regarded as a reformulation of Schwartz's proposition (1954) that formal controls appear where informal controls are ineffective and explains his finding of resort to formal controls on an Israeli moshav (cooperative settlement) but not in a kibbutz (collective settlement). In this instance, the interdependence of the kibbutzniks made informal controls effective, while the "independent" moshav members needed formal controls. This echos Durkheim's notion (1964) of different legal controls corresponding to conditions of organic and mechanical solidarity. A corollary to this is suggested by reanalysis of Mentschikoff's survey (1961) of trade association proclivity to engage in arbitration. Her data indicate that the likelihood of arbitration is strongly associated with the fungibility of goods (her categories are raw, soft, and hard goods). Presumably, dealings in more unique hard goods entail enduring purchaser-supplier relations that equip the parties with sanctions for dyadic dispute-settlement, sanctions which are absent among dealers in fungible goods. Among the latter, sanctions take the form of exclusion from the circle of traders, and it is an organized third party (the trade association) that can best organize this kind of sanction. Similarly, systematic study of indigenous law may reveal to us the conditions under which there are explication of norms; formality of procedure; the development of specialists; reliance on the norms, sanctions, and style of official law; and so forth.

The interconnections between disputing in these indigenous forums and in courts are

many. Which disputes get to which forums? Presumably, there are many sorts of disputes that rarely appear in official courts precisely because they are disposed of in these other settings. There may be whole areas of social life which are effectively insulated from the direct involvement of the courts. Thus, in a modern industrial society like Great Britain, a "core" area such as contract law may be formulated and applied primarily by private tribunals (trade group arbitration panels) (Ferguson 1980).

Disputes that do arrive in courts have often been shaped by their transit through other forums: much of the business of courts is acting as a "court of appeal" from the decisions of prison officials, union bodies, stock exchanges, sports commissioners. What courts do or refuse to do in such cases may bestow regulatory powers on these forums. Courts may empower indigenous forums explicitly or implicitly. The possibility of resort to courts may be a doomsday machine inducing acquiescence in indigenous regulation. The flow of influence from public adjudication to indigenous ordering is discussed below.

THE EFFECTS OF ADJUDICATION

Distributive Outcomes

We lack a definitive picture of the immediate results of litigation, but we can assemble a crude sketch. Studies of American courts show that in routine cases courts are overwhelmingly plaintiff's (including prosecutor's) forums. For a period of 150 years in a St. Louis court, defendants consistently won less than 10 percent of civil cases (McIntosh 1978). In two California counties in 1970, plaintiffs won 96 and 97 percent of the cases (Friedman and Percival 1976, p. 287). Similar patterns are found in England (where plaintiffs won over 90 percent of cases for a century [Friedman 1976]) and in Thailand (where defendants won outright in only 2.3 percent of civil cases in a Thai provincial court [Engel 1978]). A similar preponderance is found in criminal cases: only a tiny fraction of defendants are acquitted (see McIntyre and Lipman 1970; Administrative Office of the United States Courts 1984, p. 3). In Thailand there were convictions in 96 percent of the public prosecutions (Engel 1978, p. 51).

This preponderance of plaintiff victories reflects the opportunity of the initiating party to calculate and to screen out unpromising cases. It also reflects a large number of routine cases (especially debt collection) in which the defendant is absent and unable to contest the merits; thus, judgment is by default. Also, in many cases what is in form a plaintiff victory is a ratification of a settlement between the parties. Thus, virtually all plaintiffs in suits for divorce win in form, but typically the decree reflects an arranged settlement between the parties rather than the triumph of plaintiff. To some extent the same is true of criminal proceedings where the court decree ratifies the plea bargain that may not fully reflect the outcome preferred by the victim or the prosecutor. And of course in many cases, plaintiffs who receive favorable judgments are unable to collect money damages, recover property, and so forth. To the extent that plaintiffs (or defendants) seek other direct gains (delay, revenge, vindication, information, credibility with such other actors as stockholders or bankers) the judgment may not be an exact reflection of success. We have no way of measuring these effects in the aggregate.

In the vast majority of cases, the trial court's judgment is the final official pronouncement. Of course, there may be further maneuvers and negotiation between the parties after verdict. A minority of cases are appealed: probably less than 1 percent of the total

cases disposed of by state trial courts in the United States (Hurst 1980–81, p. 425). Of the cases that reached American state supreme courts, roughly one third were reversed: the number of reversals rises where appellate courts enjoy discretion in admitting cases for review (Hurst 1980–81, p. 427). But important sectors of trial court activity (such as landlord-tenant disputes) are quite underrepresented in the appellate process. Reversals of trial courts, which loom large as part of the appellate caseload, may be rare occurrences in relation to the total dispositions of trial courts. Davies (1981) reports that in one of California's intermediate appellate courts, only 4.8 percent of cases filed in 1974 were reversed; compared with the appealable trial courts convictions of the previous year, this constituted a reversal rate of 2.6 per thousand convictions. A larger minority of federal cases are appealed. In the late 1960s, about 30 percent of all appealable judgments were taken to the federal Courts of Appeal (roughly a quarter of all contested civil judgments and over half of criminal convictions (Howard 1981, p. 35). The judgment of the trial court was reversed in 21 percent of these appeals—and was otherwise "disturbed" in another 5 percent (Howard 1981, p. 39).

Those who litigate in their business capacity fare better than individuals. Wanner (1975) found that business and government plaintiffs win more often (1975, Table 5) and more quickly (1975, Tables 8, 9) than do individual plaintiffs. Not only are they more successful overall, which might be attributed to differences in the kinds of cases they bring, but they are more successful in almost every one of the heavily litigated categories of cases (Wanner 1975, Table 9). Similarly, in a study of two Georgia courts, Owen (1971) found that individual plaintiffs win less often and individual defendants lose more often than do their organizational counterparts. The Arthur Young et al. (1981, IV-26A) study of courts in five American counties from 1903 to 1977 finds that this pattern of organizational success and individual failure has become accentuated over the course of the century. Organizations are more successful than individuals as defendants as well as when they are plaintiffs. They enjoy greater success against individual antagonists than against other organizations; individuals fare less well contending against organizations than against other individuals.

There is a scatter of evidence to suggest that recurrent organizational litigants fare better not only in courts, but also in other forums such as lobbying (Solomon and Siegfried 1977) and administrative hearings (Kloman 1975). (It may be, however, that the advantages of recurrent play are accentuated by the forms of adjudication: Sarat [1976, p. 366] found that the advantages of repeat litigants were "diluted in the informal, compromise-oriented atmosphere of arbitration.") This pattern of organizational predominance has been found in judicial settings outside the United States (Van Houtte and Langerwerf 1981; Gessner et al. 1978).

If no conclusive explanation of the incidence and outcome of litigation can be teased out of the haphazard collection of data that are at hand, there is enough to provide some suggestive leads. One cluster of hypotheses that is suggested by litigation patterns might be called the party capability theory. By this I refer to the notion that the use and outcome of adjudication reflects the differing capabilities of parties as disputants, capabilities that include the competences of actors and advantages (or disadvantages) conferred by their position in the dispute process.

Party capability includes a range of personal capacities that can be summed up in the term "competence": ability to perceive grievances, ability to obtain information about the availability of remedies, psychic readiness to utilize them, ability to manage claims

efficiently, ability to seek and utilize appropriate help, and so forth (see Carlin and Howard 1965; Nonet 1969; Rosenthal 1974). Beyond these personal competences there is a related set of structural factors: the size and organization of the party and its position in the dispute process.

Legal encounters in industrial societies take place, for the most part, between individuals and large organizations. For example, Schuyt et al. (1977, p. 112) found that 63 percent of the legal problems of a stratified sample of Dutch individuals were conflicts with a government agency or a private organization. (Generally, cf. Coleman 1974; Moore 1978, chap. 3.) The contract, lease, grant, license, or other transaction—even the accident—is routine for the organization which has, typically, designed the transaction. If trouble develops, the occasion is one of a kind for the individual. It is an emergency or at least a disruption of routine propelling him into an area of hazard and uncertainty. For the organization (usually a business or government unit), on the other hand, making (or defending against) such claims is typically a routine and recurrent activity conducted by experienced specialists. Such recurrent organizational players ("repeat players") enjoy a set of strategic advantages over infrequent individual players ("one-shotters") (Galanter 1974). Briefly, these include:

- ability to utilize advance intelligence, structure the next transaction, build a record, and so forth.
- ability to develop expertise; ready access to specialists; economies of scale and low start-up costs for any case.
- opportunity to develop facilitative informal relations with institutional incumbents.
- ability to establish and maintain credibility as a combatant. With no bargaining reputation to maintain, the one-time litigant has greater difficulty in convincingly establishing commitments to his bargaining positions (Ross 1970, pp. 156ff.; Schelling 1963, pp. 22ff., 41).
- ability to play the odds. The larger the matter at issue looms for the one-shotter, the more likely he is to avoid risk (that is, minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for recurrent litigants because of their greater size, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases.
- ability to play for rules as well as immediate gains. It pays a recurrent litigant to expend resources in influencing the making of the relevant rules by lobbying, and so forth. Recurrent litigants can also play for rules in litigation itself, whereas a one-time litigant is unlikely to do so.

The differences in outcome may be viewed as an artifact of the selection of cases. Organizational parties bring more cases of the kinds that are easiest to win, such as debt collections. The overall pattern then results from their well-selected portfolio rather than from any difference in the rate of return. There seems to be some measure of truth in this, but it does not explain all the observed variation between individuals and organizations. Wanner (1975, Table 9) finds that organizations do better than individuals in almost every kind of frequently litigated case. And organizations do strikingly better not only as plaintiffs, but also as defendants (Wanner 1975, Table 7).

A more refined version of this selection hypothesis would say that organizations not only bring different kinds of cases, but better cases—cases in which the evidence is

stronger and the claim is more firmly located within accepted lines of recovery; as defendants, their defenses are more ironclad, and so forth. As plaintiffs, they can avoid bad cases by forbearance to bring suit or by readily accepting a low settlement. As defendants, they settle the more meritorious claims against them—perhaps before filing. To some extent this is a restatement of the party capability cluster. Stronger evidence, more cut-and-dried claims, and unassailable defenses are the result of advance planning and good record-keeping, as well as of the intrinsic merit of the claim. A calculating settlement policy reflects their skill as litigants as much as the virtues of their conduct in the underlying transaction. In good measure, "case merit" is not an alternative explanation, but a specification of one of the ways in which party capability affects the profile of litigation.

Perhaps the differences observed between organizations and individuals are explainable in terms of quantity and quality of legal services. There is evidence (for example, Ross 1970, p. 193) that legal representation makes for a massive difference both in likelihood of recovery and in amount recovered. But much of the difference attributed to legal services is again traceable to difference in party capabilities. When we speak of differences in amount of preventive work, continuity of attention, specialized expertise, economies of scale, shrewd investment in rule development—we are talking about legal services provided to certain kinds of parties. Legal professionals in the United States can be roughly dichotomized into those who service one-shot players on an episodic basis and those who service repeat players on a continuing basis (cf. Heinz and Laumann, 1978). Although there are many exceptions, there is a massive difference in education, skill, and status between these groups. There is also a massive difference in the range and quality of services provided: the profession is organized to provide a wide range of services to organizations and a much narrower range to individuals (Galanter 1983a). FitzGerald's study (1975) of the contract buyers provides a dramatic example of change in the organizational state of parties bringing in its train dramatic changes in the amount, character, and quality of legal services. Organization need not follow from improved legal services, but it seems likely that a broader range of legal services ordinarily will result from organization.

Legal services are surely one vehicle through which differences in party capability have effect. But, for several reasons, I think it useful to retain the broader notion of party capability. First, legal competence is not something supplied exclusively by professionals and entirely separable from the parties. Parties themselves may have different levels of capacity to utilize legal services. For example, Rosenthal (1974) finds superior results obtained by "active" personal injury plaintiffs; Moulton (1969, p. 1662) finds that in a California small claims court in which lawyers are not permitted to appear, businesses that are frequent users "form a class of professional plaintiffs who have significant advantages over the individual." Second, it seems that major distinctions in party competence can exist quite apart from disparities in legal services. The reports of Kidder (1973, 1974) and Morrison (1974) on litigation in India suggest a distinction between the "experienced" or "chronic" litigant and the naïve and casual one that seems to be quite independent of the organization of legal services.

The crucial distinction is between the casual participant for whom the game is an emergency, and the party who is equipped to do it as part of his routine activity. The sailor overboard and the shark are both swimmers, but only one is in the swimming business. The distinction overlaps, at least in the American setting, with two other

distinctions—that between individuals and organizations and that between the poor and the wealthy. It is generally organizations that can be repeat players—because in America law is a complex and expensive activity requiring employment of full-time specialists. Organizations can use the law routinely because, given the cost of obtaining or resisting remedies, organizations are the right size—and almost all individuals are too poor to play. And organizations are endowed with a capacity for calculated pursuit of narrow and intense interests that produces pronounced asymmetries in their dealings with natural persons (Coleman 1974). But, as the Indian studies show, in other settings the distinction between habitual and "one-shot" users may be entirely independent of distinctions between organizations and individuals.

The distinction between "repeat players" and "one-shotters" points to an antinomy that strikes me as a fundamental feature of legal life. Presumably, law is corrective and remedial in intent; it is designed to restore or promote a desired balance. But as it becomes differentiated, complex, and mazelike in order to do this with increasing autonomy and precision, the law itself becomes a source of new imbalances. Some users become adept in dealing with it; those with other advantages find that those advantages can be translated into advantages in the legal arena. There arise new differences in access and competence—thus law itself can amplify the imbalances that it set out to correct. The scope and location of these differences in party capability, one expects, would vary with other features of the society.

The party capability theory is a cluster that invites disaggregation in several ways. First, we have to isolate the nature (and composition) of the superior capability enjoyed by some parties. Is it a superior capacity to obtain, store, retrieve, and utilize information? Is it superior ability to employ experts? To coordinate related undertakings? To employ strategies unavailable to other actors? One assumes that these will vary from one class of cases to another, for different parties and at different times and in different social and cultural settings.

Then what are the specific characteristics of the parties which give rise to these superior capabilities? Is it size? Absolute size (measured by personnel or dollars)? Size relative to the other party? Size relative to the claim at stake? Or is it the element of repetition: experience in handling claims? Experience in litigation? In litigation in this forum? In this kind of claim in this forum? In some settings, superior capability may be closely related to being a repeat player in the narrow literal sense. The portrayals of Kidder (1973, 1974) and Morrison (1974) of Indian litigants and Sanders's account (1975) of American drug cases suggest that experience in the forum and adaptation to its exigencies is central to explaining the pattern of results. Other advantages like wealth are mediated through the differential capacities of actors in the immediate setting; these in turn are dependent on familiarity and experience and on tactical options that derive from recurrent play in this forum.

Courts as Sources of Bargaining and Regulatory Endowments

The consequences of adjudication extend beyond the immediate distributive effects on the parties. We have seen that courts resolve by authoritative disposition only a small fraction of all disputes that are brought to their attention. These in turn are only a small fraction of the disputes that might conceivably be brought to courts and an even

smaller fraction of the whole universe of disputes. But the observation of the limited role of courts in direct resolution of disputes should not be taken as an assertion that courts are unimportant in the entire matrix of disputing and regulation. The impact of adjudication cannot be equated with the resolution of those disputes that are fully adjudicated. Adjudication provides a background of norms and procedures against which negotiations and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute but possible remedies and estimates of the difficulty, certainty, and cost of securing particular outcomes.

The courts (and the law they apply) may thus be said to confer on the parties what Mnookin and Kornhauser (1979) call a "bargaining endowment," that is, a set of "counters" to be used in bargaining between disputants. In the case of divorce, for example,

> . . . [t]he legal rules governing alimony, child support, marital property and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law would impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts. [p. 968]

Similarly, the rules of tort law provide bargaining counters which are used in a process of negotiating settlements (Ross 1970). The gravitation to negotiated outcomes in criminal cases is well known. One astute observer concludes that "the actual significance of the sophisticated adversary process before the jury" in American criminal cases is "to set a framework for party negotiations, providing 'bargaining chips'" (Damaska 1978, p. 240). The negotiating dimension is found in the most complex as in the most routine cases: thus, in "extended impact" cases, the involvement of the courts supplies standards and the setting for negotiations among the parties (Diver 1979; Cavanagh and Sarat 1980, pp. 405–7). And, of course, this process is not confined to the United States or to "advanced" societies. The Zinacantecos described by Collier (1973, pp. 70ff.) used the courts infrequently, but predictions of what the court would do significantly affected the settlements produced by local mediators.

The bargaining endowment that courts bestow on the parties includes not only the substantive entitlement conferred by legal rules, but also rules that enable those entitlements to be vindicated—for example, rules requiring production of documents, or rules excluding evidence favorable to the other party or jeopardizing the claim of the other party (for example, contributory negligence). But rules are only one part of the endowment conferred by the forum: the delay, cost, and uncertainty of eliciting a favorable determination also confer bargaining counters on the disputants. Delay, cost, and uncertainty may themselves be the product of rules—for example, a discretionary standard involving balancing of many factors requiring detailed proofs is more costly, time-consuming, and uncertain in application than a mechanical rule. But cost, delay, and uncertainty also result from such nonrule factors as the number and organization of courts and lawyers.

The meaning of the endowment bestowed by the law is of course not fixed and invariable, but depends on the characteristics of the disputants: their preferences,

negotiating skill, aversion to risk, ability to respond to deadlines and emergencies, ability to bear costs and delay, and so forth. A different mix of disputant capabilities may make a given endowment take on very different significance.

Bargaining between the parties is not the only kind of "private ordering" that takes place in the law's capacious shadow. We can extend the notion of the bargaining endowment to imagine the courts conferring on disputants a "regulatory endowment" (Galanter 1981). That is, what the courts might do (and the difficulty of getting them to do it) clothes with authorizations and immunities the regulatory activities of the school principal, the union officer, the arbitrator, the commissioner of baseball, and a host of others—regulation which may be exercised through various forms, including adjudicatory ones.

The distinction between negotiation and regulation is a relative one. The continuity between them is displayed, for example, in the continuing relation between a university and its food service contractor, where the process of monitoring performance and negotiating adjustments partakes of (or may be interpreted as) both (Goldberg 1976). Of course, regulation may involve an important element of bargaining—as in agency "notice and comment" rule-making or in the relations of guards to prisoners described by Sykes (1958). Perhaps we should think of bargaining and regulation as the ends of a spectrum, along whose length we can find many intermediate (and alternating) instances.

Courts bestow a regulatory endowment in many ways. First, the courts provide models (norms, procedures, structures, rationalizations) for such regulatory activity. Second, there are explicit authorizations and immunities conferred by the courts (and the law) on an immense variety of regulatory settings—the school teacher and principal, the prison warden, the agricultural cooperative, the baseball league, the union leader. Such authorizations may be explicit rulings about the regulatory activity—as in judicial doctrine about the authority of arbitrators, school officials, and church bodies. Or they may be implicit in rules of jurisdiction, standing, and other procedural doctrine that denies admittance to cases involving certain kinds of regulatory activity.

Finally, there are the implicit authorizations and immunities that flow from the general conditions of overcommitment and passivity. Courts are reactive; they acquire cases not on their own motion, but only upon the initiative of one of the disputants. Thus, there is delegation to the disputants to invoke the intervention of a court. The expense, delay, and cumbersomeness of securing such intervention insulate all regulators by raising barriers to challenging them in the courts. The regulation exercised by hospitals on patients and their families, by landlords on their tenants, by universities on their students, by unions on their members, by manufacturers on their customers are rarely subject to challenge in public forums. By a kind of legal alchemy, the expense and remoteness of the courts (and the overload and lethargy of other agencies) are transformed into regulatory authority which can be exercised by a host of institutions.

The relation of official adjudicatory forums to disputes is multidimensional. Decisive resolution, while important, is not the only link of courts and disputes. Disputes may be prevented by what courts do—for example, by enabling planning to avoid disputes or by normatively disarming a potential disputant. Also, courts may foment and mobilize disputes, as when their declaration of a right arouses and legitimates expectations about the propriety of pursuing a claim; or when changes in rules of standing suggest the possibility of pursuing a claim successfully. Further, courts may displace disputes into

various forums and endow these forums with regulatory power. Finally, courts may transform disputes so that the issues addressed are broader or narrower or different from those initially raised by the disputants (see Mather and Yngvesson 1980–81). Thus, courts not only resolve disputes: they prevent them, mobilize them, displace them, and transform them.

The Radiating Effects of Adjudication

By distributing endowments a court may elicit anticipatory compliance or evasive maneuvers, stigmatize or legitimate a line of conduct, encourage or suppress the making of a claim, lower or heighten estimation of conduct or of its regulators. Another way of looking at the radiating influence of judicial action (or inaction) proceeds from a distinction between "special effects" and "general effects." "Special effects" refers to the impact of the forum's action on the specific parties before it. "General effects" are effects of the communication of information by/about the forum's action and of the response to that information.[9] We can isolate (in theory at least) various kinds of effects on the subsequent activity of various actors. For example, I may rob stores less frequently because I am imprisoned and stores are therefore hard to reach (*incapacitation*). On the other hand, I may be placed on probation and as a result subjected to increased *surveillance* by the police, making it difficult to rob stores. Or my chances for breaching contracts may be reduced by the wariness of those who deal with me, wariness that stems from an earlier suit against me. Their reluctance may reflect the stigmatizing effect of sanctions imposed on me by the court, but it may also flow from the ancillary impact of court proceedings on my credit rating, insurability, licensing, business reputation, standing in other forums, and so forth (see Engel and Steele 1979, p. 316). And, of course, such ancillary effects may be produced not only by the substantive decision of the court but by the costs (including benefits forgone) and timing of that decision (or its absence). This example involves elements of surveillance and incapacitation. Alternatively, I might refrain from robbing stores or breaking contracts because I am fearful of being caught and punished again (*special deterrence*). Finally, the experience of being exposed to the law may change my view that it is right to rob stores or break contracts (*reformation*).

If adjudication is a source of moral authority and a locus of struggles for moral vindication, at the same time it harbors tendencies to demoralization. Typically, courts enforce only a delimited part of the whole universe of recognized moral claims, and legal procedures attenuate the connection of litigated claims with the moral environment (Abel 1973). As Fallers (1969, p. 28) observes, the litigant typically "seeks the advantages of the narrow legalism of the forum while claiming the sanction of moral holism." In the American setting at least the promise of moral vindication must be pursued through a

[9]This notion of "general effects" takes off from the very helpful discussion of general preventive effects of punishment by Gibbs (1975, chap. 3) as usefully elaborated by Feeley (1976, pp. 517ff.) It is simply a generalization from the illuminating and now familiar (if not entirely serviceable, as Gibbs points out) distinction between special deterrence and general deterrence introduced by Andenaes (1966). Theory about these general effects is still inchoate. In a review of the now sizable literature on deterrence, Gibbs (this volume, chap. 7) observes that since deterrence research has proceeded without controls for other general effects, "all previous reported tests of the deterrence doctrine . . . were really tests of an implicit theory of general preventive effects; and that will remain the case as long as nondeterrent mechanisms are left uncontrolled." Some of the labels used here for the various effects are inspired by, but deviate from, those carefully discussed by Gibbs (1975, chap. 3).

costly, abrasive, and disheartening process in which one must give discounts and accept compromises; the result is less than total vindication. Those with the highest expectations of moral vindication experience the greatest disillusionment in the process—even where they are more successful than more cynical litigants (Crowe 1978).

In addition to (or instead of) changing my disposition toward the underlying transaction (the business deal or the marriage), the experience may change my perceptions and evaluations of the activity of disputing about it, the institutions in which disputes are processed, and myself as a disputant. Thus, debtors who lose collection cases may emerge from the experience with an enhanced sense of political efficacy (Jacob 1969b, p. 264). But winners of injury suits (Danzig 1978, chap. 1) or antidiscrimination cases (Crowe 1978) may be disillusioned with the forum and despair of vindicating their rights. We do not know how participants' experiences affect their ability to perceive and pursue disputes in the future.

Generally, those who prevail are satisfied with their court experience (Ruhnka and Weller 1978, p. 74). But full-blown adjudication may compare unfavorably with other procedures: criminal defendants who are convicted after trial may feel more unfairly treated than those who pled guilty (Casper 1978, pp. 48ff.) Those who experience courts firsthand tend to be less satisfied with them than those who view them from afar (Sarat 1977b, pp. 439, 441). Yankelovich et al. (1978, pp. 11, 18) found that unfavorable evaluations of state courts increased with both knowledge about courts and experience with them. (Cf. Curran 1977, p. 236, on the more critical assessment by multiple users.) Comparable responses have been found in widely different settings. Kidder (1973) reports that Indian litigants were disillusioned with the courts they had encountered

> [but] . . . everyone interviewed believed that the courts above those they had directly experienced would be free of the complications they had found in their own experience. . . . This "grass is greener" phenomenon was as true of recent winners as it was of recent losers and showed up in [experienced] "court birds" as predictably as in the newest novice. [p. 134]

The gap between use and estimation appears even in the Polish community-based Social Conciliation Commission described by Kurczewski and Frieske (1978), where those who think best of the SCC are higher-status groups with little direct experience of its operation.

> The SCC's are favored to a much lesser degree, on *general* criteria, by those who have actually used them as disputants—even though these former SCC users are largely satisfied with, and assess positively, the performance of the SCC in their own particular cases—and these former parties tend to be persons with characteristics of lower status. [p. 328]

Of course, the parties are not the only participants affected by the process of adjudication. The regular participants—lawyers, judges, and others—may be inured to the impact of any single instance, but changed by the cumulative experience. We know little about how being a judge affects judges: some find the experience disillusioning (for example, Forer 1975; Frankel 1980); others respond with complacency, stoicism, creativity. Similarly, little is known about the impact of adjudication on lawyers. Dibble (1973) finds that more experienced lawyers tend to see more issues in their cases. Brazil (1978) suggests that they find litigation demoralizing.

Adjudicative activity affects not only those immediately involved, but others as well. Further effects result from the communication of information about what was (or could be) done by courts. Thus, if I am punished for theft or have to pay damages for breaching a contract, others may reassess the risks and advantages of similar activity. This is *general deterrence.* It neither presumes nor requires any change in their moral evaluation of stealing or breaking contracts, nor does it involve any change in their opportunities to commit these infractions. It stipulates that behavior will be affected by acquisition of more information about the costs and benefits that are likely to attach to the act—information about the certainty, celerity, and severity of punishment, for example. The actor can hold to Hart's "external point of view" (1961, p. 86), treating law as a fact to be taken into account rather than as a normative framework that he is committed to uphold or be guided by. The information that induces the changed estimation of costs and benefits need not be accurate: what the court has done may be inaccurately perceived; indeed the court itself may have inaccurately depicted what it has done.

Courts are not viewed only as mechanisms that display to us the deployment of governmental force. For many of their constituents, at least, courts embody moral authority and their pronouncements induce and reinforce sentiments of moral condemnation and approval. Hence, courts may become battlegrounds of symbolic politics in which condemnation or approval of abortion, unmarried cohabitation, or school prayer are major symbolic prizes testifying to the moral worthiness of various groups in the society (Gusfield 1966). Such symbolic counters may be detached from patterns of actual regulatory behavior. Hence the passionate concern with laws that are only rarely enforced, such as adultery laws and Sunday closing laws.

Perceiving the application of a law may maintain or intensify existing evaluations of conduct—Gibbs (1975) calls this *normative validation.* Or, more dramatically, communication of the existence of a law or its application by a court may change the moral evaluation of an item of conduct by other actors. To the extent that this involves not calculation of the probability of being visited by certain costs and benefits, but a change in moral estimation, we may call this general effect *enculturation.* There is suggestive evidence to indicate that at least some segments of the population are subject to such effects (Berkowitz and Walker 1967; Colombatos 1969). Other studies provide contrasting hypotheses about the conditions under which such enculturation takes place and its relation to the coercive aspects of the law. Thus, Muir (1967) and Dolbeare and Hammond (1971) both examine the reaction of local school boards to decisions of the Supreme Court banning officially sponsored prayer in classrooms. Muir finds substantial compliance and substantial enculturation associated with low perceived coerciveness of the legal setting; Dolbeare and Hammond, finding little compliance, attribute the dissociation of practice from legal doctrine to the absence of coercive pressure.

Adjudication not only validates or changes our evaluation of specific sorts of conduct; it may radiate to wider audiences reassuring messages about the society and its processes (Casey 1973; cf. Edelman 1967). (This is the other side of the tendency, noted above, to estimate remote courts more highly than familiar ones.) The centrality of providing symbolic sustenance is asserted by Becker (1970, p. 12): "The most enduring function of the court—indeed of judicial structure—seems best described as the appeasement of the outrage felt in the soul and mind of man at the instability, tedium, amorphousness, and basic arbitrariness of our natural environment and our mortality." Ball (1975) describes the theatrical "live performance" of courts as dramatic embodiments or presentation of a

normative image of legitimate society—dramatizing the seriousness, importance, dignity, rights, and duties of citizens, surrounding them with ceremonious deference. But without further knowledge of the (presumably differentiated) reception process, we cannot specify the policy implications of the insight that courts are important symbolic transmitters.

These do not exhaust the general effects of legal action. There are other radiating effects at the level of disputing as well as at the level of the underlying transaction. The messages of adjudication may be taken neither as facts to be adapted to nor as norms to be adhered to, but as recipes to be followed. Law may be used as a cookbook from which we can learn how to bring about desired results—disposing of property, forming a partnership, securing a subsidy. We may call this effect *facilitation*.

Similarly, litigation may have powerful *mobilization* or *demobilization* effects. It may provide symbols for rallying a group, broadcasting awareness of grievance, and dramatizing challenge to the status quo (*Yale Law Journal* 1970, pp. 1087ff.). On the other hand, concentration on litigation may undermine an organization's ability to employ other political means (Scheingold 1974). Success in litigation may, for example, defuse the drive for wider legislative change. Thus, it is reported that after the Court of Appeals heroically extended the meaning of "unconscionability" in *Williams* v. *Walker-Thomas Furniture Co.* (1965), the corporation counsel dropped plans to draft consumer legislation for the District of Columbia (Dostert 1968, p. 1186).

The assumption that the authoritative pronouncements of higher courts penetrate automatically—swiftly, costlessly, without distortion—to all corners of the legal world has been challenged by several generations of studies of "the limits of effective legal action" (cf. Pound 1917; Jones 1969). This includes a tradition of "impact studies" which has demonstrated that the penetration of rules is variable and uneven and that the rules undergo significant transformation in the process. (A useful summary of the impact literature is provided by Wasby 1970; see also Becker and Feeley 1973. Some broad generalizations about the conditions conducive to penetration may be found in Grossman 1970, pp. 545ff.; Levine 1970, pp. 599ff. On the limitations of the "impact studies" genre, see Feeley 1976, pp. 498ff.) The impact design curiously echoes the naïve model of perfect penetration by attributing to rules propounded in the lofty setting of the legislature or the appellate court a single determinate meaning when "applied" in a host of particular settings (Feeley 1976, p. 500). But most authoritative norms are ambiguous: variant readings are possible in any complex system of general rules.

The centrifugal perspective adopted here suggests an enlargement of the concerns of the last generation of impact research which started from the doctrinal pronouncements of appellate courts and asked about congruence between that doctrine and the practices of other agencies (lower courts, school boards, police, and the like). In addition to the effects of doctrinal pronouncements, we are interested in the effects of costs, remedies, delay, uncertainty, legitimation, stigma, and all of the other components of the total message transmitted by the courts, including trial courts as well as appellate courts, and including informal mediation and private bargaining as well as adjudication. The product of the court is not doctrine with a mix of impurities, but rather a whole set of messages that can be used as resources in making (or contesting) claims, bargaining (or refusing to bargain), and regulating (or resisting regulation). Effects flow not only from doctrine, but also from patterns of discovery, settlement, cost, and remedy; not only from individual rulings, but from court structures and court routines. And effects flow not only to the behavior that is the subject of judicial pronouncements, but to the attempts of actors to

accommodate to the impact of those pronouncements, to the efforts of other actors accommodating those attempts, and so on. Thus, recent studies have charted the impact of the abrogation of the doctrine of charitable immunity on hospital costs (Canon and Jaros 1979; Caldeira 1981–82) as well as on self-regulation within hospitals (Zald and Hair 1972).

Beyond the effects attributed to particular instances of adjudication, cumulative effects are often attributed to institutionalized patterns of adjudication. Thus, the popularization of litigation in sixteenth-century Castile led to a dramatic increase in record-keeping (Kagan 1981, p. 126). More remarkably, courts may be credited with preserving democratic institutions, promoting economic efficiency (Posner 1977), and other salutary results—or with legitimizing oppression, and so forth. The complexities of discerning such effects are illustrated by the debate over whether judicial review by the Supreme Court should be credited with protecting the rights of minorities throughout the course of United States history. Thus, Dahl (1958) and Funston (1975) argue that except in brief transition periods, the Court functions not to protect minorities against dominant political coalitions but instead to legitimate political change. Other observers (Ademany 1973; Casper 1976; Handberg and Hill 1980), using a wider range of data, credit the Court with significant obstruction of the policies of dominant majorities.

In cataloging these various effects, it appears that the impact of adjudication is accomplished primarily through the transmission and reception of information rather than through the direct imposition of controls. Like most other contemporary legal institutions, courts have far more commitments than resources to carry them out. Enforcement agencies cannot possibly enforce all the laws. Nor can individuals enforce all of their rights. In theory courts are open for full adjudicatory hearing of all cases, but in practice their capacity to conduct full-blown adjudications is limited to a fraction of the potential cases. Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls. It affects us primarily through communication of symbols—by providing threats, promises, models, persuasion, legitimacy, stigma, and so forth. Of course, these radiating effects need not be intended (or perceived) by the forum (or the disputants). The forum may attempt to enhance certain of its effects by cultivating a public image of implacable severity or sage deliberation, by deliberately projecting an image of its general patterns of response, and so forth. Of course, no matter what it tries to project, transmission by the forum is only part of the process. Effects will also depend on the reception side: Who gets which messages? Who can evaluate and process them? Who can use the information? These messages are resources that parties use in envisioning, devising, pursuing, negotiating, and vindicating claims (and in avoiding, defending, and defeating them). Similarly, courts distribute resources by which some parties regulate others (or resist such regulation). The broad pattern of effects of courts will depend on the way these resources are used.

Just how potential disputants and regulators will draw on these resources is powerfully affected by their culture, their capabilities, and their relations with one another. For example, we would expect that the legal endowment would be used differently in bargaining among strangers with no prospect of continuing relations (as in the typical automobile injury claim) than by parties to a long-term relationship; we would expect it to be used differently where disputants shared a normative consensus or where some formidable sanctions were built into their relationship (Macaulay 1963). We would expect it to be used differently where one disputant was dependent on the other. Similarly, we would

expect that the regulatory endowment would be used differently in a continuing relationship than in an episodic one, and so on.

Messages about what courts do and what they say are mediated through various channels to different audiences with different capacities to receive and evaluate these messages. Audiences may differ, for example, in their ability to make a sophisticated assessment of what a court really does—that is, what their bargaining chips really are. Ross (1970, pp. 193ff.) describes the shift in bargaining stances when the knowledgeable lawyer replaces the inexperienced claimant as the bargaining partner. But the lawyer's sophistication may not always be placed at the disposal of the naïve client. Feeley (1979) describes how criminal defendants receive routine offers made to appear as exceptional deals:

> It is the salesman's stock in trade to represent a "going rate" as if it were a special sale price offered only once. The gap between theoretical exposure and the standard rate allows defense attorneys and prosecutors to function in much the same way. Together, prosecutors and defense attorneys operate like discount stores, pointing to the never used high list price and then marketing the product as a "special" at what is in fact the standard price. [pp. 464–65]

Similarly, it has been suggested that the effectiveness of deterrence systems varies with the capabilities of the recipients. While naïve amateurs may generalize the high risk of punishment from one type of crime to another, sophisticated professionals who "make relevant distinctions and . . . put the message into a refined context" will be able to extract more specific and accurate information from the deterrence message. Geerken and Gove (1975) provide this illustration:

> Let us assume, for example, that an armed robber has just been convicted for his crime. A child might receive the message that crime does not pay, a businessman who cheats on his income tax might receive the message that violent or "lower-class" crime does not pay, a burglar might receive a message that armed robbery is too dangerous and an armed robber might receive the message that armed robbery under particular circumstances—a bank for instance—is too risky. [p. 507]

Compare Silbey (1980–81, p. 871) on merchant perceptions of consumer complaint enforcement and Dwyer (1979) on systematic differences in the way in which men and women in southern Morocco perceive law and legal practices and extract support in their ongoing struggle over the subordination of women. Where control is exerted through communication, the system will be powerfully influenced by the information-processing capacities of the recipients—and by the differences in their capacities.

I have used two idioms to discuss the centrifugal flow from the courts: endowments and effects. When discussing courts as sources of bargaining (and regulatory) endowments, the point of view was that of the disputants. In talking of general effects the stance is more detached. The time frame shifts from the strategic present to the retrospective or predictive. Calculations are probabilistic rather than prudential. Judgments are aggregate rather than distributive. The point of view is that of the detached observer or the remote manager of the system, not of a participant interested in specific transactions. What these viewpoints share is a vision of legal action as a centrifugal flow of symbols, radiating beyond the parties immediately involved. Both lead us to focus on the disputants as receivers of this symbolic radiation. And the "endowments" that courts confer depend on the capabilities of actors to receive, store, and use them, capabilities that reflect their

skills, resources, and opportunities. The patterns of general effects that we attribute to the courts depend on the endowments that actors extract from the messages that radiate from the courts.

I do not mean to portray these capabilities as immutable qualities intrinsic to the actors, marking the irreducible endpoints of analysis. Disputants' capabilities derive from, and are relative to, structures of communication and structures for organizing action. Capabilities depend, for example, on location on a network that carries information about rights and remedies and on proximity to remedy institutions or "exit" alternatives. The process of distributing and extracting endowments is framed by the larger structures of social life. As these structures undergo change, the character of the centrifugal flow of effects from the courts will change as well. For example, changes in political structures and communication systems may bring in their train a shift from reliance on special effects (impinging directly on disputants) to emphasis on general effects (worked by communication about such impingements). Thus, Abel (1979b, p. 193) suggests that compared with litigation in the tribal setting, modern litigation in Africa involves fewer courts with larger jurisdictions, prosecution of a smaller proportion of wrongs, and imposition of sterner punishments, shifting from the earlier reliance on special deterrence to reliance on general deterrence. This comports with Aubert's observation (1979, p. 30) that the modern state has moved from inexpensive criminal punishments (hanging, whipping) to expensive ones like imprisonment that must be used sparingly. This might imply great reliance on the private sector to deliver sanctions, either by civil damages or by the social and economic cost of entanglement with the legal system.

We might expect the mix and the relative prominence of these radiating effects to vary across space as well as over time. For example, the role of general effects of court action compared with direct effects on the disputants may be greater in the United States, which maintains a relatively small judicial plant but a very large private legal profession, compared with other industrial countries (Table 3).

This centrifugal flow of endowments or effects is rendered even more complex when adjudication (and its kindred processes) is juxtaposed with the uneven but pervasive clusters of patterned norms and sanctions that I have called "indigenous law." The image of "bargaining in the shadow of the law" (Mnookin and Kornhauser 1979) suggests that the law is *there* and the disputants meet in a landscape naked of normative habitation (or in which such structures are subsumed into their "preferences"). Instead we may visualize a landscape overgrown with an uneven tangle of indigenous law. In many settings, the norms and controls of indigenous ordering are palpably *there*, the official law is remote, and its intervention is problematic and transitory. Consider, for example, the businessmen described by Macaulay (1963) or a typical dispute within a university. In such settings the relation might be better depicted as "law in the shadow of indigenous regulatory activity."

The relation of official law to indigenous ordering is not invariably a matter of mutual exclusion (where the former ousts the latter), nor one of hierarchic control (where the latter is conformed to or aligned with the former). Judicial intervention to apply official standards does not necessarily weaken indigenous control. For example, Zald and Hair (1972, p. 66) suggest that the judicial erosion of the doctrine of charitable immunity and the exposure of hospitals to liability for negligence provided enlarged "incentives and sanctions . . . to governmental and private standard-setting bodies such as the Joint Commission [of Accreditation of Hospitals] to induce compliance with standards on the

part of hospitals." Similarly, Macaulay (1966) shows that official intervention in the relations between automobile manufacturers and their dealers led to a growth of internal regulation rather than to its attenuation. And Randall's study (1968) of movie censorship reveals how the elaboration of internal controls within the movie industry was a reflection of actual and potential control by the official law. Just as the character of such indigenous regulation is affected in unanticipated ways by developments in the official law, so the presence of indigenous regulation may transform the meaning and effect of the official law.

The complexity of the interface between external and indigenous controls (cf. Katz 1977) is demonstrated in the observation that the official system is frequently used to induce compliance with a decision in an indigenous forum. Thus, Ruffini (1978) describes Sardinian shepherds threatening to complain to officials to force resort to and compliance with the indigenous system of settlement. In the Brazilian squatter settlement described by Santos (1977, p. 79), "the official legal system is presented not as a forum to which a litigant may appeal from an adverse decision under Pasargada law but as a threat aimed at reinforcing the decision of the RA [Residents' Association] under that law." Similar instances in which the cost, delay, aggravation, and risk of being subjected to the official system become a resource of indigenous regulators are found in accounts from India (Meschievitz and Galanter 1982, p. 59), Lebanon (Witty 1978), and Mexico (Collier 1973, p. 263). Thus, official adjudication becomes a means for the enforcement of norms foreign to the official law.

The effects of indigenous tribunals, like those of official courts, are not confined to direct participation in cases. The work of these tribunals may radiate norms, symbols, models, threats, and so forth. In indigenous law, too, the shadow reaches further than its source. What kind of bargaining and regulatory endowments actors extract from the messages depends on their capabilities. Community standing, seniority, reputation for integrity, or formidability may confer capability in the indigenous setting that does not translate into capability in official tribunals. Indeed, indigenous law may be insulated from external controls by its constituents' lack of capability to use official remedies (cf. Doo 1973). Acquisition of capability to use official courts may lead to erosion of indigenous tribunals (cf. Galanter 1968). On the other hand, an equalizing of capabilities in official forums may lead to their abandonment and development of indigenous tribunals, as in the labor-management field.

CHANGES OVER TIME IN PATTERNS AND CHARACTER OF ADJUDICATION

Some long-term changes were noted earlier: the emergence of differentiated judicial institutions and the concentration of judicial power in the hands of smaller, professional judiciaries. These are linked with changes in the character of law. Rationalized systems of secular law, applied by specialized legal institutions forming part of the nation state, consolidated in the industrializing West and spread over most of the world during the nineteenth and twentieth centuries (see Galanter 1966). Changing patterns of adjudication must be seen against the background of this transformation.

Qualitative "before and after" comparisons of litigation across the great divide portray the varied effects of this shift from multiple and sometimes diffuse forums into a system of governmental courts. The arrival of these courts might redistribute power among local

groups (as in Thailand; Engel 1978, p. 35). Or their employment by outsiders might disastrously unravel the fabric of local institutions (as in Burma; Furnivall 1948). Or their proceedings might be assimilated into a general atmosphere of didactic conciliation (as in Japan; Henderson 1965). In the Indian case, the one best known to me, there was a shift of disputing from local tribunals (and local notables) to the government's courts which provoked nineteenth-century observers to complain of a flood of litigation. These new tribunals and their strange methods had a powerful allure. Maine (1895, pp. 70–71) speaks of the "revolution of legal ideas" inadvertently produced in the very course of attempting to enforce the usages of the country. This revolution, he found, proceeded from a single innovation—"the mere establishment of local courts of lowest jurisdiction" in every administrative district. These new courts undertook to deal with the merits of a single transaction or offense, isolated from the related disputes among the parties and their supporters. The "fireside equities" and qualifying circumstances known to the indigenous tribunal were excluded from the court's consideration. In accordance with the precept of "equality before the law," the statuses and ties of the parties, matters of moment to an indigenous tribunal, were deliberately ignored. And, unlike the indigenous tribunals which sought compromise or face-saving solutions acceptable to all parties, the government's courts dispensed clear-cut, "all or none" decisions. Decrees were enforced by extra-local force and were not subject to the delays and protracted negotiations which abounded when decisions were enforced by informal pressures. Thus, "larger prizes" were available to successful litigants and these winnings might be grasped independently of the assent of local opinion. The new courts not only created new opportunities for intimidation and harassment and new means for carrying on old disputes, but they also gave rise to a sense of individual right not dependent on opinion or usage and capable of being actively enforced by government, even in opposition to community opinion (Cohn 1959; Rudolph and Rudolph 1965). These "modern" courts have endured in India. Movements to dislodge these Western-style courts in favor of a revival of older indigenous forms of adjudication have enjoyed very limited success in India (Galanter 1972; Baxi and Galanter 1979) as elsewhere (Lev 1972; Takayanagi 1963, p. 31).

If the official government court has flourished in the modern world, it may no longer enjoy the same eminence as the typical and decisive institutional actor in the legal system (Aubert 1969). Courts have been overtaken by the explosive growth of legislative activity and by the exponential increase of administrative agencies and government bureaucracies. Vast areas of disputing and claims have been located away from the regular courts. Individuated treatment based on concepts of fault and contest gives way to generic treatments based on systemic and actuarial solutions. Contest is eliminated and courts, if present at all, act in a highly routinized way or as mere registries, as in workmen's compensation, no-fault auto injury recovery, no-fault divorce, simplified probate.

As courts change there are simultaneous changes in the array of companion and rival institutions that process many comparable claims and disputes. Institutions established to escape judicial formality and to be responsive to substantive policy considerations may become more formal and courtlike. Thus, Nonet (1969) traces the judicialization of the California Industrial Accident Commission. On federal administrative agencies, see Bernstein (1955).

There is a tendency to pay attention to fora during their periods of growth and prosperity. But institutions also undergo decay, displacement, and "downward mobility."

Courts may cease to attract litigants—as in the precipitous decline in caseloads in seventeenth-century Castile (Kagan 1981, pp. 215–16) or eighteenth-century France (Kaiser 1980). Less formal dispute institutions may be deliberately dismantled as a measure of reform (like the elimination of justices of the peace in the United States and the removal of judicial powers from other public officials). But officially sponsored informal tribunals may decline even where they retain political support and their more formal counterparts flourish. Compare the decline of the Schiedesmann in Germany (see Bierbrauer et al. 1978, pp. 48ff.) and the nyaya panchayats in India (Baxi and Galanter 1979).

Where government courts (with regular record-keeping) are established "early" while other aspects of social life remain relatively "traditional," it is possible to trace the change in character of litigation as society undergoes other changes. Thus, Abel has traced changing patterns of litigation from colonial courts in tribal Africa to courts in urbanizing independent African states. He finds that the overall rate of litigation declines (1979b, p. 184), a decrease which reflects a drastic decline in civil litigation combined with a great increase in criminal prosecution.

Industrialism multiplies dealings among strangers and occasions for disputes; new centers of power and increased mobility subvert traditional dispute mechanisms. But eventually the new industrial society produces new valued relationships and new forms of indigenous regulation. Toharia (1975a, p. 57), examining the relations between industrialization and litigation in Spain from 1900 to 1967, finds that the rate of litigation increased during the early stages of industrialization, but leveled off as industrialism matured—even though legal activity (measured neatly in Spain by notarial acts) continues to climb. Evidence that fits this "curvilinear hypothesis" (as Friedman 1976 labels it) has been supplied from Britain (Friedman 1976, p. 34), Sweden and Denmark (Blegvad et al. 1973, p. 104), Belgium (Langerwerf 1978), Japan (Haley 1978), and Italy (Toharia 1975a, p. 57). But compare McIntosh (1982b), who suggests that the process is one of cyclic oscillation.

Changing litigation rates may tell us directly about the location rather than about the amount of adjudicative disputing in society. There are no data from earlier points in American history comparable to contemporary survey evidence, so we have only a dim picture of changes in the lower layers of the dispute pyramid. The number of cases in the regular courts does not disclose the portions of disputes that come before the shifting array of indigenous forums or before other agencies—administrative agencies, zoning boards, licensing bodies, small-claims courts, and others whose number and identity have changed over time. But if they do not tell us about the entire use of third-party dispute institutions, data on litigation may tell us something about changes in the use and practices of the regular courts.

Per capita rates of civil litigation (that is, filings) have increased in the twentieth century in most, but not all, American courts (McIntosh 1980–81, p. 81; Arthur Young et al. 1981; Grossman and Sarat 1975; Daniels 1981; Friedman and Percival 1976). The increase of filings in the federal courts has been more accentuated. These are larger and often more visible cases; a dramatic rise in recent decades is frequently cited as evidence of crushing overload in American courts and feverish litigiousness in American society.[10]

[10] Federal courts handle only a tiny fraction of all the cases filed in the United States. In 1975 approximately 7.27 million cases (civil, criminal, and juvenile) were filed in state courts of general jurisdiction and

But current American litigation rates are not unprecedented. The fragmentary historical record includes instances of sustained higher per capita rates of litigation than now prevail. The litigation rate in the St. Louis Circuit Court in the 1970s is about half of what it was during the early nineteenth century (McIntosh 1980–81; see Daniels 1981). A study of litigation in Los Angeles Superior Court concludes: "The population of Los Angeles County was much more litigious in the 1920s and 1930s and in the late nineteenth century than it is today" (Selvin and Ebener 1984, p. 32).

Scattered evidence from our more remote colonial past suggests even less reluctance to go to court. In Accomack County, Virginia, in 1639 the rate of litigation rate (240 per thousand) was more than four times that in any contemporary American county for which we have data. In a seven-year period, 20 percent of the adult population appeared in court as parties or witnesses five or more times (Curtis 1977, p. 287). In Salem County, Massachusetts, about 11 percent of the adult males were involved in court conflicts during the year 1683; ". . . most men living there had some involvement with the court system and many of them appeared repeatedly" (Konig 1979, p. xii).

As industrialization and urbanization proceed, the subject matter of litigation in the regular courts changes. On the whole, more of it is criminal and less civil. (This is contrary to what might be expected on the basis of Durkheim's hypothesis [1964, p. 132] of the replacement of criminal by civil sanctions as society becomes more intricately differentiated.) A growing portion of the criminal cases are administrative offenses rather than interpersonal crimes (Abel 1979b).

Over the past century there has been a pronounced shift in the make-up of the cases being brought to regular trial courts in the United States. There has been a shift from civil to criminal in the work of these courts, and on the civil side, there has been a shift from cases involving market transactions (contract, property, and debt collection) to family and tort cases (Friedman and Percival 1976; McIntosh 1980–81; Arthur Young et al. 1981, Table 10; Selvin and Ebener 1984, p. 44; Laurent 1959, xxix). Regular civil courts in America are being called on to deal with a very different mix of matters than they used to. These shifts are reflected in the make-up of appellate caseloads. Studies of state supreme courts (Kagan et al. 1977) and of federal Courts of Appeal (Baum et al.

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about 160,000 in the federal district courts. There has been a dramatic rise in federal court filings in recent decades. Filings in the district courts increased from 68,135 in 1940 to 89,112 in 1960 to 198,710 in 1980 (Administrative Office 1980, p. 3). From 1940 to 1960, the absolute rise barely kept pace with population growth, but from 1960 to 1980 there was a pronounced per capita increase in filings from 0.5 per thousand population to 0.9 per thousand.

Other evidence provides little support for the notion that these are linked with desperate congestion and crushing caseloads. Clark's revealing analysis (1981, p. 81) of federal district court activity from 1900 to 1980 shows a dramatic reduction in the duration of civil cases from about 3.5 at the beginning of the century to 1.16 years in 1980. The number of cases terminated per judge has been steady since World War II and remains considerably lower than it was in the interwar period (Clark 1981, p. 83). Not only has the increase in judges kept up with the caseload, but there has been a massive increase in the support staff. While the average number of cases terminated per judge was approximately the same in 1980 as in 1960, the total employment of the federal judiciary rose during that period from 27.7 per million population to 65.5 per million (Clark 1981, pp. 87–88).

However, there has been a striking growth of appeals in federal courts. The rate at which those eligible to press appeals have exercised that right has risen, especially in criminal cases. The number of appeals filed in the Courts of Appeals almost quintupled from 1960 to 1980, while the number of judges nearly doubled (Howard 1982). Understandably, the Supreme Court, whose filings during this period more than doubled, and the Courts of Appeals are the provenance of much of the imagery of catastrophic overload.

1981–82) trace a parallel movement from business and property cases to tort, criminal law, and public law.

These filing statistics treat all cases filed as equivalent units. But cases are of different sizes and shapes. Some represent hotly contested disputes; others (like most divorce or debt or probate cases) are seeking administrative confirmation of a resolution, a claim, or some action taken. Some represent a major involvement by a court in which a judge actually decides the controversy; others represent little more than registration at the court.

Most cases for the entire span of time in question have been disposed of without a full adversary trial. Voluntary dismissal (presumably a surrogate for settlement) and uncontested judgment have been the most common dispositions recorded in these courts throughout the twentieth century (Arthur Young et al. 1981; Friedman and Percival 1976; McIntosh 1982a). Although the composition of the caseload has changed, and contested cases have become more complex, it appears that a smaller proportion of all cases reach trial. While federal court filings have risen dramatically, the percentage of cases reaching trial has diminished from 15.2 percent in 1940 to 6.5 percent in 1980 (Administrative Office 1940, p. 49; 1980, p. A-26). (Note that this is a measure of trials begun, not trials completed.) A comparison of dispositions in Los Angeles Superior Court between 1915–1940 and 1950–1979 showed a dramatic drop in the percentage tried and a striking increase in the portion settled (Selvin and Ebener 1984, p. 50). Similarly, even in a period of increased filings (and increased jury awards) the number of jury trials actually held fell in both Cook County and in San Francisco County (Shanley and Peterson 1983, pp. 19–20).

Several studies suggest that while litigation rates have risen, there has been a decline in the per capita rate of contested cases (Friedman and Percival 1976; McIntosh 1980–81). In an unpublished study of state trial courts of general jurisdiction in six cities, the late Craig Wanner found that the rate of complete trials or hearings per 1000 of population fell from 12.2 in 1951 to 10.2 in 1981 (Wanner 1983, chap. 6, Table 1). Similarly, there has been a decline in the per capita rate of cases eliciting written opinions from state supreme courts (Kagan et al. 1978, p. 965).

The proportion of cases that runs the full course declines. But for the minority of matters that do run the full course, adjudication is more protracted, more complex, and more expensive. Criminal and civil trials become more elaborate and due process more refined (see p. 203 above) just as full-blown adversary adjudication becomes relatively more rare. As the complexity and cost of full-blown adjudication increase, it becomes a source of counters and signals that permeate the processes of negotiation which occupy and surround the courts.

If full-blown adjudication is relatively less common, absolutely there is more of it. In America, this minority includes a growing component of large and complex cases that involve investments of immense amounts of time, exhaustive investigation and research, lavish deployment of expensive experts, and prodigious use of court resources (see, for example, Tinnin 1973; Stern 1977). It also includes a growing number of what have been called "public law" or "structural" or "extended impact" cases involving public policies and institutions—for example, a prison, mental hospital, or school in which many contending groups are locked together in an enduring relationship. In such cases the traditional format of the lawsuit is stretched in various ways (cf. Chayes 1976; Eisenberg and Yeazell 1980), and this extension of the scope of adjudication is connected with

development of an expansive style of judging (Chayes 1976; Fiss 1979; Horowitz 1977). (See p. 179 above.) Litigation on this enlarged scale also reflects the presence of larger aggregations of specialist lawyers with enduring relations to the parties, able to assemble factual materials, coordinate experts, and monitor performance (see Galanter 1983).

In other ways, too, courts are less inclined to shrink from promethean responses. They burst through older ceilings on the scope of remedy: there is an increase by an order of magnitude in the highest awards (Friedman 1980; Peterson and Priest 1982); doctrinal cut-offs that once prevented recovery (charitable immunity, contributory negligence) have been largely effaced.

Judicial willingness to respond to innovative claims is part of a wider shift of legal thought and practice to instrumentalist (result-oriented, consequentialist) modes of decision-making and justification (Friedman 1969, pp. 33ff.; Abel 1973, p. 86; Kennedy 1975). Among professionals, there has been a loss of faith in law as an autonomous scientific undertaking that could discern valid principles of social ordering (Gilmore 1974, 1977; Woodard 1972; Kennedy 1976). Although formal considerations continue to influence outcomes, there is an unmistakable shift away from "internal" decision-making toward decision-making oriented to external goals and consequences. Judges are more inclined to look beyond the corpus of authoritative legal doctrine (Kagan et al. 1978; Friedman 1983). But at the same time that judges are more receptive to substantive rationality, formalism proliferates: forms are used not as a source or guarantor of predictability, but as efficient instruments for processing masses of transactions (Friedman 1966).

Litigation about areas of life previously untouched by the courts mirrors a massive extension of governmental concern into areas of life previously unregulated by the state (as in the great proliferation of environmental, health, safety, and welfare regulation) or where regulation was not closely linked with the application of legal principles. As many activities and relationships not earlier subject to governmental control have become the subject of legislative and administrative concern, they have come before the courts as well. Hurst (1980–81, p. 58) points out that "only limited and episodically selected aspects of these reaches of statute and administrative law come into litigation at all. . . ." Although the judicial role in shaping public policy is overshadowed, there has been extension of judicial oversight and the consequent legalization of whole areas of government activity that were not previously thought to be in need of close articulation with legal principles (Reich 1964). These include large sections of the criminal justice system (Fleming 1974), including police (Haller 1976), prisons, and juvenile justice; and other institutions dealing with dependent clients, such as schools (Kirp 1976), mental hospitals, and welfare agencies (O'Neil 1970).

There has been a parallel extension of judicial supervision over associational life and a concomitant tendency toward the legalization of procedures within organizations and associations. Courts more readily intervene to ensure that various "private governments" conform to the requirements of due process. But the penetration of public adjudication into private associations does not necessarily reduce the amount of indigenous regulatory activity. (See p. 214 above.)

As courts become remote, professional, and expensive, they are less places for individuals to air and resolve everyday disputes and more the province of professionals (that is, those concerned with making and defending claims as part of their ordinary round of activity). Courts become the scene of organizational campaigns to deal with classes of

their constituents. Court agendas include large portions of routine administration and supervised bargaining. Courts contribute to dispute settlement less by direct decisive resolution and more by mediation, distributing bargaining counters, and pattern-setting (Lempert 1978; Abel 1979b). Resolutions of particular controversies are eclipsed by the production of wide radiating effects. Severe criminal sanctions (Abel 1979b) and high injury awards (Friedman 1980) become signals and a source of counters used for bargaining and regulation in many other settings.

Over time a smaller proportion of the population are direct participants in contested adjudication. But more Americans have what they perceive to be legal problems and they increasingly use lawyers to deal with them (Avichai 1978). After a period of relative stability, the number of lawyers has increased much faster than the population in the last quarter century (Clark 1981, p. 94) and the portion of national wealth spent on their services has grown dramatically. These lawyers work in larger units with more specialization and coordination than was present earlier (Galanter 1983). But if adjudication declines as part of direct personal experience, it becomes more prominent as a symbolic presence. There is more big-time, major-league litigation involving major institutions and/or pathbreaking claims. There is absolutely (if not proportionately) more law stuff that invites media coverage with its built-in bias toward the dramatic, the novel, the deviant; toward innovation and conflict. There has been a dramatic increase in the amount of media coverage of law and lawyers (apart from the always popular criminal law). While the confidentiality of the lawyer-client relationship remains a central professional norm, commitments to preserve the confidentiality of the interior working of other legal institutions have eroded—as evidenced by "leaks" from and about courts. The cloistered private quality of law practice has declined. Lawyer advertising has accentuated the visibility of lawyers and disseminated information about legal possibilities. A more educated and more informed public is more capable of digesting this richer fare.

We emerge with a paradoxical double vision of adjudication in the contemporary United States, a vision in which adjudication is both more elaborate and more attenuated, more prevalent and more remote. This vision is mirrored in the array of prevalent discontents with the legal process. A significant section of legal, business, and media elites is joined by wider publics in decrying the superabundance of law and the delay, cost, and complexity of litigation (Galanter 1983b). But another cluster of articulate critics (for example, Nader and Singer 1976) assails the lack of access to legal remedies for poor and middle-income individuals and for unorganized citizen interests. Would-be users and their champions complain of lacking remedies (or being forced to yield up inordinate discounts). When courts are available, they are cumbersome and formal, unsuited to dealing with living relationships. At the same time, many judges feel inundated by a flood of litigation and many institutional managers chafe at unwanted exposure to judicial scrutiny. These complaints are articulated by critics who bemoan the "litigation explosion" (Manning 1977) which overloads the courts and injects them into areas for which they are unsuited, distracting them from their proper role, and the arrogation by an "imperial judiciary" of tasks for which courts have neither expertise nor legitimacy (Glazer 1975; Horowitz 1977).

Litigation proliferates. It becomes more complex and refined, but at the same time most of it is truncated, decomposing into bargaining, mediation, or administration. Courts and big cases are more visible. For many in the society, courts occupy a larger part of the symbolic universe (even as their relative position in the whole governmental

complex diminishes). Cost and remoteness remove the courts as an option in almost all disputes for almost all individuals. When courts are available, they may be found flawed. Friedman (1971) points out the tendency of constitutional governments to create and recognize new rights even while they relinquish their ability to guarantee and enforce them. The courts join in proliferating symbols of entitlement, enlivening consciousness of rights and heightening our expectations of vindication. As adjudication becomes more elaborated and more prone to decompose into bargaining, the promise of full and decisive vindication that it holds out beckons and recedes before us.

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5

LEGISLATION

David R. Mayhew
Yale University

Students of governments and of what they do apply both functional and structural typologies. "Rule-making," "rule application," and "rule adjudication" are contemporary terms designating some basic and familiar functions (see Almond and Powell 1966, chap. 6), and of course legislatures, executive or administrative organs, and courts make up a familiar set of structures. An early lesson in most courses in comparative politics teaches that functions do not reside according to any neat one-to-one pattern in structures.

Legislatures, for example, are commonly regarded as the bodies most responsible for rule-making, at least in constitutional states; but in fact they also act in other capacities not readily captured by the basic triad of functions; they commonly deal with citizen grievances, express public opinion, and oversee the administration of laws. General rule-making, the province of legislatures, is also exercised by executive officials, courts, and administrative agencies. In the case of civil rights regulations in the United States, the Supreme Court ordered in the mid-1950s that school systems be desegregated "with all deliberate speed"; the presidency initiated in the enactment of the Public Accommodations Act of 1964 and the Voting Rights Act of 1965; the Equal Employment Opportunity Commission and other administrative units led the development of national rules on affirmative action.

Since institutions evolve, and some new ones are even intentionally created, the question of the functions to be located in each structure is a live and practical one. American regulatory agencies, commonly mandated both to make general rules and to apply them and adjudicate disputes about them, are a multifunctional innovation of the industrial era, variously reshaped decade by decade. The presidency of the French Fifth Republic is an institution rich in functional capacity, designed to perform tasks not very

well accomplished by any of the institutions of the Fourth Republic. The elected transnational parliament of the European Economic Community is a new structure in search of consequential functions, in some respects an interesting analogue to the fledgling United States Congress of the 1790s.

Common sense, ancient wisdom, and contemporary scholarship supply at least a number of considerations for any general statement on the appropriate structural location of functions. Within the context of the United States, such considerations turn, for example, on the capacities of legislatures, courts, and administrative agencies as makers of general rules. (For sources for this passage, see Horowitz 1977, chaps. 2, 7; Lorch 1969, chaps. 1, 2; Shapiro 1968, chap. 1; Huntington 1965.) Nine distinctions stand out.

1. In many policy areas, agency personnel are trained as professionals, whereas judges and legislators are not.
2. Agency personnel deal in their policy areas as specialists; so, to an important extent, do many legislatures; except in specialized courts, judges deal as generalists.
3. Bargaining and compromise are routine and legitimate in decision-making among formally equal legislators, but not—or not to a great extent—in agency hierarchies or among judges—though agencies bargain and compromise in dealing with each other, judges participate with other court personnel in plea bargaining, and juries commonly proceed by compromise.
4. Agencies and pertinent sets of legislators often build close relations with outside client groups; courts do not.
5. Agencies give sustained attention to what goes on in their policy areas; legislators, by comparison, give episodic attention; court attention is on an ad hoc basis.
6. Agencies and legislatures are capable of taking the initiative in policy areas; courts wait for cases to be brought.
7. Agencies can generate studies that turn up elaborate social information; legislators can do so as well, although their constructions of reality rely heavily on what they learn from constituents and interest groups; courts ordinarily have before them only the facts of cases, which may supply poor guides to general social realities.
8. Agencies and legislatures commonly set out plans for the future, whereas courts ordinarily render judgments on situations of the past.
9. Most legislatures, like elected executives but unlike agency personnel and judges—in practice, even elected judges—serve in a relation of formal accountability to outside electorates.

In the eye of publics, this last circumstance confers legitimacy on legislators; it also makes them especially interesting to students of democracy and representation. The term "to legislate," it should be noted, is not, in ordinary Western parlance, an exact synonym of the functional term "to make rules." "Legislate" and its noun form "legislation" carry a connotation of structure as well as functions; to legislate is to make rules in a formal process, where one or more of the approving bodies constitute a "legislature" and where at least one of the bodies of the legislature is an elected assembly.

The actual role a legislature plays in legislating may be small or large. The role of the

British Parliament is relatively small; in British lawmaking, cabinet and civil service carry most of the burden. The roles of postwar German and Italian parliaments are somewhat larger, those of the Swedish and Dutch parliaments substantially larger, and those of the United States Congress a great deal larger. These and other legislatures may be arranged along a continuum running from "arenas"—the British case—through "transformative assemblies"—legislatures that do a great deal of instigating on their own, the extreme example being the uniquely influential United States Congress (Polsby 1975; on the British case, see also Walkland 1968).

Congress warrants close inspection. For anyone interested in what happens when a legislature is established to write laws, freed from the obligation of sustaining a government, supplied an electoral base, and accorded considerable influence, the United States Congress furnishes the most rewarding testing ground. Having marshaled nine generalities, I shall proceed by delving into particularities, past and present, of the United States Congress, following what might be called a logic of the best-developed case.

Such logic would lead anyone with an interest in cabinet government to take a close look, covering past and present, at the Westminster model in Britain; those interested in decentralized federalism to inspect Canada; students of "consociational" politics to examine the Netherlands; those concerned with the functions of ombudsmen to track them down in Scandinavia; researchers on the evolution from authoritarian to democratic institutions to examine contemporary Spain; and so on. Studying a best-developed case risks identifying particularities that are no more than idiosyncrasies. Nevertheless, anyone concerned with what happens when a representative national assembly—or, more precisely, a two-part assembly—is allowed to function as a specialized legislative institution should ponder what the United States Congress has done and become over two centuries. (Unless specified otherwise, I shall use the term "Congress" to refer to both national houses—the constitutional and coequal partnership of the Senate and the House of Representatives.)

I shall write about legislation by writing about legislating—the process that generates the product. This course, natural to a political scientist, is, I trust, a useful one. In principle, the product is anything written formally into resolutions or laws—budgetary resolutions, laws authorizing expenditures or appropriating money, regulatory statutes covering corporate or individual behavior, laws prescribing the structure or functions of the branches of government, resolutions declaring judgments on events of the day, laws on pork barrel projects up through important matters of state. All these are formally enactments of Congress, although, of course, in recent decades, the presidency and the agencies have become increasingly important as suppliers of bills and ideas to Capitol Hill.

I shall frame my discussion of congressional process in a fashion that implies answers, or at least shapes speculation about possible answers, to two general questions of interest to students of law and society: What is the nature of whatever ends up on the statute books? How much legitimacy should be assigned to whatever emanates from legislative processes and ends up on the statute books? I shall set out briefly some major kinds of scholarly thinking on what congressional legislating amounts to or ought to amount to and indicate where fuller statements may be found.

The essay is in three parts. First, I shall consider some theories, assertions, accounts, prescriptions, and the like, in which Congress appears as a *passive* institution—a place where the influence of outside individuals, groups, and institutions is felt and recorded.

The second section will offer a consideration of a number of scholarly organizing concepts in which Congress figures as an *active* institution—a set of members who make their own specifiable imprint on the law. Most of the treatments covered in these parts offer at least a grain of truth; it should be noted that the distinction between *active* and *passive* is sometimes blurred. The third part of the article consists of a piece of speculation on a subject insufficiently covered in scholarship—the impact of public opinion on congressional lawmaking.

CONGRESS AS A PASSIVE INSTITUTION

A vast amount of scholarship dealing with the United States Congress during the last century focuses on the outside forces that are said to influence congressional lawmaking, for better or worse, or that might usefully be induced to do so. This concern is not surprising, given that Congress was set up as a representative institution and that the term "representation" ordinarily implies external considerations. Most of the pertinent writing is laced in one way or another with normative notions; views on what the relations of influence are usually underlie views on whether or to what degree congressional lawmaking should be considered legitimate.

The question of what *influence* is—or what *power* is—is a source of unending confusion and controversy in the scholarship. A good state-of-the-art definition of a power relation, which I shall rely on in framing this section, states that a "power relation, actual or potential, is an actual or potential causal relation between the preferences of an actor regarding an outcome and the outcome itself" (Nagel 1975, p. 29).[1]

This definition casts a big enough net to include relations of anticipated reaction—that is, relations in which A has a preference about an outcome and B acts to achieve the outcome because A wants it, but in which A makes no effort to induce B to act and, indeed, may never know that B has acted. Relations of this sort, though in principle detectable, present obvious empirical difficulties of a high order. Still, it is not possible to deal adequately with the subject of influence on legislatures without taking relations of anticipated reaction into account. An example is provided by the hypothetical instance in which a Mississippi congressman voted against a civil rights bill in 1950; hardly anyone back home noticed; nevertheless, people back home almost certainly would have noticed and erupted if he had voted the other way; he knew this and acted so as to minimize the probability of eruption; therefore, the (all white) electorate's preference caused the congressman's action.

Descriptive and prescriptive scholarship identifies four external actors or sets of actors as influencers of congressional activity.

Political Parties

The pertinent writing on parties is prescriptive and could defensibly be situated under either or both of the "active" and "passive" rubrics. I have in mind the "responsible parties" literature, the tradition of writing on Congress that has had the longest life and probably the greatest renown. Its central message is that Congress does not work very well and that it would work a great deal better if cohesive, programmatic, well-organized, electorally competitive, national parties existed and controlled its activities. The argu-

[1] Nagel draws no distinction between "power" and "influence," and I shall make no effort to do so either.

ment maintains that the American electorate's preferences are not properly expressed in Congress but that the existence of strong parties could provide such expression. Alternately, the claim is made that the electorate's preferences are not very good anyway, but that better ones would be brought to bear if programmatic parties existed to generate them.

The founder of the tradition was Woodrow Wilson (1956), who discovered what he took to be British party government in the writing of Walter Bagehot and more or less advocated its American adoption in his 1885 work, *Congressional Government*—though without considering that the British electorate of the middle or late nineteenth century encompassed a much narrower stratum of society than did the American electorate. (For a general treatment of Wilson's views on parties, see Ranney 1954, chap. 3.) What Wilson urged—at least implicitly—was no less than an elitist counterrevolution, an abandonment of the Jacksonian mode of politics—with its localism and individualism, its corruption, its incoherence, its messiness, and its explosions of such public sentiment as the anti-Masonic movement, the antibank crusade, Know-Nothingism, abolitionism, the Greenback movement, and the Ku Klux Klan. Better the ritualized combat of a Gladstone and a Disraeli over broad "principles" and overall "programs" than such an unorganized free-for-all.

On the specifics, Wilson urged only a strengthening of parties within Congress itself, but subsequent writers have called for a forging of extraparliamentary party organizations—national and local—capable of keeping members of Congress in line. This recommendation was formalized in the American Political Science Association report, *Toward a More Responsible Party System* (1950), an audacious venture in Anglophilia. (For a retrospective reflection on the committee's statement, see Kirkpatrick 1971.) James MacGregor Burns, one of the leading contemporary exponents of the "responsible parties" cause, has urged a building of more influential extraparliamentary parties. (See, for example, Burns 1963, pp. 325–32.)

But none of this sort of exhortation has ever had much effect. The only American parties with a record of producing voting discipline in assemblies are local machines—such as Chicago's Democratic party organization under Mayor Richard Daley, with its servile board of aldermen. These are hardly the sorts of parties Wilson and his successors have had in mind. Members of Congress remain resolutely individualistic, very little influenced by party leaders inside Congress or by organizations properly called party organizations outside. Party loyalty on roll calls is loose by European standards, and during the twentieth century it has gradually grown looser. Such policy differences as there are between congressional Democrats and Republicans—and the two parties do have their distinctive centers of gravity on many issues—result, for the most part, from differences in personal views or ideologies and in the kinds of electoral constituencies members of either party must satisfy. The combination of Madisonian and Jacksonian traditions probably ruled out a long time ago a building of "party government" at the American national level and thereby ruled out the sort of lawmaking that might flow from it—arguably, a lawmaking more influenced than ours by experts and ideologies, more given to "planning," more abrupt and sweeping in its measures.

Interest Groups

While, in the United States, extraparliamentary parties do not exert much influence, interest groups do. Such groups range from tightly organized trade associations

representing single industries through "public interest" groups, such as Common Cause, and mobilization of much of the general public by mail or media, such as the Moral Majority. Organized groups plainly wield a good deal of power in Congress and in lower-level assemblies. A generation ago, this circumstance was a cause of celebration among political scientists. "Group theorists" described and applauded a political world in which all people are free to coalesce in groups to further their interests and in which public policy is legitimately a resultant of group pressures. The classic statement of this brand of pluralism is contained in David B. Truman's *The Governmental Process* (1960). The heady claims of group theory are understandable, given the development of farmers in interest groups, finally, in the 1920s and industrial workers in the 1930s. For a time during the 1940s and 1950s, it seemed to some observers that interest groups, in place of parties, could offer a comprehensive set of linkages between the public and government. But major political problems since 1960 have not been comparably "solved" by the mobilization of interest groups of the farmer or labor kind, and political scientists, like most others, have retreated to a commonplace view of politics. (For a statement of disenchantment with "group theory" pluralism, see Lowi 1969.) This argument holds that some sets of people are better organized than others, that people in general are better organized in some of their roles than in others, and that better organization is likely to win better representation. The claim is certainly true for congressional representation. Minimum wage legislation, for example, a congressional staple, favors unionized adults over unorganized teenagers (whose source of jobs diminishes). Teachers have greater influence on education matters than do students or parents. Unorganized farm workers exercise little influence. In general people are better represented in their roles as producers than in their positions as consumers, as in the case of the tariff over most of American history—although the gap on producer and consumer matters has probably narrowed in the last two decades, with the mushrooming of public-interest groups on and around Capitol Hill.

The marked responsiveness of American legislative assemblies to organized groups raises chronic questions about the adequacy of ordinary lawmaking as a recourse for the relatively unorganized. Often, courts take up the slack, as in the case of general rulemaking on racial matters during recent decades.

The scholarship on interest groups is only episodically an improvement on the American muckraking tradition—a genre in which some sets of people accuse other sets of constituting "special interests" (without defining very clearly what the label means), with the allegation that these "interests" get their way by rewarding or punishing politicians. (For an example of this genre, see Green et al. 1972, the flagship book of Ralph Nader's 1972 Congress project.) This scholarship does not cite much evidence or seem to realize that there are other ways of exercising influence—for example, by engaging in one-on-one persuasion and by expending resources to shape public opinion, which thereupon supplies a context in which politicians operate. In surprisingly few instances have scholars looked closely at the actual transactions between interest groups and politicians.[2] Such studies as exist suggest that persuasion—adducing information and making a case in Capitol Hill processes—is a more common means of exerting influence than is the offer of rewards or threats of punishment. Nor are students very sensitive to relations of anticipated reaction; the image of "pressure" is so strong that the influence of groups is

[2] The major study in which these transactions are inspected is Bauer et al. 1963, a study of the making of foreign trade policy in the mid-1950s.

ordinarily thought to be detectable only in actual transactions, though there is no good reason to suppose that a member of Congress from Oklahoma needs to receive any actual message from oil companies in order to be inspired to champion their interests. A final deficiency in the scholarship is its hangover image from the past that interest groups are private-sector organizations making claims on government; in fact, the world of interest groups is increasingly part of the public sector itself, with such organizations as mayors' and teachers' groups cutting a considerable swath on Capitol Hill (Beer 1976).

The President

Presidential influence on Congress is one of the hardiest concerns of American politics and the subject of a great many treatments, both positive and normative. Writing in the former vein—just how much and in what ways do presidents influence Congress—is rife with the problems and considerations inherent in discussing "power." Richard E. Neustadt's *Presidential Power* (1976), the standard analysis on the subject, makes the general case that presidents are most likely to be successful on Capitol Hill in two circumstances. The first is when their standing with the general public is high; members of Congress are then likely to see presidential claims as legitimate or to calculate that they themselves can profit, rather than lose, politically by going along with the White House. The second is when they build good "professional reputations" in the community of Washington politicians—that is, when they have records as forgers of good relations of reciprocal benefit with other political actors. In dealing with legislating, a sensible recourse is to note that president and Congress commonly weigh in at different stages of the process—initiation, information gathering, interest aggregation, and so on. (For a good discussion which picks up earlier scholarship, see Price 1972, chaps. 1, 8.)

Two hundred years of wrestling with the question of the matters on which presidents should exercise influence over Congress yields some clues to the inherent capabilities of representative assemblies. A simple distinction may be helpful. In a role envisioned in the Constitution and first fully exemplified by Lincoln as war leader, a president acts in the manner of a Roman consul—a manager, an executive, a doer of the sorts of tasks that seem to require quick action, centralized information gathering, day-to-day calculation, sometimes secrecy. The obvious examples are foreign policy in all eras of crisis management and economic policy since the mid-1930s—in the latter case, the kind of policy making that requires continuous watching of exchange rates, discount rates, price levels, and unemployment statistics. In playing consul, a president is not, strictly speaking, influencing Congress; rather, he is influencing events. The strengthening or weakening of the presidency as a managerial office—its weakening on foreign-policy matters since the early 1970s, for example—reflects judgments (popular and congressional) on the replacement of ordinary lawmaking processes by managerial processes in specified policy realms.

But many presidents take on a second role, not envisioned in the Constitution and first exemplified by Jackson. In this capacity they act like Roman tribunes. They speak, or claim to speak, for unorganized people not well enough represented in congressional lawmaking—either because too many members of Congress are hostile to what are claimed to be their interests or because congressional processes, for whatever reasons, fail to generate laws promoting what are claimed to be their interests. One thinks of Franklin Roosevelt and his "forgotten men" or Richard Nixon and his "silent majority." In this

latter role, presidents do their work by trying to influence what Congress does in passing laws. All welfare-state builders are examples, but so is Ronald Reagan—a striking example, in the early part of his presidency, of a leader acting as tribune, rather than consul, in his all-consuming evocation of public opinion to foster a legislative program.

American views on whether the presidency or Congress should influence events, and on whether or how much presidents should influence congressional lawmaking, are based largely on perceptions of the country's managerial, as opposed to lawmaking, needs and, separately, perceptions of how well the unorganized are represented in Congress. One of the most conspicuous pieces of writing on Congress in recent decades, which argues that Congress should more or less give up trying to pass laws and spend its energies instead on oversight and casework, was written at a high-water mark of cold-war welfare-state liberalism (Huntington 1965).

Public Opinion

A century ago, James Bryce wrote of American legislators, "There is no country whose representatives are more dependent on public opinion, more ready to trim their sails to the last breath of it" (1959, vol. 1, p. 42). It does seem a reasonable assertion that public opinion exerts a greater influence on Congress than any other factor. This is an easier case to believe than to demonstrate, both because the tie between the public and members of Congress is largely (as in the case of the exemplary Mississippi district) a relation of anticipated reactions and because it is hard to decide what counts as a manifestation of public opinion. One study, based on interviews, conducted in the late 1960s in which a sizable number of House members were asked about the influences they felt in voting on a set of important issues, concluded (using some equations) that the perception or anticipation of constituency sentiment far outweighed interest groups, party leaders in Congress, and the presidential administration as an influence on roll call voting (Kingdon 1973, pp. 16–23 and, more generally, chaps. 1, 2).[3] The work's elaborate rendition of interview material makes the case more persuasively than any bare statement of it can. Again, however, the topic of public opinion has been insufficiently explored in the scholarship. It warrants more thinking and more scrutiny.

CONGRESS AS AN ACTIVE INSTITUTION

The next task is to consider Congress as a relatively autonomous institution, to ponder ways in which it makes its own predictable and distinctive imprint on the law. A fruitful approach takes a series of "organizing concepts" often said to capture processes, propensities, or attitudes of the institution or its members. The reason for treating these, once again, is to fuel speculation on the strengths and weaknesses of representative assemblies as generators of laws.

[3]Kingdon sets out another equation (p. 20) in which he adds two other causal agents to the four specified here—that is, fellow congressmen (who supply "cues" on how to vote) and staff members (who supply information and advice). The four-variable equation is more interesting than the six-variable, for the reason that the two additional agents could supply a causal relation without its being a "power relation" (in Nagel's sense): we have no decisive reason to suppose that colleagues or staff members care how their cue-receivers vote.

Particularism

There is a well-known legislators' propensity, probably detectable wherever members of assemblies have legislative powers and district roots, to pass out governmental benefits in small packets pleasing to districts or to groups or individuals within them. Such actions can cause—indeed, do cause, in the case of Congress—three kinds of "distortion" in the legislative product and one kind of distortion in members' activity.

Overspending First, representative assemblies may "overspend" resources on some governmental programs—either rewarding some government programs (particularistic) over others (nonparticularistic) or spending more on some than the private sector would spend (on matters about which private-sector transactions supply a sensible standard). In fostering the Army Engineers' water projects, such as dams, for example, Congress works with a discount rate well under the market rate, thereby supplying more projects than the private market would. (See Ferejohn 1974, chap. 2.)

Inefficiency Second, assemblies may inspire geographically inefficient allocation of resources within programs. The interesting argument on this matter has recently been set out along with some compelling evidence (Arnold 1979, especially chap. 9). The pertinent point is that for each program, its creators and sustainers—either legislative leaders or the heads of agencies—must earn and keep the support of a majority coalition in Congress. (Agency leaders succeed largely by anticipating the reactions of members of Congress; that is to say, members influence agencies.) On a program offering collections of local goods or services, the way to nurture such a coalition is to spread funds thinly around many districts and states, often creating what can be regarded as inefficiencies. A program to deal with poverty in Appalachia develops over time an extraordinarily broad geographic definition of Appalachia.[4] A Model Cities program designed at the outset as a means of renovating a small set of urban disaster areas ends up as a source of modest and inconsequential funding for no fewer than 151 cities (*Public Interest* 1980). The National Endowments for the Arts and the Humanities start out, unsurprisingly, as patrons of New York City but end up, just as unsurprisingly, as funders of local ventures all over the country (Friedman 1979).

Design Bias A third kind of "distortion" affects basic program design. Congress seems to prefer programs that offer geographically divisible benefits to other kinds, even if the former are not obviously more efficient. In times of economic downturn, for example, members of Congress reach instinctively for "accelerated public-works programs" rather than other sorts of macroeconomic levers—subsidies to the districts turn up as a way of dealing with water pollution. More generally, Congress prefers categorical grant programs to state and local aid that takes the form of generalized revenue sharing (the elected officials can claim credit for individual grants even if bureaucrats pass them out).

Casework A fourth "distortion"—in congressional activity rather than directly, in legislative product—occurs in the extraordinary amounts of time and energy members

[4] By 1980 nearly 85 percent of the country's population lived in "distressed areas" eligible for federal aid. See *Public Interest* 1980.

spend on casework as a result of inducement from their home electorates (servicing constituents' requests) as compared with actually making laws. Emphasis on casework may reasonably be thought of as a nonstatutory brand of particularism. A survey conducted by the Obey Commission, a panel created by the House in the mid-1970s to study its internal organization, revealed that members of Congress and voters place approximately equal value on the legislative and service roles, that members themselves believe that the former role ought to be far more important than the latter, but that they admit to being induced by constituents' pressure to spend much more time and energy in the latter activity than they think they should (Cavanagh 1978).

These claims should not be taken as a judgment that members of Congress do nothing but build gratuitous dams and chase lost Social Security checks. In fact public-works programs—the old "pork barrel" standbys, with members of Congress retaining substantial discretion over item-by-item allocation—now take up only about 2 percent of the federal budget (Arnold 1978). The major growth in contemporary federal budgets has been in transfer programs—such as Medicare—rather than programs allocating benefits by discretionary or seemingly discretionary decision. And modern congressional offices, bulging with staff members, surely devote more resources to both legislating and casework than did the offices of a generation ago. Nevertheless, particularism is a propensity to watch for and wonder how to correct for.

Specialization

House and Senate members are organized into well over a hundred specialized committees and subcommittees in each house, where most of the essential work of legislating is done.[5] It is probable that no contemporary legislature can make a significant impact on the law without a division of labor to work out adequate methods, and in practice this requires committees. But delegation to committees creates its own sorts of problems, or is thought to do so. Three lines of criticism are worth setting out.

Special Interests The first argues as follows. For electoral or other reasons, members of Congress ordinarily join committees dealing with programs in which they have a special interest (farm belt members, for example, join the agricultural committees);[6] committees ordinarily carry a great deal of weight on the floor; ergo, the congressional legislative product can come to resemble an unrepresentative collection of committee-centered programs. They may be unrepresentative in the senses both that, if asked, the general public might not approve the enacted individual programs and that, in a hypothetical world where all members of Congress are equally informed and equally influential on all matters, congressional floor majorities might also disapprove. This argument has a ring of truth. Following more or less the same line of reasoning, one scholar posits a budgetary effect—systematic "overspending" on committee programs (Niskanen 1971, chap. 14).

[5] For sophisticated treatments of what goes on in sets of House and Senate committees see Fenno 1973 and Price 1972. Fenno covers both chambers but looks more closely at the House. Price concentrates on the Senate. On the building of the House committee system over time, see Polsby 1968.

[6] For a definitive analysis of how Democrats get to be members of committees in the House, see Shepsle 1978. On agriculture in particular, see Jones 1961.

Committee Control The second critique is a time-specific complaint often lodged by liberals against Congress from the late 1930s through the late 1960s. The argument went as follows: Democrats ordinarily controlled the Congress; committee chairmen (all Democrats) were chosen by seniority; committee chairmen had a great deal of influence; southern Democrats were chairmen in large numbers because they had safe seats and remained in Congress longer than northern Democrats; most southerners were conservatives; ergo, the current form of committee specialization resulted in Congress being controlled by a conservative oligarchy unrepresentative of the membership.

At one time this claim held a slight kernel of truth. Most of the time over these decades, however, the liberals' real problem lay in the fact that they lacked floor majorities, even though they made up a majority of the majority party; in fact, southern committee leaders tended to be fairly representative of cross-party floor majorities in their areas of specialty. But no matter, the argument has become nothing more than historical curiosity now. Congress no longer has a southern tilt.[7]

Division The third argument makes a persuasive case. Dividing up power among a multitude of committees makes legislating difficult, if not impossible, in the more complicated policy areas. Authorizing dams is easy enough, but arriving at a plan on the order of a congressional "energy policy" is extraordinarily difficult—indeed, more difficult now than it was a generation ago, because of "democratizing" reforms of the 1970s that weakened parent committees and strengthened more than a hundred subcommittees in the House (making the House more like the Senate). (For an account of the reforming of the House in the 1970s, see Dodd and Oppenheimer 1977.) Having legions of cooks stirring around makes for an unusual meal, a late meal, or no meal at all, even if most are working from more or less the same recipe. A few years ago, Jeffrey L. Pressman and Aaron B. Wildavsky wrote a book entitled *Implementation,* in which they pointed out the difficulty of carrying through a federal program that has to survive some seventy "decision points" between its statutory authorization and its final realization (Pressman and Wildavsky 1973). A still unwritten work, *Enactment,* could point out the difficulty of getting out of Congress anything worthy of the name of "energy policy" or anything of the sort, as long as literally scores of committees and subcommittees have a place in its making.

Careerism

Service in an assembly can fit into a lifetime career in many different ways. Members may serve a term or two before withdrawing to private life; this pattern is common in many American city councils and state legislatures. (See Prewitt 1970, pp. 5–17.) Membership in a legislature may be a preface to or a concomitant of holding a higher public position, as in the case of the eighteenth-century British House of Commons, a producer of cabinet members, generals, admirals, and bishops. Municipal and state legislative service may be a part-time occupation, an adjunct to a private career supplying a better and steadier source of income. The typical modern member of Congress, however, is what has been called a fully professionalized legislator, members ordinarily devote full time to their positions, and they aim to pursue lifelong careers on Capitol Hill—

[7] That the southern advantage would erode away was evident already in 1965. See Wolfinger and Heifetz 1965.

although, of course, many House members aim to abandon the House and move up to the Senate.[8]

Spending a full career in Congress requires multiple reelection, and this need shapes activities on Capitol Hill. Elsewhere I have argued that members seeking reelection—whatever the length of their term—are induced to engage relentlessly in three specifiable sorts of activity: *advertising*—"any effort to disseminate one's name among constituents in such a fashion as to create a favorable image but in messages having little or no issue content"; *credit claiming*—"acting so as to generate a belief in a relevant political actor (or actors) that one is personally responsible for causing the government, or some unit thereof, to do something that the actor (or actors) considers desirable"; and *position taking*—"the public enunciation of a judgmental statement (which may take the form of a roll call vote) on anything likely to be of interest to political actors" (Mayhew 1974, pp. 49–77). Since members seeking reelection spend much time and energy engaging in these activities, the effects on the legislative product merit consideration.

One set of inferences is obvious. The need to "claim credit" can be expected to generate patterns of particularism. Its further effect of "clientelism"—working to achieve legislative ends in committees under the alert scrutiny of interest groups—has been discussed under "specialization."

Additionally, the politics of position taking has its legislative consequences. (The logic of this is set out in Mayhew 1974, pp. 61–73.) On broad matters, where no single member of Congress can believably claim credit for passing a law or for achieving its effect, the members' sense of craftsmanship or organizational incentives, rather than electoral considerations, must be relied on to yield workable laws. Where the electoral reward is for issue positions rather than programmatic effects, craftsmanship and internal incentives may have limited power. The contrast between the federal tax code and federal statutes regulating industry is illustrative. The tax code presents a history of the painstaking creation of precise, elaborate provisions—"loopholes" to some; this result is what one would expect in a process rife with particularism and clientelism. But regulatory statutes, until the mid-1960s, after which time they were put together by congressional staff members, have been notoriously brief, vague, and studded with internal contradictions. They are best considered as emanations of an amorphous public opinion rather than as exercises in instrumental rationality geared to produce programmatic effects.

The general distinction here is important. Making laws on matters on which members cannot easily claim individual credit can be a breathtakingly haphazard activity. One knowledgeable scholar writes, "Within the Congress words are equated with deeds. Votes represent final acts. There is a concern with administration, but it is focused primarily on those elements which directly affect constituency interests or committee jurisdictions. Legislative proposals seldom are debated from the viewpoint of their administrative feasibility" (Seidman 1970, pp. 65–66).

Coalition Formation

One line of theorizing in contemporary political science gives an arresting answer to the old question of the sort of winning coalitions likely to form where decisions are made by majority rule. William H. Riker has put forth what he calls a size principle, the gist of

[8]Congressional service was not always so "professionalized." For a treatment of the evolution toward "professionalization," see Price 1975; and Polsby 1968.

which is that "minimal winning coalitions" are likely to form in assemblies and other settings; people putting together victories will try to make them as narrow as possible (51 percent is the ideal under majority rule) so as to maximize per capita benefits on the winning side (Riker 1962). In a politics of dam building, for example, one might expect outcomes in which narrow majorities of legislators team up to supply dams for their own districts but impose tax burdens on all districts—or, indeed, merely on the districts of excluded minorities. Such a vision is less than edifying, and if members of assemblies routinely behaved as it predicts, it might reasonably be wondered whether assemblies are appropriate bodies for making decisions—or, if they are, whether they ought to make them by majority rule.

The primary objection to this "size principle" theory is that it generates a grotesque misconstruction of congressional reality on matters where it might be thought most directly to apply—that is, on what are often called "distributive" benefits: goods such as dams or block grants, which can be ladled out in piecemeal fashion, district by district. Benefits of this sort do indeed impose diffuse costs on taxpayers everywhere, but they need not of necessity be apportioned in a way that arouses hostility among excluded minorities anywhere. Processes can be arranged so as to allow every district its share of distributive goods at one time or another; impressive evidence suggests that Congress more or less does so arrange them. A statement of a member of the House Public Works Committee of the 1960s renders the spirit of the politics: "Any time any member of the Committee wants something, or wants to get a bill out, we get it out for him. . . . Makes no difference—Republican or Democrat. We are all Americans when it comes to that" (Murphy 1968, p. 23). (For a pertinent treatment of distributive politics on the House Interior Committee of the 1960s, see Fenno 1973, chaps. 3, 4; see also the discussion in Mayhew 1974, pp. 87–91.)

It seems likely that politicians who have to deal with each other over time find it more advantageous to devise long-term, "universalistic" standards of interaction than to exploit each other at the instant. (For a statement of this logic, see Barry 1965, pp. 255–56.) Bureaucrats, too, follow a logic of universalism; on some distributive federal programs, there is decisive evidence that, in doling out benefits so as to build congressional support, the aim of federal agencies is, not to service narrow majorities, but to spread goods around widely enough to silence all opposition (Arnold 1979).

Distributive politics poses its problems, of course, as the earlier discussion of particularism suggests. But injustice or idiosyncrasy brought on by the size principle is scarcely one of them.

It seems more probable that coalition builders try to squeeze out narrow majorities primarily on matters where conflict is unavoidable—on issues where two sides anchored in public opinion do battle on Capitol Hill and where "half a loaf" strategies can supply just enough votes to make one position or another prevail. Surely this happens sometimes (Stephen K. Bailey's classic account [1950] of the passage of the Employment Act of 1946 comes to mind), but how is this situation to be interpreted? Indeed, beyond the familiar ruminations about majority rule and minority rights, what considerations can be brought to bear on any situations in which congressional majorities vote down vocal minorities?

One good question, in line with concerns about coalition building and about the imprints assemblies distinctively make, is whether congressional decision processes tend to exacerbate or to diminish conflict naturally existing in the larger society. A reasonable answer suggests that ordinarily they diminish it. In the language of Capitol Hill, members

trying to get a bill passed normally seek to "accommodate" the views of prospective opponents—that is, to shape legislation in ways that will head off objections and, if not to foreclose opposition, at least to reduce its intensity. Ordinarily, accommodation is a tactical necessity. There are in Congress so many dispersed decision points that legislation of any complexity can hardly be passed without it. The Senate, which operates procedurally by "unanimous consent" and where any inflamed Senator can hold up a bill, raises accommodation to a high art.[9] Thus, any image of Congress as a place where majorities routinely and wantonly trample on vocal minorities in passing bills is at variance with reality.

The need for "accommodation" nevertheless raises its own obvious difficulty: blocking bills is easier than passing them. On balance it is probably true that processes on Capitol Hill display a built-in bias for the status quo. Anyone can make up a list of issues on which the public—at least as its views are captured in opinion polls—pushes one way and Congress, by inaction, pushes the other. One such is gun control. Another is national health insurance, a public favorite but so far a congressional casualty to interest-group opposition and the sheer difficulty of maneuvering a bill through. School busing, affirmative action, and school prayer are all matters on which the Supreme Court or any agency handed down rulings that were unpopular with a majority of the public in the 1970s but which Congress did not overturn during that decade. The tendency toward stasis produces a demonstrable effect in the politics of the public sector; federal agencies and programs are hard to create, but once in place and bolstered by clients, they are very difficult to dismantle. (See Wilson 1975 and Kaufman 1976.)

A distinction is in order, however. No public majority or even vocal minority can now be said to be permanently barred from prevailing on Capitol Hill—permanently in the sense that obtained when advocates for blacks' equality were dealt out in the initial constitutional settlement, again in the Compromise of 1877 (giving the Republicans the presidency and the white South autonomy on racial matters, as a settlement of the disputed Hayes-Tilden election), and afterward, until the mid-1960s, by the race-saturated politics of the Senate filibuster. These persisting arrangements between northern and southern whites, embedded in congressional processes, probably belong in a class with the formulas of Dutch and Swiss consociationalism—long-standing quasi-constitutional agreements dividing governmental authority among ethnic, religious, or linguistic segments of the population. Since 1965, many senators of all ideological shades have used the filibuster, but no set of them has presumed to claim—probably none successfully could—that it can legitimately be used over and over again on the same issue. While a bias for the status quo clearly exists, Congress is no longer predictably static on any specifiable issue or set of issues.

And its members do, after all, pass a great number of bills, many of them controversial. A few members dedicated to a goal, fortified by staff work, and capable of shrewd maneuvering can often carry through a piece of legislation; the consumer statutes of the 1960s enacted over industry opposition supply some cases in point. (See, for example, the account in Price 1972, chap. 2.) Indeed, what Robert A. Dahl refers to in another context as a pattern of "minorities rule" is a fair characterization of much congressional

[9] Bernard Asbell makes the point with acuity and voluminous evidence in *The Senate Nobody Knows* (1978), a treatment of (among other things) Senate handling of clean air legislation in 1976.

bill passing (Dahl 1963, pp. 131–34). The accommodation required to conform House and Senate bills is also a matter of negotiated compromise.

Deliberation

Lawmakers may be said to be engaging in "deliberation" when the following set of circumstances characterize their activity: (a) they try to change or make up each other's minds about what, if anything, should be enacted into law; (b) they do so by adducing descriptive statements ("facts"), causal statements (for example, "Decontrolling gas prices will reduce demand"), normative statements (such as, "The government shouldn't interfere in people's lives"), or some combination of the three; and (c) the criterion they use, explicitly or implicitly, in arguing whether a bill should become law is whether it would be "good" for some reference group larger than themselves (for example, a district, the farmers, the nation, humanity). In principle, deliberation differs from bargaining—trying to get others to change their positions by making threats or offering inducements, although in practice the two forms of interaction are commonly entangled.

Operating on a premise that legislators register fixed positions or hone them to serve electoral ends, modern scholars have seldom paid much attention to deliberation or taken the process seriously. The oversight is curious, given the earlier emphasis accorded it by the authors of the Federalist papers and by Woodrow Wilson; the prominence of a twentieth-century "problem-solving" scholarship, from John Dewey through Harold Lasswell, that might have, but has not, made it a first-order concern; and the obvious fact that it does indeed take place. One thinks of the losing effort in the Senate in 1970 to confirm the nomination of G. Harrold Carswell to the Supreme Court, in which the arguments in his favor wore thin and in which the salient argument became Senator Roman L. Hruska's that "even if he were mediocre, there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they?" Another illustration is furnished by President Carter's bill allowing election-day registration of voters, which lost its support when critics took a cold look at it and concluded that the potential for fraud was immense (*Congressional Quarterly Weekly* 1977). And there is President Nixon's Family Assistance Plan, impaled on its inconsistencies in the Senate Finance Committee; Senator John Williams adduced elaborate information and apparently persuaded the committee that "work incentives," predicted to be a product of the plan, were a mirage.[10] As a result of the scholarly oversight, political scientists have had little to say on such matters as the televising of congressional floor sessions; whether committee markup sessions (where decisions on particulars are hammered out) should be closed or open; whether treatment of legislative subjects should be scattered around many committees or concentrated in a few;[11] whether hiring of huge legislative staffs makes for

[10] See Bessette 1979, pp. 33–42. For an especially good account of deliberative activity at the committee and subcommittee levels, see Asbell 1978, pp. 10–17, 29–43, 121–27, 131–35, 176–79, 185–89, 198–207, 216–18, 224–28, 328–29, 333–36, 349–64, 371–74, 392–95; these scattered references, if strung together, supply a coherent narrative on the Senate Public Works Committee's handling of clean air legislation in 1976.

[11] See Davidson and Oleszek 1977, an account of the Bolling Committee's effort to make over the House committee system in 1973–74. Discussions among committee members and staff (the latter including some political scientists), reported in chapter 5, display traces of an interest in making committees better deliberative bodies.

better or worse consideration of bills (see Malbin 1977, 1980; Scully 1977); or, in general, what sorts of institutional arrangements make for a proper deliberative setting.

A heterogeneous collection of recent writings, however, offers promise that the topic of deliberation may become an object of scholarly interest. A paper by Joseph M. Bessette (1979) offers a careful probe of its nature.[12] Charles E. Lindblom and David K. Cohen, exemplary of writers in a tradition outside congressional scholarship but relevant to it, have considered how social-scientific knowledge can usefully be inserted into decision-making processes in legislative and other settings (Lindblom and Cohen 1979). Nelson W. Polsby has given thought to the place of deliberation in presidential nominating conventions, settings from which it has virtually disappeared in recent decades as primaries and the mass media have become the realm and instruments of nominating (Polsby 1980). John W. Kingdon and Richard F. Fenno, Jr., both authors of books based on interviews with members of Congress, have told of a practice independent of deliberation but, on close inspection, arguably related to it—the members' standard, time-consuming practice of explaining their Capitol Hill activities, including their votes, to their constituencies (Fenno 1978, chap. 5; Kingdon 1973, pp. 46–53).

Taking positions is not enough: in order to show that they are performing well, members of Congress must travel around their districts and repeatedly make statements—descriptive, causal, and normative—about the legislative issues they deal with in Washington. Knowing that, back home, they will have to cite reasons for their stands on Capitol Hill, they worry and ruminate about how to explain later as they take their stands now. This circumstance, which may not be surprising, suggests the idea of a representative tie of some sophistication. Members can be judged, at least in part, in their home districts according to whether their statements are plausible; the statement making, so judged, is an attenuated form of the sort required in deliberation on Capitol Hill; the more alert constituents, in so judging, are therefore engaging in what amounts to a sampling activity, testing whether their representatives are likely to be much good at deliberating. Fenno argues that, in making explanations and performing the other actions they engage in back home, members of the House try, above all, to create a relation of "trust" with their constituents (Fenno 1978, passim). To carry the argument further, "trust" relations empower members to take part in arcane Washington discussions. It should further be remembered that argument on Capitol Hill, insofar as it is a rehearsal for explanations in the home district—and to some important degree it has this function—imparts popular styles of thinking into Congress's legislative activity.

BACK TO PUBLIC OPINION

The foregoing treatments of influence relations and processes will convey a sense of some of the achievements and difficulties when loosely structured elective assemblies generate laws. But there is a need for a general point of a different sort—one not covered in these treatments, not rooted in available scholarship or easily renderable by standard techniques or scholarship, but important nonetheless for what it suggests about American legislatures, Congress in particular, as distinctively popular institutions.

The point concerns language and style of thinking. As much as any, and probably

[12] For a pertinent earlier offering see Barry 1965, pp. 87–88. Barry sets out seven methods of resolving disagreements, of which "discussion on merits" is one.

more than most, American legislatures are places where ordinary-language, common-sense ways of thinking percolate upward from the public to permeate lawmaking processes and laws. This process can occur either because legislators embody public opinion or because they cater to it—probably as much the former as the latter. Capitol Hill terminology is normally no more complicated than the idiom of journalists or common-law lawyers. Styles of reasoning are ordinary; arguments in the *Congressional Record* are full of references to such images as mares' nests, entering wedges, camels' noses, last-mile walks, cans of worms, Pandora's boxes, stitches in time, golden eggs, roosting chickens, pigs in a poke, forests and trees, babies and bathwater. (See the discussion in Large 1973.)

This commonplace takes on importance with a view toward what the language of lawmaking could be but, at least in the American setting, normally is not—a "scientific" or otherwise inaccessible medium, a language of technical expertise (common, of course, in government agencies), of labyrinthine ideology, or of esoteric ethics.[13] Whatever else may be said about Congress and other American legislatures, they have little in common with task forces of economists or with seminars of Jesuits or Marxists or philosophy professors; their styles of thought and discourse are, by contrast, utterly prosaic.

A way to make this point is to set out some "cognitive grooves," some ordinary-language, common-sense ways of thinking about things, which unquestionably originate in public opinion and which, over and over again, infuse legislative discourse and give shape to American statutory law. I offer ten such "cognitive grooves."

Corrective Measures

"There Ought to Be a Law" Conjuring up a "scientific" vision of legislating is easy enough; a body of lawmakers settles on some desirable ends and then builds statutes with a vigorous instrumental rationality to achieve them. A law is a "scientific" means to reach an end. But surely lawmaking rooted in public opinion is not likely to take this form, only with important qualifications. In the first place, to the average person, "law" is probably a kind of Mosaic mishmash—a mix of moral command and positive edict. Why pass a law proscribing marijuana or fornication? To set a standard or to abolish a practice? A "scientific" way to reduce air pollution might be to tax factory owners according to the amounts of poison they inject into the air; but this kind of remedy is hard to sell to American publics or their legislators because it appears immoral. If polluting the air is bad, why not simply pass a law stamping it out altogether?

In the second place, legislators rooted in public opinion are somewhat quicker on the draw in framing laws than, I suspect, "scientists" would have them be. They are casual, to say the least, in applying the tenets of instrumental rationality. If something is wrong, "there ought to be a law." The response is reflexive. An example of moralism intertwined with casual thinking is embodied in the Humphrey-Hawkins Act of 1978—an enacted national mandate, barren of instruction on means, to achieve a 4 percent unemployment rate as well as a 3 percent inflation rate by 1983. (See Singer 1978.) It is difficult to characterize such a venture; it can hardly be seen as an exercise in "scientific" lawmaking. The relentless currents of moralism and of quick, reflexive casualness in American lawmaking—at state and local levels in the nineteenth century, but extended to the national in the twentieth—almost certainly rule out a whole brand of economists' thinking

[13] The distinction here is akin to one Bruce A. Ackerman makes between "ordinary" and "scientific" legal language in *Private Property and the Constitution* (1977, chap. 1).

as incompatible with popular democracy: the stark antistatist economics, that is, associated with Milton Friedman. Any collection of American legislators is likely to pass a great many laws in a short time that vigorously free-market economists will find gratuitous or hateful; the public wants them. As long as a century and a half ago, Tocqueville reported on "American legislatures in a state of continual agitation," on the "continual feverish activity of the legislatures," and on the fact that "in America the legislator's activity never slows down" (Tocqueville 1969, pp. 243, 241, 249).

"Regulate It" The reflexive American response to any malfunction in the private sector—most of the ills of the Industrial Revolution are cases in point—is to call for regulation. Such a recourse is simple, practical, and easily understood. It requires no theory. It flows from a judgment that some practices are good and others are bad.

At the legislative level, regulation is primarily expressed in lists of actions that people or organizations are mandated or forbidden to engage in. During the last two or three decades, when large staffs and "public interest advocates" have become fixtures on Capitol Hill, the lists have grown longer and more detailed. But they still cause despair among all sorts of economists on the ground that their means do not efficiently achieve their ends. (See, for example, the analysis in Ackerman et al. 1974.)

Furthermore, the American "regulatory" recourse has ruled out or taken the place of ways of dealing with the private sector that some would consider more basic or fundamental—for example, the Marxist recourse of "nationalizing the means of production." This is a message of intellectuals, rooted in a complicated body of theory, and it has never had much resonance in the American public or in American legislatures.

"Stamp It Out" Reflecting public opinion, American lawmakers put a great deal of energy into trying to eliminate easily identifiable evils. Such targets may include slavery, drinking, Communism, drug addiction, vice, unemployment, inflation, pollution, hunger, and poverty.

But while "poverty" can become a fitting statutory target, it is more difficult, if not impossible, for any American legislature to ordain general societal rearrangements in the interest of realizing a complicated ethical theory. John Rawls and Robert Nozick may be captivating in university settings, but their lack of common-sense targets—they attack no manifest evil—makes them unsalable in an American political marketplace. George McGovern's "demogrant" plan of 1972 to give each person $1,000 a year as an incomes policy may have sounded persuasive in Cambridge, but it aroused bafflement and suspicion in the public and, as a result, would almost certainly have been unrealizable on Capitol Hill. Its intended underpinnings were not easy to convey.

"We're in a Crisis"; or, "This Is an Outrage" There is a common inclination among American legislators, responding to public opinion, to frame measures as a quick reaction to events. One thinks of the "hundred days" legislation in response to the economic crisis of 1933; laws regulating drugs in 1938 and 1962 (the former brought on by a deadly sulfanilamide elixir, the latter by thalidomide) (see Harris 1964, pp. 181–245); the Tonkin Gulf resolution of 1964, giving President Lyndon Johnson what amounted to free rein in Vietnam; mining-safety laws passed in 1941, 1952, and 1969, all inspired by coal-mine disasters (see Lewis-Beck and Alford 1980); the National Defense Education Act of 1958, brought on by Sputnik; the civil-rights laws of 1964 and 1965,

triggered by violence in Birmingham and Selma. No one should be surprised by this reactiveness, of course, or even necessarily dismayed, but it does sometimes yield measures that are not very well thought out in their means or ends.

"Do It Once and for All" Most of the natural sciences and some of the social sciences proceed by experimentation, either in laboratories or, with suitable application of rules, in real-life settings. Given the chance, therefore, scientists of various sorts might bring an experimental cast of mind to legislating. In many areas of lawmaking, there is no sure way of predicting the effects of a contemplated law. From a scientific standpoint, a reasonable—indeed, an obvious—course on such congressional subjects as campaign finance, minimum wage, water and air pollution, occupational safety, housing, and school busing would be experimentation with different laws in randomly selected parts of the country to observe the results. To be sure, such action would pose constitutional and other kinds of problems. But it is my impression that members of Congress almost never even consider such procedures. My guess is that their view of lawmaking as a substantially *moral* activity—a popularly rooted view—prevents them from contemplating experimentation: if there is a *right* solution to a problem, it must be universally imposed. By an accident of history, American lawmaking was more experimental half a century ago than it is now; fortuitous mixes of state laws on various subjects, at a time when states had greater autonomy, supplied what amounted to "natural experiments"—the individual states serving, in Louis D. Brandeis's phrase, as "laboratories." The current costly recourse at the federal level is, in effect, to try out solutions over time rather than across space.

"Wipe Out Corruption" Nothing may be easier for people to understand than a charge of "corruption." Hence, a hypersensitivity on the subject has developed among American journalists and lawmakers. As a result, revelations of corruption produce laws; one thinks of the Watergate hearings and the subsequent overhaul of campaign-finance rulings.[14] Further, views on corruption give shape to laws; in important respects, the entire American public sector, with its elaborate civil-service requirements, its auditing arrangements, its reporting and disclosure constraints, its vast paperwork, is a monument to the memory and possibility of corruption. "There are watchdogs who watch watchdogs watching watchdogs." (See, for example, Kaufman 1977, p. 54; more generally pp. 50–56.) Initiative and flexibility can get lost in a quest for palpable honesty; agencies created by American legislatures may not always accomplish whatever else they are supposed to do, but they do manage to spend enormous amounts of money without much of it being illegally misused or stolen.

"Pin the Blame" The gist of what might be called "blame theories" is that when something goes wrong, someone or a group of someones is intentionally and malevolently causing the situation; there may well be a conspiracy. This strain in American popular thinking has persisted from the beginning, the lineup of villains running from the Illuminati, the Masons, and the Pope up through such modern forces as the "Communist conspiracy," the "military industrial complex," and the Trilateral Commission. (For a

[14] For a treatment of the Federal Election Campaign Act of 1974 and its follow-up litigation, see Polsby 1977, pp. 1–43. The act was among other things "a major legacy of [the Nixon] administration" (p. 1).

general treatment, see Hofstadter 1967.) Some blame theories are more sophisticated than others, and some are surely true, but all probably win popular currency by their dealing in blame—one of the simplest of ideas.

A point worth making is that blame theories do not ordinarily achieve as much success in American legislatures as they do among the public; lawmakers seeking explanations, as a preface to writing statutes, are more likely to reach for impersonal causes. Their doing so may offer a good instance (and one that might, in social-science parlance, be "operationalizable"—survive rigorous definition of terms and scrutiny of evidence) of what James Madison expected of congressional representation: that it would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens" (*Federalist Papers* 1961, p. 82).

Nevertheless, at times blame theories do make their mark on Capitol Hill. One thinks of a long line of noisy investigations: the Nye committee of the 1930s, with its theory that munitions makers brought on World War I; the McCarthy hearings and the three-decade run of the House Un-American Activities Committee; more recently, the House Select Committee on Assassinations and its unswerving conviction—evidence or the lack of it notwithstanding—that John F. Kennedy and Martin Luther King, Jr., were both victims of bizarre conspiracies. While such hearings occasionally result in laws, for the most part, the act of investigating in itself—authoritatively assigning the blame—seems to satisfy interested publics.

Anticipatory Measures

"We Need a Program" The view that, if there is a problem, a government "program" can be created to "solve" it seems to be a twentieth-century idea, perhaps a remnant of the "problem-solving" strain in Progressivism. Sometimes the belief makes good sense; the space program, the Marshall Plan, and the effort of the 1970s to wipe out hunger come to mind. Sometimes it makes less sense; the crash program to wipe out cancer and most of the housing programs since the 1930s are cases in point. But the idea of "having a program" seems deeply ingrained in the popular mind and in politicians' minds. Anyone running for high office is obliged to set forth, for example, a "program for the cities." Consequently, the statute books fill up with plans for programs, whether or not there is good reason to suppose that labeling problems and creating programs to solve them will in fact achieve any intended ends.

"We've Got a Right" The notion of rights has always been prominent in American culture, but since the mid-1960s, when southern obstruction of efforts to extend elementary rights to blacks finally gave way in Congress and in the southern state capitals, a new phenomenon has arisen—the persistent, frenetic invention of new rights. (For the treatment of the modern class of rights that amount to entitlements to government largesse, see Reich 1964.) (Of course, the best way to establish a new right is to argue that it is an ancient one currently being traduced.) Some of this invention has been carried on in Congress. The controversy on abortion, which, in principle, could be conducted on utilitarian lines—that is, on the presumed social effects of one policy or another—in fact, took the form of a competitive assertion of rights—as in the politically imaginative declaration of a "right to life" (with its conscious or unconscious appeal to

the Declaration of Independence). An excellent current way to bring about large-scale social change is to label a desideratum a "right" by statute, specifying as little as possible about the costs or effects of implementation. In passing the Age Discrimination Act of 1975, for example, Congress "held no public hearings and left behind virtually no legislative history of its intentions to guide the government's policy makers" (Stanfield 1978, p. 2066; for a more extended treatment, see Schuck 1980). The Rehabilitation Act of 1973 included only one sentence barring discrimination against the handicapped in access to public transit; five years later, these few words had cost billions of dollars in public expenditure and filled the *Federal Register* with 51 pages of follow-up regulations (Clark 1973).

A vast potential exists for brief and cloudy laws producing expensive, enduring, and often surprising effects. Declaring "rights" may cause more notable results than creating "programs"; in the case of the handicapped, for example, a program in their behalf—a more traditional recourse—would probably have brought about less actual change. The congressional concern with rights has recently spilled over into foreign policy, where marking up foreign aid bills has sometimes taken the form of list bargaining—my Chile for your Mozambique. Each member has a distinctive list of countries argued to be too wicked on human-rights matters to deserve financial aid. (See Franck and Weisband 1979, chap. 4.)

"Balance the Budget and Stamp Out Waste" An enduring substratum of public opinion seems to exist in American society that concentrates on money; its tenets are roughly as follows. Government budgets should be balanced. Agencies have an inherent tendency to waste money and should be stopped from doing so. Tax money is, in principle, citizens' property, and the burden is on government to prove it ought to be taken away. Running up a national debt is an improvident and, indeed, immoral act. The Proposition 13 movement in California, and similar initiatives in other states calling for reductions in public spending as a matter of law, have apparently built on a notion that a huge share of public expenditure is simply wasted. (For a good analysis based on national survey data, see Sussman 1978.) A publicly inspired constitutional amendment requiring that federal budgets be balanced may yet be enacted. (See Wildavsky 1980.)

To be sure, such a package of views hardly supplies an accurate prediction any more of what takes place on Capitol Hill: members of Congress, acting in the shadow of Keynesian theory, have not been hesitant to approve deficits and debts. Nevertheless, compared with other governmental organs—certainly the President's Council of Economic Advisers—Congress is a uniquely good reflector of public views on money matters. Decade after decade, the keynote of the House Appropriations Committee's activity has been the stamping out of governmental waste. (See Fenno 1966, especially pp. 98–108.) And deficits notwithstanding, it probably remains the case that no theory of budgeting other than a common-sense balancing theory has ever been decisively sold on Capitol Hill. Congress went along only half-heartedly with the Kennedy-Johnson tax cut of 1964—the first salient Keynesian instrument—and neither the statements nor the actions of its members since that time suggest any firm attachment to notions of countercyclicalism. The economic program of the Reagan administration in its early days was a powerful statement of mass opinion on government spending, budget balancing, and waste; but it is interesting that Reagan's macroeconomic proposal that encountered the

strongest opposition in Congress was his tax scheme. The administration's Kemp-Roth plan, with its Laffer Curve justification of tax cuts unmatched by spending cuts, aroused suspicion of the sort inspired by the Democrats' Keynesianism of two decades earlier. And the opposition was rooted in public opinion; national surveys supplied evidence that unalloyed budget balancing is the macroeconomics of the mass public.[15] The main problem for economists on Capitol Hill is winning a lasting commitment to any theories at all, budget balancing aside.

These ten categories make my point about public opinion. Anyone examining the product of elective American assemblies, pondering what to make of it and how much to honor it, might consider not only the relations of influence and organizing concepts set out earlier, but also the infusion of raw public opinion into lawmaking. An inspection of congressional behavior on energy matters in the 1970s, for example, certainly warrants a consideration of pressure brought to bear by oil companies, the contemporary status of the presidency, the absence of disciplined national parties, patterns of coalition formation on Capitol Hill, the effects of hyperspecialization in the congressional committee system; but it must also consider the dogged, simultaneous expression on Capitol Hill of the conflicting demands of public opinion: big cars, low gas and oil prices, more investment in energy, more conservation, customary levels of energy consumption, nonintervention abroad, less dependence on imports, less government regulation, and lower taxes.

There is much to be said for the American model of rooting assemblies in public opinion. No doubt, it imparts a signal legitimacy to governmental actions, and it invests legislative enactments with a piecemeal cast of the kind advocated by Karl Popper—consider the "cognitive grooves" having to do with incremental regulation, obvious evils, and reaction to events.

The system also has its costs, however. A summary way of stating them is to cite a contrast drawn by Tocqueville (substituting, with some of the modern European regimes in mind, the phrase "party-centered technocracy" for his "aristocracy"):

> An aristocracy is infinitely more skillful in the science of legislation than the United States democracy ever can be. Being master of itself, it is not subject to transitory impulses; it has far-sighted plans and knows how to let them mature until the favorable opportunity offers. An aristocracy moves forward intelligently; it knows how to make the collective force of all its laws converge on one point at a time. A democracy is not like that; its laws are almost always defective or untimely. [Tocqueville 1969, p. 232]

He continued with a familiar assertion—"the great privilege of the Americans is to be able to make retrievable mistakes."

[15] See Samuelson 1978; Clymer 1978; Reinhold 1978. A nationwide election-day survey conducted in 1978 by the Times and CBS News turned up a 3-to-1 voter preference for spending cuts over tax cuts, and a 50 percent to 42 percent rejection of a "large Federal income tax cut, regardless of its effect on prices or government services"—a tendentious but recognizable rendition of Kemp-Roth (Clymer 1978, p. A19). In the same poll, 82 percent of Democratic voters and 86 percent of Republicans said they favored a constitutional amendment requiring federal budgets to be balanced (Reinhold 1978).

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IMPLEMENTATION AND ENFORCEMENT OF LAW

Jeffrey L. Jowell
University of London

INTRODUCTION

The legal process is rarely self-initiating. Much law commands obedience and is obeyed. But much still needs to be enforced. A rule does not usually "itself step forward to claim its own instances."[1] Enforcement of law requires action by an individual asserting a right or duty or claiming an obligation or benefit. Some laws (most contracts and torts) rely for their enforcement on private individuals, but many depend upon initiation by public officials.

For example, a law setting a maximum speed limit may of itself induce obedience, but in cases of deviance enforcement is generated by the police. Similarly, laws against racial discrimination may simply through their enactment induce conformity. But in cases of infringement, the individual victim may generate enforcement by complaint to an official agency, which may in turn possess discretion to prosecute enforcement.

As a heuristic device we may employ the illustration below. Law is directed through an administrative agency, which is charged with the enforcement of the law, and emerges at

[1] Hart 1961, p. 123.

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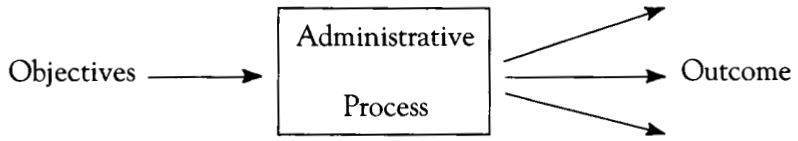
the other end. The ideal of "perfect enforcement" would require its emergence in a straight line. In reality the direction may be refracted.



Of course, this illustration is wholly artificial. It assumes that the objective of a law, its purpose or goal, is clear and identifiable in advance. The picture painted by Max Weber of officials enforcing law "without hatred or passion and hence without affection or enthusiasm"[2] gives the impression of a law being clear in its purpose, and thus capable of mechanical enforcement. This view provides a useful ideal-typical construct.

In reality, however, the objectives of a law are often not clear and identifiable in advance. The definition and elaboration of purpose is a crucial issue in the implementation of laws. A law is normally assigned for enforcement in whole or part to a bureaucracy for the express purpose of allowing the bureaucracy to develop and elaborate the law's objectives. One reason for this may be the desire to incorporate community norms, which may change over time. For example, British planning law assigns to local authorities the task of granting or refusing planning permission in accordance with a plan (the Development Plan) and "other material considerations."[3] Fair rental laws may incorporate the concept of a "fair rent" to be decided in accordance with comparable rentals in the neighborhood. These laws invite the enforcers to develop standards, and in so doing to take into account shifting expectations and conditions in society.

Indefiniteness of purpose may have another, political reason, reflecting a compromise between factions in the legislature that could not agree on goals. The administrative arena will then become central to the battle for goals. Consider the possible objectives behind a law against racial discrimination: to persuade the public not to discriminate, to vindicate the rights of individuals who have been the victims of unlawful discrimination, or to equalize opportunities for blacks.[4] Rules about automobile accidents also show a number of differing goals. One goal, that of "justice," is to adjust the consequences of an accident fairly between those involved. Another is to reduce the number and severity of accidents. A further goal is to lower the social costs of accidents, whatever their number, and a fourth is to reduce the cost of administering the system of treatment of accidents.[5]

Again, we must distinguish between the direct objective of a law (the precise behavior commanded or allowed) and the indirect motive. And a distinction must be drawn between instrumental objectives of a law, where the aim is to effect concrete behavior—for example to stop people discriminating or drinking—and symbolic objectives, where the law aims at the public affirmation of social ideals—for example, persuading people that it is *wrong* to discriminate or to drink.[6]

Not only the passing of the law but also the setting up of an administrative structure for enforcement may be instrumental or symbolic. Edelman points out how enforcement

[2]Weber 1947, p. 340.
[3]Town and Country Planning Act, 1971, s.29(1).
[4]Jowell 1975, pp. 169–94.
[5]Calabresi 1970, pp. 24–33.
[6]Friedman 1975, pp. 49–50.

mechanisms may have the function of "symbolic reassurance" and rendering "quiescent" the public who seek the achievement of the law's objectives.[7]

In the "outcome" of the diagram above we confront an equal number of problems. Ideally, the quality of implementation could be tested by matching outcome against objectives. But objectives may be ambiguous, confused, or multifarious. And how do we measure the outcome, or the "impact" of a law? The measurement of impact is notoriously difficult for any public organization. In the absence of an objective, ascertainable, or quantifiable criterion of "success," such as profit margin, ratings, or productivity, organizations are frequently ignorant of how well or badly they are doing (given an identifiable objective). Few police departments can know how much crime and disorder a community would suffer if the police functioned differently, or not at all. Similarly, how do antidiscrimination agencies evaluate the success of their operations? By the number of complaints they receive?[8] By the "strategic" nature of these complaints (insofar as these can be measured)? By the amount of discrimination in the community (insofar as this can be measured)? Even if it can be shown that discrimination is reduced, can we be sure that the cause is the law itself, or the agency's activities? In Britain, for example, it is by no means clear to what extent the massive reduction in smog in big cities was the result of Clean Air laws which forbade the emission of "dark smoke" and the use of certain fuels, or of a general change in the use of fuels (including the widespread introduction of gas and oil-fired central heating to replace coal and wood fires).[9]

Moving now to the black box itself—the administrative process—we locate the bureaucracy (used here not only in reference to Weber's ideal type, but interchangeably with "administration," "administrative agency," or "organization"). In the illustration above the administrative process is the mediating device by which objectives are translated into outcomes.

It is here that the problem of accountability presents itself both to law and to political science. Democratic theory insists that bureaucracy is not a law unto itself, but accountable. Under notions of separation of powers, bureaucracy is an instrument of the legislature. In Britain, a minister is technically responsible to Parliament for the work of his department. Modern government, however, does not in practice permit a high degree of legislative control, and therefore the notion of accountability takes a different form. Accountability to purpose is presented as a modern substitute for traditional constitutional notions. The definition of purpose, according to others, requires more than a mere process of official ratiocination, but also a specific reference to the public interest, defined after taking into account disparate points of view.[10] Echoing this debate is one that argues the respective merits of representative and participatory democracy, and another that identifies competing ideologies in seemingly neutral administrative processes.[11]

Sociolegal studies of implementation mostly avoid the problem of constitutional setting. They content themselves largely with identifying the influences upon bureaucracy in the definition and enforcement of organizational goals. Early studies of the U.S. federal agencies were intrigued with the slack enforcement of regulatory standards.

[7] Edelman 1964.
[8] Wilson 1968, pp. 57–82.
[9] Scarrow 1972, p. 275.
[10] See Stewart (1975, p. 1675).
[11] See McAuslan (1980).

Selznick,[12] Bernstein,[13] and others showed how agencies were "captured" or "co-opted" by the interests they were attempting to regulate.

During the 1950s, the concept of discretion became the focus of interest of legal studies. Federal agencies were asked to define their standards, to reduce their discretion.[14] Concern was expressed at the growth of government "largesse," where individuals received privileges from the state at the mercy of official discretion. Reich favored granting firm "rights" or "entitlement" to recipients under criteria established in advance.[15] In Britain similar arguments were made by groups arguing for "welfare rights,"[16] opposed by Richard Titmuss, who argued that rights can produce a "pathology of legalism" where rules lack responsiveness to human needs and the law creates an "esoteric" and "mystical" atmosphere.[17]

Meanwhile, administrative lawyers were interested largely in judicial review of administrative action and, within that interest, in the rules and standards laid down by the courts to control administrative action. Only recently have they shown interest in some of the wider questions of the control of discretion, largely at the prompting of one of their number, K. C. Davis, to examine techniques at structuring, confining, and checking discretion through rules, open decision-making, and appeals.[18]

Recent work in legal philosophy also bears upon the enforcement process, although not specifically related thereto. Dworkin seeks to delineate the proper role of the judge and denies that the judge "makes" the law.[19] He distinguishes principles from policies, denying judges the right to deal in the latter or the right to exercise discretion in the strong sense of that word.

The recent legal concern with discretion has thus focused attention upon institutional design: the structures and techniques by which the agents of implementation (decision-makers of one kind or another) may be channeled into fidelity to the purpose of the law. The structures include appeals, reviews, and openness. The techniques include rules, principles, and criteria. Where judges are involved, either as agents of implementation or as agents of control (over nonjudicial decision-makers), debate rages over the permissible use of decision referents (policies, principles, or rules).

These purely legal questions are important but leave many questions unanswered that are the concern of the organizational and political theorists, who in turn tend to neglect the legal dimension. The first is that of nonlegal constraints on discretion—the long list of factors which, through various empirical studies, we know influence organizational behavior. These include the constraints of resources, time, professional norms, hierarchy, and incentives. These influencing factors are of interest in understanding the workings of organizations as implementing and enforcing agencies, and they comment also upon institutional design; they may permit the shaping of the structure of an organization in the light of a knowledge of these various constraints.

Recent writings on implementation have examined the exercise of discretion by official

[12] Selznick 1949.
[13] Bernstein 1955.
[14] Friendly 1962.
[15] Reich 1964, p. 733; 1965, p. 1245; 1966, p. 1227.
[16] See, for example, Lynes (1969).
[17] Titmuss 1971, p. 113. Compare a recent American contribution on these lines, Mashaw 1983.
[18] See Davis (1969).
[19] Dworkin 1977.

agencies. Mayhew[20] (on antidiscrimination commissions), Nonet[21] (on an industrial accidents commission), and Kagan[22] (on wage- and price-"freeze" legislation) all consider the context of agencies that narrow their wide powers by judicialization of varying degrees (leading in some instances to legalism) and legalization. In these studies organizational and legal theory at last begin to inform each other.

Turning specifically to nonlegal studies of implementation it is noteworthy that Pressman and Wildavsky, seeking studies of implementation, came to the conclusion that little work had been done on that subject.[23] On the other hand, there are a number of works that deal indirectly with implementation and, although rarely expressly identified as such, deal with essentially "legal" problems relating to the use of rules and adjudicative techniques to communicate policy, to solve disputes, and to achieve the broader objectives of accountability and control of discretion.

One of the first works directly from organization theory to speak to implementation is Herbert Simon's *Administrative Behaviour*,[24] which considers how rule-making and control within organizations are achieved through the specification of factual and value premises for subordinates. In this way the discretion of subordinates may be reduced although not entirely eliminated.

This concern to understand the hierarchical control within organizations is shared by lawyers who wish to prevent the distortion of goals by actors within the organizations and who suggest that rules be used as a device to control or to "confine" discretion.

However, a reliance only on rules and a concern only with "top-down" enforcement (implementation through the progressive reduction of discretion) ignore a number of factors operating upon and within an organization, which also influence its outcome.[25] For example, Gouldner[26] shows that rules are secured in a work setting not only by management, but also by labor who attempt to limit the discretionary freedom of their superiors. "Rational management," or control of administrative "distortion," is therefore not the sole function of rules. Others have shown how confining rules of themselves have led to "bureaupathic" behavior. Merton[27] points out how means may be treated as ends, thus both avoiding an organization's objectives and failing to provide the flexibility necessary to achieve the needs of particular clients. Recent studies in industrial relations have shown how an excessive reduction of discretion to the line official (the individual on the "coal face") leads to a low level of commitment to the effective performance of his task.[28]

Studies of organizations thus demonstrate a great deal about implementation and the use of legal techniques to influence outcomes. The question provoking most of them, however, asks why public agencies fail to achieve the goals of public policies and programs. The administrative process is seen as performing the task of "execution." Concern

[20] Mayhew 1968.
[21] Nonet 1969.
[22] Kagan 1978.
[23] See Pressman and Wildavsky (1973, p. 166).
[24] Simon emphasizes the importance of specifying "premises" within organizations for the control of subordinates (1945, pp. 223–24). Compare Dunsire (1979, p. 221).
[25] This point is made very persuasively by Ham and Hill (1984). See also Barrett and Fudge (1981).
[26] Gouldner 1954, p. 232.
[27] Merton 1957, pp. 195–206.
[28] See Fox (1974).

is expressed at the fact that goals are subverted during the process of implementation, causing an "implementation deficit" or "implementation gap."[29] This literature thus focuses largely upon managerial interests, dealing with policy communication, coordination, and control.

We can identify four different organizational "models" derived from different standpoints. The first of these, which Elmore[30] calls the "systems management" model, approximates what has just been described, namely, a model that views implementation as a "top-down" coordination and control. Elmore points out that in this model organizations are assumed to act as units; "policy" is treated as a single identifiable conception, with the process of implementation involving the attempt of the policy-makers and those at the top of the organization to hold subordinates faithful to the policy and accountable for any deviation therefrom.

A second model, the "bureaucratic process"[31] model, represents the sociological view of organizations, including recent research on "street-level" bureaucracy and the implementation of social programs. Studies here deal with routines developed within organizations as a necessary function of specialization and division of tasks and the techniques developed to maintain and enhance positions within the organization, which in turn may subvert original policy goals.

A third model deals with "organizational development" representing recent sociological and psychological theory and has a normative rather than descriptive focus, seeking ways of improving motivation, involvement, and task satisfaction within an organization as a "democratic" alternative to established theories of organization.

These models do point to features of organizations which both inform and correct the excessive concern with control through policy statement from the top-down and with methods of systems management to shape policy-making by hierarchical control. Elmore rightly points out that the second and third models recognize that the process of implementing new policy may begin at the bottom and end at the top, as policy does not exist in any concrete sense until implementers have shaped it and claimed it for their own.[32]

A fourth model, the "conflict and bargaining" model, will be discussed in greater detail below.

This cursory introduction shows from how many perspectives the legal contribution to implementation may be considered. Not all implementation theory is relevant to law, nor is law relevant to all implementation theory. The suggestion here is that more of each is relevant to the other than has been recognized.

It should perhaps be made clear that this essay will not deal with three issues of current concern in most industrial societies. The first relates to broad techniques of economic regulation, the question whether to achieve goals by means of independent agencies, as in the United States, or by means of ownership and control, as with the "nationalized industries" in Europe run by public corporations. The choice of instrument here is dependent upon deep political and economic structures and cultures.

The second issue not considered here relates to the circumstances of nonlegal techniques which are alternative to those employed in traditional administrative regulation

[29] Pressman and Wildavsky 1973, pp. xiv, iv; Dunsire 1979, p. 18.
[30] Elmore 1979, p. 601; 1978, p. 185.
[31] Elmore takes this from Allison's model; see Allison (1971).
[32] Elmore 1978, pp. 215–16.

and are exciting increasing interest on both sides of the Atlantic. I refer here to economic-based incentives such as taxes and subsidies as opposed to rule-making, adjudication, and other legal devices.[33]

The third issue not considered here relates to the appropriateness of the *judicial* role in administrative schemes—the role of courts as a check on arbitrary and unreasonable governmental power as opposed to other methods such as executive control or control through instruments such as the U.S. Office of Management and Budget.[34]

LAW IN ORGANIZATIONS

The process of enforcement usually engages the administrator in a choice about his own discretion: whether to keep it wide and open-textured, thus maintaining a variety of options, or to confine it by rule, by a process of *legalization.* This process deals with the substance of the decision: it announces the organizational response to a given situation. The policy to promote safe driving is legalized by the rule requiring a 30-mile-per-hour speed limit on given streets.

The second choice is directed less to the substance of the decision (although this may be affected, too) than to the process of decision-making. This choice relates to *judicialization:* should the decision be taken through some kind of adjudicative process?

Legalization

The argument in favor of legalization is generally based upon the desirability of achieving accountability to purpose, achieved by the announcement of policies. However, the concept of accountability, in the legal literature at least, is not well developed. It is vaguely assumed that the existence of a specific rule will allow a form of redress to an individual who complies with the rule but is nevertheless dealt with as a deviant. An announced speed limit of 35 miles per hour ought to allow redress to a person prosecuted for unsafe driving at 32 miles per hour. Whether redress is possible in practice depends upon a variety of factors relating to the initiation of remedies, proof, and so forth, that will be considered in relation to enforcement. Another meaning of accountability, however, relates to fidelity to purpose. Here the actual process of rule-making is significant. The rule, as the product of that process, becomes the formal operational definition of purpose. There is also a hint in this sense of accountability of an element of *rationality,* a logical and publicized exercise demonstrating the link between powers conferred and consequential action. Although the exercise itself may result in a rule that is arbitrary, or unreasonable, its public aspect opens it to scrutiny and challenge.

These meanings of accountability have a different sense from those advanced by Dicey in his concept of the "rule of law,"[35] which is also directed at accountability, but more at the mistrust of any official discretion, largely on the ground that an affected person must know the rules before being subjected to them ex post facto. Here we have a principle of justice that no one should be condemned without a presumed knowledge of the rule he is alleged to have breached. This assumes a penal law and is understandable in that context where in a world without rules much behavior would involve risky guesses with serious

[33] See, generally, Breyer (1982); Breyer and Stewart (1985).
[34] See Mashaw (1983); Ely (1980).
[35] Dicey 1985.

consequences for noncompliance. It is surely fairer to a person prosecuted for dangerous driving to have been made aware of the precise speed limit.

This argument has a slightly different compulsion when dealing not with regulation but with the allocation of resources. Is it fairer to an applicant for a university place to know the precise grades required for entrance? Or an applicant for social welfare benefits to know the precise "entitlement" to a new winter coat? Only recently has an argument been made for "rights" based on ascertainable rules in these areas, which were previously considered "privileges" to be determined at the discretion of the decision-maker.

Legalization is also said to encourage justice—to the extent that rules speak generally and promote uniformity, or the "like" treatment of "like" cases. Regulation of wages or prices, for example, that specifies a certain permissible percentage increase per annum will, if enforced regularly, apply equally to all and be no respecter of particularistic factors. Similarly, welfare benefits specifying a given entitlement should apply to all who qualify, irrespective of their personal merit in the eye of the decision-maker, or factors such as their race, political predilections, or personal connections.

The virtues of legalization as a technique in the implementation process are therefore largely the virtues of legality. These virtues stress congruence to official purpose and distributive justice and accountability, loosely so-called. While none of these virtues speaks directly to substance, they implicitly suggest an adherence to rational decision-making, to purpose, and to the reduction of arbitrariness. This is done by proscribing decision-making criteria that are unrelated to organizational ends or prescribing those that are. As Selznick points out, legalization does not simply allow officials to "congratulate themselves—and await obedience."[36] The rules in themselves may generate scrutiny and appraisal that make them subject to assessment in the light of substantive ends. Legality in itself therefore provides a tendency toward criticism of a law's substance and opens the door to moral debate.

We have thus far considered the principles of legality that are desirable features of any scheme of implementation. To these should be added the advantages to the implementing agent itself of legalization.

Much organization theory tends to assume that implementing agencies oppose legal constraints on their discretion in an effort to maintain and enhance their freedom of action. Legalization also, however, possesses administrative advantages. Rules announce or clarify official policies to affected parties and thus facilitate obedience. They may also allow more efficient handling of cases by allowing routine treatment of cases. A zoning system in planning, a list of features of "substandard" housing, a list of grades for university admission, all allow decisions to be taken more quickly and without constant reappraisal. This in turn reduces the anxiety factor in any administration and conserves the constant energy needed to decide on a case-by-case basis. Max Weber's portrayal of his ideal-typical bureaucrat applying rules *sine ira et studio* alludes to the nonaffective approach of a legalized framework, to the possibility of insulating the decision-maker from the pressure of constant reconsideration. Despite the fact that rules may promote criticism they also, in the short run at least, provide a shield behind which officials may hide, pleading equal and uniform justice in response to criticism.

The virtues of legalization speak largely to the general issues of accountability and administrative dispatch. The general effect is to reduce the personality of both official

[36] Selznick 1949, p. 29.

and affected client in order to promote an "objective" discharge of business. These features are often opposed to another virtue of implementation, namely, that of responsiveness. This tension is seen typically in the rigid "bureaucratic" adherence to a rule in the face of the individual circumstances in a given case. Here we can turn the features mentioned above on their heads and list the virtues as defects. In particular, a virtue from the point of view of the administrator may be seen as a defect from the point of view of the client and vice versa. Uniformity, for example, may be seen also as excusing individualized application. The advantages of routine dispatch of business may preclude a flexible response to a unique situation. The "rational" element in rule-making may produce a result that is not itself easily subject to change and does not itself contain any explanation. Distributive justice may work against individualized justice precisely because cases are not "alike." The administrator's shield may be seen as an unjustified protection from the client's sword.

The competing demands of accountability and responsiveness are echoed in a concern of organization analysts with managerial problems that relate to the implementation of goals. The attempt to devise "rational" procedures for implementation that avoid "distortions" (the refractions referred to in the diagram above) has led to a reliance on the techniques of legalization, setting out routines, procedures, and criteria that are intended to be pursued at various stages of the organizational hierarchy. Commentators have pointed out, however, that these techniques lead in turn to their own distortions and become instances of a bureaucratic pathology, since the ritualistic attachment to these rules is often for the purpose not of advancing organizational goals but of reflecting the status needs of individuals within the organizations.

The essence of the defect of legalization lies in the tendency to legalism. Paradoxically, the search for a reduction of the arbitrary may lead to the legalistic. Arbitrary and legalistic decisions both share the common feature of lack of fidelity to organizational ends. Legalistic enforcement of a traffic law, for example, would prosecute a driver driving through a red light that was stuck, or a doctor driving to an accident on a deserted street at night narrowly exceeding the 30-mile-per-hour limit. Arbitrary enforcement would prosecute only large cars, or blue cars, or bearded drivers. We should note that the mode of enforcement here can be arbitrary (selecting for enforcement by no rational criteria), while the act is nevertheless unlawful (exceeding the speed limit) and the discretion therefore authorized. This differs from a decision that is often said to be arbitrary in the sense of being unauthorized, or unlawful—beyond the powers conferred. An example is the charging of a motorist who in fact did not exceed the speed limit.

Kagan[37] has developed dimensions of modes of rule application which he presents in the dichotomized form shown in Figure 1, which alludes to some of the issues disclosed above. He distinguishes two dimensions of rule application, one that emphasizes adherence to rules and one that emphasizes realization of organizational ends.[38] His "judicial mode" with a high degree of emphasis on each is equivalent to what I have called the legalized decision, and his "legalism" accords with the legalistic decision described above. "Retreatism" is characterized by avoidance of decisions, refusal to take responsibility for any definitive rule application, or cynical manipulation of the rules for the purely personal gain or convenience of the official. "Unauthorized discretion" refers to the deliber-

[37]Kagan 1978, pp. 85–98.
[38]Kagan 1978, p. 95.

Emphasis on Adherence to Rules	Emphasis on Realization of Organizational Ends: +	Emphasis on Realization of Organizational Ends: −
+	Judicial Mode	Legalism
−	Unauthorized Discretion	Retreatism

FIGURE 1
Kagan's modes of rule application.

ate ignoring of rules by officials in order to achieve certain outcomes: the policeman who tickets drivers who have broken no legal rule but who seem to him a threat to public safety; the policeman who violates constitutional rules of search and seizure in order to apprehend drivers who the policeman thinks have broken the law in other contexts. Another example would be the welfare department official who circumvents the rules prescribing maximum welfare payments for different classes of recipients in order to provide a recipient with what he—the official—believes is a minimal amount of money to live on decently.

Kagan's distinctions show clearly the different dimensions of the judicial and legalistic decision. His placing of "retreatism" is close to the conventionally "arbitrary" decision (which includes features such as negligence, neglect, and capriciousness). If we were to examine not modes of rule application but modes of legal implementation (the subject of this essay), adjustment could be made to his labeling of "unauthorized" discretion (Figure 2). The perfectly authorized and lawful discretionary decision could stand in its place since that decision, unconfined by a rule, nevertheless allows emphasis on the realization of organizational ends. The unauthorized decision thus falls away as irrelevant for purposes of this revised analysis.

Judicialization

The defects of a fully legalized model of implementation suggest that the discretionary mode has advantages in terms of flexibility of approach yet fidelity to organizational ends. The "discretionary" decision may be formally without structure, for example, leaving to the individual police officer the decision whether or not to prosecute, or it may be structured by any one of a number of forms involving participation or individual justification. The perfectly judicialized decision is one in which proofs and arguments are presented to an "independent" adjudicator.[39] The form of institutionalized participation in itself structures the discretion by exposing the decision-maker to the claims of the interested persons. The independent adjudication role also presumes an unbiased umpire who does not meet with either party in private. Procedural devices such as the right to cross-examination add to the rational intent, which is above all furthered by a reasoned decision, involving justification and the possibility of future criticism.

In addition, adjudication in its perfect form contains a number of functional prerequisites. These flow from the method of institutional participation which requires proofs and

[39] See Fuller (1963, p. 3).

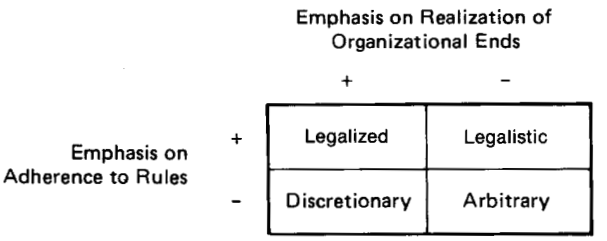


FIGURE 2
Modes of legal implementation.

arguments and therefore requires decision referents to which they can be directed. These referents take the form of rules (of more or less specificity, shading into standards) or of principles.

In his discussion of appropriate adjudicative action in a *judicial* context, Dworkin makes a distinction between principles, to which judges may refer, and policies, to which they may not.[40] Policies involve that kind of standard that sets out a collective goal to be reached. Principles involve standards of justice, fairness, and other dimensions of morality, such as that no man may profit by his own wrong. Arguments of policy justify a political decision by showing that the decision respects or secures some individual or group right.

The distinction between principles and policies is, with his denial of "strong" judicial discretion, central to Dworkin's thesis that judges do not "make" the law. Their task involves weighing of principles, not the application of policy.

This view ties in to Dworkin's view of discretion.[41] He denies that judges possess discretion in his strong sense. Dworkin recognizes judgment (or discretion in the weak sense) where the official is bound by a set of standards (such as the discretion of the sergeant to pick "the five most experienced men" for a patrol). But he denies that judges have discretion in the strong sense (as when the sergeant may pick any five men he chooses for a patrol).

Dworkin's view here is not without some force. For example, the British Supplementary Benefits Commission (SBC) at present grants weekly benefits to applicants according to a catalogue of rules (based on number in family, resources, age, and so forth) and a residual category to cover exceptional needs. These "exceptional needs" payments could be said to be the hole in the doughnut; the area of discretion left open by the surrounding belt of restriction.

A closer look, however, will show that the SBC has discretion only in Dworkin's weak sense. Various policy documents lay down criteria to govern the use of the SBC officer's discretion (one winter coat every four years, for example). It is nevertheless useful to refer to the SBC as exercising discretion, which is defined correctly by K. C. Davis: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."[42] Discretion is the room for decisional maneuver possessed by a decision-maker. It is rarely absent, rarely absolute. It

[40] Dworkin 1977, p. 82.
[41] Dworkin 1977, pp. 31–35.
[42] Davis 1969.

ranges along a continuum. When it is low it is usually constrained by rules (such as the rule that a given number of witnesses shall sign a will) and when it is high it is usually governed by standards such as "reasonableness."

It is not necessary here to join the debate as to the appropriate judicial role. The purpose of the present discussion is to indicate constraints on discretion provided by adjudication in the implementation of a law. Here a difference arises between *judicial* and *administrative* enforcement, for in the latter reference to *policy* is not only permissible but frequently the very purpose of the exercise. Policy thus becomes an inevitable decision referent in administrative adjudication. It is often the subject of the adjudication itself.

The application of policy does not, of course, exclude recourse to rules or adjudication. First, as we have noted, a policy may be operationalized by rules. The policy of preventing unsafe driving of vehicles, for example, is legalized as rules (for example, speed limits) are specified. Because of the open texture of language, the rule may still require interpretation (is a pedal car a vehicle?), which gives further scope to adjudicative techniques. In many cases, however, policies are specified not by rules but by less specific standards, general directions (like rules), which require for their implementation a qualitative evaluation. (Is the landlord seeking a "fair rent"? Was the vehicle going at a "reasonable speed"?) This standard may be accommodated over time to shifting practices and values.

If adjudication in an administrative setting allows, and even requires, what, according to Dworkin, is not permitted in a judicial setting, namely, reference to policies, is the process still legitimate to interested persons? Nonet argues that any decision is legitimated by purposive application of laws. One can answer the question more generally by considering the merits and defects of administrative adjudication from the point of view of an affected litigant.

Perhaps the most obvious merits of adjudication for the litigant arise from the fact that it guarantees participation to affected parties. Although they do not make the final decision, the litigants are involved in the decision-making process and are permitted to plead for a decision in their favor and to challenge each other's proofs and arguments. Being immediately involved, they are well placed to advance the strongest case for their proposition. This benefit applies whether the litigant is arguing to principle or to policy.

Rules, as we have seen, are in a sense nonrational. The adjudicator's obligation to reason will provide a check against the use of criteria that are improper, arbitrary, or legalistic, or fail to achieve congruence between the effect of the decision and official objectives. Adjudication contains a desire to give "formal and institutional expression to the influence of reasoned argument in human affairs."[43] The requirement that a decision be justified, and that the justification be published, implies that the justification is open to public criticism. Thus, adjudication normally provides an opportunity for scrutiny and thus for the accountability of the decision-makers to their clientele and to the public.

What strengthens this point is the nature of the justifications embodied in judicialized decisions. Such decisions must be justified by a rule, standard, or principle. Ascriptive or particularistic criteria are illegitimate. Litigants will make their claims as members of a generalized category. In consequence, an appeal to power, private interests, or political expediency will be inappropriate. The adjudicator will in turn be bound to evaluate the claims by means of accepted techniques and by reference to authoritative guides, rather

[43] Fuller 1963, p. 13.

than his personal interest in the result or his personal predisposition toward the claimants.

Administrators might also derive benefits from the fact that a reasoned decision was made and openly arrived at with equal participation. The process of adjudication, whatever the decision, might therefore provide administrative action with the gloss of legitimacy.

A final merit of adjudication is the fact that it involves incremental elaboration of laws on a case-by-case basis. Although an organization might feel itself bound by its own decisions, adjudication deals with a specific fact situation, and later cases can be "distinguished" from earlier ones on the basis of the facts. Thus, despite pressures for consistency, which might lead to a rule's ossification, and for the gradual reduction of discretion (features that students of the common law know too well), the case-by-case approach of adjudication allows an administrative body to deal with cases as they arise and to build its commitments gradually, and even to change its mind.

Offsetting these benefits, however, are certain countervailing costs, largely arising from the necessary adversarial structure of the adjudicative format. The adversary structure in itself may be potentially damaging, as it provokes antagonism between the litigants who may need to work together in the future. The adversary-adjudicative situation also places the participants in what game theorists call a "zero-sum" situation. One side must win; the other must lose. The defendant is liable or not liable, guilty or not guilty. Except for the possibility of a flexible settlement out of court, the matter is placed in a clear yes-no, either-or, more-or-less setting. Matters that are suited to compromise, mediation, and accommodation are not best pursued in the structured adversary setting of adjudication.

Rules, as we have seen, may be of benefit to officials as a means of announcing policies to affected parties. Individual application of laws is thus possible without the necessity of administrative intervention. Adjudicative decisions, however, are less possible of communication because they arise in the context of specific dispute situations. The specific dispute orientation of adjudication highlights another defect from the administrative perspective: it concerns individual rights and may thus bear little relation to the primary administrative function, which involves the performance of a particular task. A particular case, for example, may raise questions wider than the question at issue. The adjudicator may deal with the wider questions but is not required to do so, and remarks made on the wider issue are considered strictly *obiter dicta* and thus not binding on future cases. Furthermore, although the specific decision may affect outside parties, the decision-maker is not required to consult or to notify these wider interests.

Institutional Controls on Discretion

Judicialization itself controls discretion to the extent that it influences fidelity to organizational ends or, as put by Nonet, encourages "purposive decisions."[44] It should be repeated that this view adopts what we have seen is a "top-down" approach to organizational decision-making. Ends and purpose are assumed to exist. An alternative "bottom-up" approach would instead see purpose as designed incrementally, carved out of the coal

[44]Nonet 1980, p. 263.

face. We shall discuss this later. For the moment organizational ends may be assumed and methods considered that may control administrative discretion to depart from those ends.

Adjudication itself provides a procedural model of control that relies on participation of affected parties. This participatory mode may also be applied outside the adjudicative format. Institutional design may allow the participation of affected persons in a nonadjudicative setting. Nonet[45] presents the models of legitimation that attempt to achieve this. The "pragmatic model" is based upon a principle of "maximum feasible inquiry" leaving it largely to the organization itself to involve the interests involved. The "pluralist model" goes further and builds affected interests into the exercise of organizational powers, thus politicizing the decisions and giving the institution the responsibility to open a forum and manage conflicts within a defined jurisdiction. Echoes of these models are found in British planning law where, moving from an ideology that protects private property and its institutions, two ideologies now compete for recognition, one based upon an ideology of "public interest" (based upon Benthamite principles and relying on public officials to formulate the general interest) and the other based upon an ideology of "public participation" giving a right to all interests—owners of property as well as tenants and neighbors—to a say in all land-use planning decisions.[46]

It might be noted here that participation, in its "pragmatic" or "pluralist" form, does not guarantee a substantive decision that is necessarily faithful to organizational purposes as initially conceived. It is therefore not necessarily a device of accountability. It is, however, a device of responsiveness, an alternative and sometimes competing ideal, which considers acceptability and legitimacy of day-to-day decisions a value in itself.

On the other hand, it is well known that those who involve themselves in participation with an agency may not be representative of the range of interests affected by agency decisions. Representative democracy through periodic election is seen by some for that reason as more democratic, with more possibility of general responsiveness, or less liable to be responsive to sectional interests, than a participatory mode.

Institutionalized participation, in one form or another, is thus a method of controlling discretion through what Davis[47] would call its "structuring"—although he refers here largely to open rule-making procedures and tends to ignore ways of structuring discretion through institutional design that aims at responsiveness through participatory mechanisms. Davis also refers to the "check" on discretion, usually through appeals, not only to courts, but internal administrative review—providing a further look at the decision in question through fresh eyes. To this technique we may add the check on discretion by means of an independent, nonlegal body such as the Ombudsman or, in eastern Europe, by the Prokuratura. In Britain, it is common for decision-making bodies of local authorities to be reviewed by central government, by an inspector at a public inquiry, hearing the matter on behalf of a minister or, increasingly, deciding the issue himself.

In addition to the institutional controls on discretion mentioned, we should add what may be called the general principles of administrative law. These operate in varying degree in different countries and are provided through statute, such as the United States Administrative Procedure Act, or incremental development through a "common law"

[45] Nonet 1980, p. 263.
[46] McAuslan 1980.
[47] Davis 1969.

system, as in Britain (although there, too, statute specifies certain procedures before statutory tribunals and inquiries).

A good deal of general administrative law directs the procedures of rule-making and adjudicative bodies and thus informs the content of the legalization and judicialization discussed above. Other rules of administrative law address themselves more broadly to any kind of official decision and thus influence and control discretion (at least to the extent that they are known and acted upon). An example here is the English judicially created doctrine that discretion should not be "fettered" by rule to the extent that a decision-maker must not shut his ears to an application and refuse to listen to anyone with something new to say. An extension of another judicially created doctrine, the right to "natural justice," or a "fair hearing," the "fettering" concept seems to fly in the face of Davis's advice to "confine" discretion wherever possible. Where a decision-maker does so limit his discretion by a rule (for example, that local authorities who spend over 20 percent above their previous year's expenditure will be penalized by losing a proportion of central government grant), the adherents of confining discretion would point up the benefits of specifying the rule about overspending and of limiting a broad discretionary power (to penalize local authorities as the minister "thinks fit"). The rule, however, may in itself cause injustice, or not be fair to the individual case, hence the judicially developed procedure rule requiring the decision-maker who develops such a rule not to fetter his discretion totally, and at least to hear someone who may cast doubt upon the routine application of the rule to that individual case.[48]

ENFORCEMENT OF LAWS

Tasks

Government performs such a variety of regulatory tasks in modern industrialized states that the issues concerning the enforcement or implementation of any one "law" will differ in kind and content from that of another. Clearly there will be great differences in one area of regulation, such as the police enforcement of crime, from another, such as the enforcement of land-use planning controls, consumer protection laws, pollution laws, or the implementation of welfare benefits. Studies that attempt to draw generalized conclusions from any of these areas may be flawed, particularly since even within these areas there may be differences in style, in administrative and legal culture, and in many other factors that force an admission of particularity.

On the other hand, it may also be worth noting those factors which do influence the enforcement process and examining those conditions which may be of general application. We may perhaps begin to aid this process by making a distinction between the various tasks that government does perform. Lowi's policy classification[49] may be helpful here, providing a distinction between (a) distributive policies which have the purpose of creating "public goods"; (b) regulatory policies, both those seeking "public goods," such as antipollution laws, and those seeking to protect specific populations, such as antidiscrimination laws; (c) redistributive policies, such as the provision of welfare benefits.

[48] *Regina* v. *Secretary of State for the Environment* 1982, p. 693.
[49] Lowi 1972, p. 32.

Lowi's fourth category, "constituent policy" (or rules about rules or power), need not concern us now.

It is not suggested here that this classification is completely descriptive of the administrative process. For example, it could be argued that it ignores a vital governmental task, namely, the entrepreneurial task, where government itself through ownership of land or resources performs a managerial task in the public interest. It is suggested that such a classification points up an appreciation of the disparate tasks performed by modern government and introduces a note of caution about generalizing about enforcement and implementation processes across the board.

Levels of Discretion

A further distinction which ought to be made about enforcement refers to the discretionary decision. Most studies of enforcement assume a discretion to implement, or enforce, but fail to distinguish various levels at which that discretion may come into play.

The first level may be that of actual standard-setting. Relevant legislation may provide an open-textured discretion to the enforcement agency to set the standards of deviant or permissible conduct. For example, laws against air pollution in Great Britain allow the enforcement agency, the Alkali Inspectorate, to determine the standard, known as the "best practicable means," for each industrial process. For some processes the standard simply forbids the emission of "dark smoke." Initially this was determined on a case-by-case basis, but subsequently the standard was made more specific by employing grades made available by a diagrammatic chart known as the Ringelmann Chart. Even under the Alkali Inspectorate's wide definition, standards of presumptive limits on the concentration of gases and particles have been set—for example, providing that emissions from cadmium works must contain less than 0.0017 grain per cubic foot. Other standards refer to use of plant, specifying minimum chimney heights, condition and maintenance of kilns, type of fuel, and so on.

The second level of discretion is of a "weaker" kind (in Dworkin's sense) than the first and involves the application of the standard to the conduct. At first sight this might appear to be a question of pure judgment (Was the car driving at a "reasonable speed," or at 30 miles per hour? Did the firm use its "best practicable means" to reduce pollution?). However, where the standard itself is vague, the interpretational question is not one of pure fact. The decisional latitude in itself provides room for maneuver on the part of the decision-maker and allows a variety of external factors to influence the interpretation of the standard. In other words, the term "best practical means" is sufficiently imprecise to allow its definition to be influenced by an assessment of, for example, the costs of the abatement of the pollution to that particular owner, as well as his attitude toward the officials and the problem, taking into account whether he was cooperative or defiant. The standard does not in so many words invite the latter considerations to be taken into account, but in the real world factors that are known to influence the invocation of the enforcement process (such as the attitude of the offender) frequently also influence the interpretation of the standard as applied to the concrete-fact situation and thus influence the definition of the offense itself. In this sense the decision-maker, in practice, has discretion whether or not to take these external factors into account in his definition of the standard.

The third level of discretion applies to the decision to invoke the enforcement process.

Studies of criminal law tend to concentrate here on the decision to arrest or to prosecute, invoking a system that could lead to the deprivation of the offender's liberty, or to penalties such as a fine. Many other enforcement decisions are taken within the criminal system, including whether to grant bail, to caution, or to sentence. In the field of trade regulation or environmental protection the decision to prosecute with a view to penalty is usually taken as a last resort, after attempts to persuade the offender to implement the law have failed. But here, too, the decision whether or not to invoke the enforcement process, even through conciliation, may involve a high degree of discretion.

Influences on Enforcement

In the discussion that follows the distinction between the levels of discretion mentioned above will not always be maintained because all three levels—the establishment of standards, the definition of the offense, and the invocation of the penalty—may be influenced by similar considerations. Another reason, as has been suggested, is that the exercise of any one level may affect the others. For example, the decision not to invoke the prosecution process (say, for dangerous driving) may be expressed as a decision denying the breach of the law (by refusing to label the driving as "dangerous").

The influences on enforcement and implementation are many and will not all be considered here. They vary from the obvious one of financial resources allowing detection and apprehension, to inter-organizational morale of the administration itself. Other factors are more dependent upon the area of enforcement and particular social or cultural factors. For example, La Fave[50] identifies a number of categories or situations where discretion not to arrest is exercised, thus forestalling any possibility of prosecution. These include ambiguous or anachronistic laws, cases where the offender belongs to a minority group among whom the conduct in question is thought to be common, where the victim is unwilling to press charges, or where the prosecution is felt to achieve nothing (he believes cases of domestic violence come into this category). Wilcox's[51] list of reasons why police would not prosecute an offense is longer, taking into account personal factors such as extreme youth, old age, or consequences for a person of otherwise good character. James Q. Wilson stresses the "varieties of police behavior" (in a book of that title)[52] dependent upon organizational arrangements, community attachments, and institutionalized norms governing the daily life of the police and providing its "ethos." Studies of regulation, by contrast, tend to note the power of regulated groups as a factor influencing enforcement.

It is probably not fruitful to attempt, in this essay, to list the various influences on enforcement that may or may not depend on particular circumstances, organizations, and cultures. Instead, three main influences upon enforcement will be noted, relating to the nature of the offense, the nature of the offender, and the officer's perception of the law's purpose. Here, too, it should be stressed, it will be necessary to be relatively selective in the issues covered.

The Offense A number of studies have noted that a key element in the behavior toward deviance of enforcement agents is the nature of the conduct to be controlled. In

[50] La Fave 1965.
[51] Wilcox 1972, p. 25.
[52] Wilson 1968.

criminal law, what are known as "victimless crimes" (such as drug offenses) may be enforced less rigorously than crimes where a victim has suffered tangible harm. The setting of the deviance may also affect the enforcement process; for example, violence in a family setting is less likely to be prosecuted than that in a public place,[53] and the way the offense was brought to the notice of the enforcement agency may also determine the attitude toward enforcement. It has been noted, for example, that when agencies adopt a "reactive" approach to enforcement, relying on external complaints bringing infringements to their notice, they perceive themselves as having less discretion to enforce or refrain from enforcing than when their approach is "proactive," and the agency makes a positive effort itself to discover breaches of the law.[54]

It has been said that behavior that is normally the subject of regulatory control often differs from behavior traditionally labeled as "criminal" because of a great moral ambivalence surrounding it. Thus, breach of pollution control, for example, is said not to evoke the strong feelings of moral outrage associated with theft, murder, or assault. Kadish considers conduct addressed by regulation as largely "morally neutral."[55] In criminal law a distinction is made between *mala in se* and *mala prohibita*, offenses that are wrong in themselves, without further ado, and those which are prohibited wrongs, requiring further enforcement. The sociologist David Matza uses the word "prohibition" to describe the regulatory as opposed to traditional criminal offense.[56] He considers that prohibitions are still crimes, because they do elicit authorized state intervention, but they differ from other crimes in "failing to self-evidently warrant state intervention." Matza calls the traditional crimes "consensual crimes." Conklin distinguishes acts considered "illegal" from those considered "criminal."[57]

The consequence of the regulatory as opposed to "consensual" crimes is said by these commentators to involve greater discretion to evoke the enforcement process as well as a more conciliatory style of enforcement with a reliance on informal regulating procedures. In short, regulatory offenders have more chance of avoiding any penalty than those who have committed the "consensual" crimes.

This thesis is to a large extent borne out by data. In Britain, the number of court proceedings brought for violation of air pollution regulations is minuscule.[58] The penalties imposed for breach of regulatory laws by courts are often small, and the reasons are not hard to find. Regulatory laws, to a large extent over industrial and commercial practices, aim to control aspects of economic life that themselves have benefits in production and the maintenance of employment. The victims of the "crime" are often not clearly identifiable (Who suffers from an inflationary wage deal or the erection of a building contrary to planning control?). Furthermore, the legislation itself usually expressly allocates discretion to enforce the law, either by providing, as with British land-use planning law, the authority with the power to enforce if it considers it "expedient," or by providing, as with Anglo-American antidiscrimination law, the agency with the power to proceed by way of conciliation rather than direct criminal prosecution as a first step. Contrast this with traditional criminal law, which simply defines the offense. The

[53] See Freeman (1979); Parnas (1967, p. 914).
[54] Reiss 1971; Black and Reiss 1970, p. 63.
[55] Kadish 1963, p. 432.
[56] Matza 1964, pp. 71, 161.
[57] Conklin 1977.
[58] See two recent British studies: Hawkins 1984; Richardson, Ogus, and Burrows 1982.

normal agents of enforcement (police, prosecutors, or attorneys general) then, implicitly, have power to seek sanctions through the courts. Finally, the definition of the regulatory crimes is normally left to the enforcement agency itself. This relates to the different levels of discretion (to define the standard as well as invoke the enforcement process) discussed above. Since the definition of the crime is itself vague, or incorporates the possibility of evasion (such as the "best practicable means" test) or permits a negotiated solution (as with antidiscrimination laws), it is more difficult to associate moral disapprobrium with deviance than with those crimes (such as murder, rape, arson, and theft) that are relatively clearly defined by the legislative process independent of the agency of enforcement.

We ought not to accept the thesis of the less rigorous enforcement of regulatory laws too uncritically, however. Some behavior proscribed by regulatory laws may, after time, become both clearly defined by the incremental elaboration of standards, and also more generally accepted as morally wrong. A case in point might be that of laws against racial and sexual discrimination. Both in Britain and in America these laws were introduced tentatively and with some reservation about interfering with individual and business freedom of choice. The conciliation machinery was introduced partly as a device to give the law the appearance of moral flexibility. However, over time discrimination was no longer considered morally acceptable, and "moral entrepreneurs"[59] presented themselves as advocates of a vigorous approach to the law's more stringent enforcement. Individuals affected by discrimination considered themselves to be victims of deviant behavior and sought to establish their rights against the wrongdoers. In England, so pronounced was this change in attitude to the laws that individuals alleging discrimination were given the right of direct suit against the discriminator through a tort action. Similar examples could be taken from environmental protection laws. At first displaying some moral ambivalence, attitudes changed owing to the progressive definition of standards, public awareness of the harm, and the development of a powerful environmental lobby. The mode of enforcement moved from the proactive to the reactive, with less opportunity for the agency to exercise its discretion not to enforce.

The Offender There are obvious aspects of the nature and attitude of the offender that will affect individual instances of enforcement, but perhaps less obvious aspects that affect the enforcement process as a whole.

Individual instances may be affected by the two variables postulated by Selznick[60]: danger and authority. Police, having to act quickly in a situation of danger, cultivate "symbolic assailants." Where the victim fits a stereotypical description of that assailant police action is likely to be hostile, affecting vaguely defined areas such as being a "suspicious person" and "loitering with intent." In addition, a number of studies explain differential rates of arrest on the basis of a suspect's cooperation. Police judgment of substantive misconduct is mitigated, according to these studies, by diffidence of the suspect and aggravated by arrogance and defiance.[61]

Expressions of cooperation are also noted as a factor influencing enforcement in the regulatory field. Blau notes that violators in this context were regarded as honest businessmen who had inadvertently engaged in practices that conflicted with some complex

[59] Becker 1963, pp. 147–62.
[60] Selznick 1949, p. 62.
[61] Bottomley 1973, chap. 2.

legal regulations, unless they were willful and repeating offenders.[62] Only the latter were brought into court. In a more recent study three causes of noncompliance are identified, each eliciting a different enforcement strategy. Kagan notes,[63] first, business firms regarded as "amoral calculators," motivated by profit and breaking the law when it is in their interest to do so. In answer to such noncompliance the agency acts aggressively and enforces strictly. Second, the firm is seen as a political citizen whose managers hold strong views as to the nature of proper business conduct. Here noncompliance stems from "principled disagreement" with regulations seen as unreasonable, and the agency attempts to persuade the violator of the rationality of the regulations. Third, the firm may be seen as "organizationally incompetent." In this instance the agency would act so as to advise and assist the violator to comply with the law.

The perception of the offender should also be seen in an organizational and cultural context. Wilson[64] noted the different styles of police enforcement influenced by various factors, including the perception of the offender. His "watchman style," which used discretion to achieve "order-maintenance" rather than law enforcement, was influenced by a "personal" style of a force recruited locally and therefore did not regard violators as alien or hostile. This contrasted with the "legalistic style," where a professional, specialized force stressed their enforcement role. The "service style" departments were again formed in homogeneous (suburban middle class) communities, and they stressed informal sanctioning mechanisms. Maureen Cain's English study[65] of policing resembles Wilson's results; her rural force, in a homogeneous area, shared values and definitions of policing with potential offenders and adopted peace-keeping, service style, as opposed to that of the urban force, where the police adopted a law-enforcement "thief taking" view of their task in the face of a heterogeneous community.

Official Perception of the Law's Purpose We have seen that enforcement may be influenced by the nature of the offense. Those offenses that are "morally ambivalent," for example, are enforced selectively, and with conciliation rather than prosecution as the main technique. We consider here not the specific nature of the offense and its properties but the aims of the law itself as seen by the enforcement agency or officer.

Any rational application of a discretionary enforcement power contains an appreciation of the purpose behind the exercise. Wilson's "styles" of enforcement are influenced by a variety of factors but also exist to achieve, in their particular environment, a variety of purposes. Bittner[66] comments upon the instrumental use of law on skid row and suggests that the police seek compliance not as an end in itself but as a resource enabling them to achieve some further objective. The point is that the officer's conception of the law's purpose will influence in turn his technique of enforcement.

Returning to our black box into which we saw a law's "purpose" being shone, we may now repeat as simplistic the frequent misconception that that purpose is fixed, defined, and immutable. We raised the possibility that purpose itself may be postponed for definition by the enforcement agency. The process of enforcement as well as standard-setting involves search for purpose.

[62] Blau 1955, especially chap. 9.
[63] Kagan 1979.
[64] Wilson 1968.
[65] Cain 1973.
[66] Bittner 1967, p. 699.

Following the example of the laws controlling pollution, it soon becomes clear to any pollution enforcement agency that both the ultimate purpose of the law and the raison d'être of the agency are not clearly established. A recent study of pollution control in England discovered that officials had three possible purposes of prosecution of violators.[67] The first regarded prosecution as achieving "just deserts," punishing a culpable act in its own right apart from any utilitarian concern with deterrence. This view was held by a minority of enforcement officers, who understood the violation itself to carry with it a notion of culpability and moral condemnation, and the purpose of their task, and that of the law, to punish offenders. A larger proportion of officials however justified prosecution in the interest of deterrence as an encouragement to others to comply. They saw the law's purpose as achieving a broader effect of the reduction of pollution generally.

A more vivid example can be taken from laws against racial discrimination. In a study of their enforcement in Massachusetts,[68] I found three distinct approaches to the enforcement of antidiscrimination laws. These approaches were reflected by three different patterns of results of lodged complaints. The reason lay in the commissioners' different conception of purpose (both the law's and the commission's). The commission's early years were characterized by a "didactic" approach to enforcement. In response to considerable opposition to the enactment of the legislation, the commission was at pains to stress that its purpose was "education and conciliation." At this stage the existence of a law was itself considered to have educational qualities, and the commission was there to conciliate cases, to legitimize the law, and to educate respondents in methods of complying with the law.

The second approach was completely different. This was a tort approach. When pressure from civil rights organizations grew, the law was seen as a device to vindicate the rights of individual complainants. The commission at that point concentrated less on persuading and assisting the respondent to comply than on achieving a remedy for the complainant. In England, too, after the early years of conciliation through an enforcement agency complainants were given the right of direct enforcement against the respondent with the possibility of damages.

The third approach was identified as an equal opportunity approach, where individual cases were seen not primarily to "educate" the respondents nor to vindicate the complainants' rights, but to provide a lever for increased opportunities for blacks and more racial integration in the respondent's firm or housing. "Affirmative action" was seen as the law's main goal.

Clearly, different approaches to purpose can exist as complementary aims. Nonetheless, in some cases the various purposes may be contradictory. They may change over time and exist in any one organization among different officials, as seen in the studies referred to previously. They are not generally considered in most organizational studies that tend to assume fixed purpose, an assumption that may not be justified.

In considering the official construction of purpose we should not ignore the way in which it may be shaped by external constraints such as the necessity for external justification, or the complexity of the enforcement process. We have seen above that the impact of a regulatory law is often not easy to assess. Nevertheless, public enforcement agencies will be called upon to justify their record, usually in their annual reports or

[67] Richardson, Ogus, and Burrows 1982.
[68] Jowell 1975, pp. 169–94.

budgetary claims. The need for justification may in some cases lead the agency to pursue cases that look good on the record, no matter whether they genuinely work to achieve organizational goals (insofar as these are clear).[69] Studies have shown the propensity of enforcement agencies to pursue small violators at the expense of the larger in order to give the appearance of active regulation.[70]

ENFORCEMENT AND THE BARGAINING PROCESS

The discussion about organizational purposes points to a feature of the implementation process that does not accept the view that implementation begins when policy-making ends. Pressman and Wildavsky,[71] for example, define implementation as "starting" when two initial conditions are satisfied, namely, the legitimization of policy through the passage of legislation and the allocation of resources. They consider that the evaluation of implementation must necessarily follow the setting of goals through a formal definitional process.

We have noted how goals may be vague, ill-considered, the result of a compromise, and often left to the agency itself to specify. A "bottom-up" view of implementation and enforcement recognizes that the implementation process and the policy-making process may be linked and that policy is defined in its implementation.

That is not to say that standards are always capable of incremental adjustment. Some laws are clearly set by the legislature. However, the discretion to invoke the enforcement process may then create an opportunity of reflection upon purpose and the possibility of negotiated settlement in the light of competing goals. Assault laws, for example, are relatively clear, but their enforcement in a situation of marital violence may lead to a reluctance to prosecute following, as Parnas[72] has found, from recognition by police that prosecution may exacerbate the poor family situation and lead to a termination of relationships and to deprivation. Here the clear purpose behind the law prohibiting violence is considered secondary to a value that seeks to preserve the well-being of the family unit.

Bargaining is thus an integral part of implementation and enforcement. The Weberian notion of mechanical enforcement rarely occurs. As we have seen, a number of variables influence the stringency of the enforcement, but the possibility of a negotiated settlement is, in most forms of regulation, rarely completely absent. Even in a typically "consensual crime," such as murder or theft, the possibility of negotiation arises even after the invocation of enforcement proceedings in the now well-documented "plea bargain." The opportunity for bargaining, however, exists largely in the area of regulation, for reasons discussed above.

In all situations of enforcement, the bargain arises through an assessment on the part of the law enforcer of the damage costs of the act set against the abatement costs.[73] Thus, in cases of marital violence, we see the damage of the assault set against the costs to the family of enforcement. In pollution regulation the damage to the environment may be measured against the costs of abatement—a firm may be forced out of business or may

[69] See Thomas (1982).
[70] Turner 1970.
[71] Pressman and Wildavsky 1973, p. 166.
[72] Freeman 1979; Parnas 1967, p. 914.
[73] See Burrows (1980) and Richardson, Ogus, and Burrows (1982).

locate elsewhere, in both cases causing damage to the local economy and causing unemployment. Or the firm might pass on the costs of abatement to the ultimate consumer.

Underlying this assessment are a number of questions about how both damage and abatement costs are calculated. In water pollution control, it is notoriously difficult to measure the output of polluting effluent or to know its impact.[74] The position of the trader is also difficult to assess and hence the potential damage to society of abatement. Because of these uncertainties regulator and regulatee resort to a certain amount of bluff and counter-bluff, and the process is influenced by the attitudes and approaches mentioned above: whether the trader is a "one-off" violator as opposed to a "amoral calculator." The question of "moral fault" becomes relevant, even where, as in the enforcement of safety legislation by the British factory inspectorate, the law provides for strict liability (without fault).[75]

The setting of regulation particularly attracts a negotiating pattern because of the association of the agency with the regulated, over a period of time. As Hawkins points out,[76] the agency's discretion is "informed by continuity" and "exercised in longitudinal perspective." Compared to penal enforcement, which is normally divorced from a historical context, being based upon what is learned about a specific act or set of acts, regulatory agencies deal with a relatively stable and constant population. Pollution agencies, for example, normally know their firms, their trade, their practices, and their attitudes. Their adaptive stance is therefore largely formed in an effort to achieve cooperation. An approach that seeks sanctions rather than compliance and future cooperation would seem not to be productive. It is here of course that a "symbiotic" relationship may develop and accusations of token enforcement and capture tend to be made.

In this essay, we have been mostly considering enforcement of laws through negative sanction—by crime and regulation. We did consider other kinds of implementation under Lowi's classification, which identifies, for example, distributive and redistributive policies that involve agencies in the provision of services and welfare benefits. Issues of discretion and its legal control also arise here, but is the bargaining model still appropriate?

The general answer to that question is that wherever discretion exists bargaining is likely to be engaged. Even in the distribution of resources through a system of welfare benefits, claimants' organizations and agencies may negotiate for benefit levels. An activity of regulation that is partly distributional is that of land-use planning. Countries differ as to the amount of discretion provided to the decision-makers. A strict zoning system technically provides little discretion, although the variance system, allowing for exceptions to the rules, may introduce a discretionary element. In Britain, the system of development control is highly discretionary; people wishing to carry out land development must apply to local authorities, who are statutorily guided in their response by a "development plan" and the broad standard of "other material considerations."

A "judicial" model of implementation of planning in Britain would see planning permissions being granted or refused in accordance with relatively objective rules and standards. This was the case for some years, the rules being based largely upon fairly specific plans, not unlike zoning maps. In the 1970s, however, I discovered that this

[74] See Richardson, Ogus, and Burrows (1982); Hawkins (1984).
[75] Carson 1970, p. 396.
[76] Carson 1970, p. 396.

model was increasingly being abandoned in favor of one based upon contract: applicant and authority negotiated a solution whereby the planning permission would be granted and, in return, the applicant would provide what became known as "planning gain," a benefit to the "community" that was not part of the original application. Thus, for example, instances arose where the applicant for office permission was granted that permission, perhaps at a density higher than the norm. The applicant would, however, on his part agree to dedicate part of the site to the local authority, to be used as a public right of way. Some developers would dedicate buildings for a community center, and even build housing for use as public housing.[77]

This method of bartering for planning permission is very different from that of the normal model of regulation, under which the permission is granted or refused (with or without conditions) in accordance with accepted rules and standards. The contractual model involves the negotiation of standards and a resolution that is agreed, not imposed. In this case it permits the parties to provide conditions (such as the dedication of land or buildings) that would be *ultra vires* if imposed by the regulatory scheme.

Why does this regulatory activity, involving in this case the allocation of a resource (planning permission), also assume, like so much of the enforcement activity that we have considered, a contractual form?

Some answers to that question arise from the particular setting of the activity. As opposed to the typical judicial situation, which has been described by Aubert[78] as "triadic" (the classic triad of plaintiff, defendant, and judge), the planning situation is "dyadic," with only two parties, applicant and decision-maker. Aubert considers the intervention of the institutionalized third party to be the "embryo of the legal phenomenon," developed through third-party intervention to stop blood feuding. The triadic, typically judicial, structure is thus reserved for dissensus, for conflict over facts and values. The dyadic structure, by contrast, tends to be based on bargaining and the avoidance or resolution of conflict.

This explanation is helpful to explain the tendency to bargaining in the planning area, and in other areas of implementation as well. It is, however, doubtful whether the dyadic structure is always sufficient of itself to promote bargaining. A necessary element to induce bargaining into the dyadic relationship is that each side has something to give or something to concede that is of value to the other. Since bargaining is a form of what Lindblom[79] calls "partisan mutual adjustment" it works by each party inducing responses from the other.

The applicant for welfare benefits, for example, is in a suppliant position, with nothing to give in return, and therefore unable to influence his caseworker's decision by reciprocal concessions, adjustments, or unrelated public benefits. (He may offer a private benefit, a bribe, in exchange for the grant, but that issue is not being considered here.)

For this reason, bargaining in planning burgeoned during the "property boom" in England. Planning permissions became extremely profitable. Local authorities began to regard it as legitimate to insist that the profit they had made possible be conceded in part exchange for the planning permission, perhaps in the form of housing or a community center.

[77] See Jowell 1977a, p. 414; 1977b, p. 63.
[78] Aubert 1963, p. 26; 1967, p. 40.
[79] Lindblom 1965.

An additional factor encouraging bargaining is a continuing relationship. Where the parties have to continue living with each other, where they are likely to deal in the future, both sides will be keen to strike a reasonable stance and will be reluctant to "throw the book," or to be regarded as a party with whom one cannot strike a fair deal in an atmosphere of future trust. Even a bad bargain may prove more acceptable than a broken relationship. For this reason bargains were struck in most instances between large developers and local authorities, where a pattern of dealing could be expected in the future.

Given these two factors, then, the dyadic relationship will tend to encourage bargaining. However, other negative features of the judicialized decision that we considered earlier may also lead the participants to prefer a negotiated solution to one that is imposed in a regulatory framework.

Where, as in the English planning system, there is an appeal from the local authority's refusal of permission to the minister, and the appeal will be held under the "triadic" structure of a public local inquiry, there is a risk to either side of an all-or-nothing resolution common, as we have discussed, in the adjudicative format, where one side will win and the other lose. Therefore, bargaining in a dyadic situation will promote what game theorists call the "minimax" principle—minimizing the risk of maximum loss. Other characteristics of the judicialized structure also deter its use—for example, the necessity for relatively precise rules or standards. At a time when planning merits were ill-defined, uncertain, and lacking in consensus, the problem of finding clear authoritative guides for decision-making became acute. The resulting discretion on the part of the decision-maker left a good deal of room for maneuver and allowed extraneous, subjective considerations to be accommodated by a process of negotiation.

The implementation of pay policy, as a further example, has been conducted in Britain over the last few years, not by means of a statutory framework but through informal "guidelines," stipulating a maximum percentage for pay settlements. These guidelines were then used in relations with recipients of government contracts or export credit guarantees. The firms who were said to have made inflationary wage settlements had their grants or contracts withdrawn or refused as a sanction for the breach. Procurement powers have also been used to enforce sex or racial employment policy. Discretionary grants under various industrial aid schemes have been used to achieve wider objectives such as the provision of employment in depressed areas, or increased investment. In a completely different area, Daintith[80] describes how the Labour government decided, in 1974, to secure state participation in the exploitation of North Sea oil. This was done by making the new state oil company, British National Oil Corporation, a co-licensee with existing licensees in any production licence covering a commercially exploitable oilfield. This arrangement was achieved, however, not by legislating rules but by negotiation. Those who were reluctant to concede state participation were apparently threatened with a refusal of a future licence. "Voluntary," "consensual" means were used to achieve the objective.

The Administrative Culture of Bargaining

These examples of a shift to a contractual model of law implementation and enforcement have been cited as selective instances. To some extent each depends on specific

[80]Daintith 1979, p. 41; 1985, pp. 174–97.

structures and features of its particular subject matter, such as the judicialized structure and the available standards. Others may be caused by reasons based on political and economic trends and administrative practices, all of which create a general administrative culture.

One recent feature of Anglo-American public administration, for example, has been a move to a "corporate" approach to government.[81] Essentially, corporate planning intends to communicate the idea that an organization should consider its resources and activities as a systemic whole. It argues that the work of government is seriously hampered by the fragmentation of effort between departments, professions, committees, and other units. Corporate planning tries to bridge organizational gaps, to link common subjects, so that decisions are not taken in isolation without consideration of the system as a whole.

The move to a contractual model is affected by a corporate approach in that official "policy" as seen in its broadest sense, and policies developed in one area (say, the housing department, in relation to council housing) can be achieved in another department (by means of planning powers). Thus, an agreement to construct council housing on the roof of a development is granted in return for planning permission. In a similar fashion "government policy" on pay settlements or racial discrimination may be enforced through powers granted for a separate activity, namely, the placing of contracts or the grant of guarantees or financial assistance.

The deeper structural reasons for bargaining may be more culturally bound. In Britain, Daintith notes the move to bargaining based on the increased state ownership of resources.[82] Instead of ordering individual regulatees to act, the state offers its own resources in return for the objectives it seeks. As the potential dispenser of a benefit in the form of a contract, grant, loan, guarantee, licence, export credit, or permission of one kind or another, government is well placed to exact a benefit for the public interest in return. This kind of manipulation through property ownership is not unlike that detected in the grants of government "largesse" through welfare benefits.

To this feature of British institutional structures may be added a mistrust of litigated solutions, a confidence in the civil service to act benevolently, a fear of judicial sabotage of social welfare objectives, and a suspicion of the "pathology" of law.

Looking further into the structure of modern capitalism, other commentators have noted more deeply rooted economic causes of a general move to discretionary governmental operation. Some have used the term "corporatism" to describe a form of "continuous contract" in which power is shared between the state and large organized groups (such as trade unions and industrial organizations) who bargain with each other to establish mutually acceptable goals.[83] The national legislature establishes wide "framework acts" allocating wide discretionary powers to officials, unwilling to be constrained by rules in order freely to indulge in the bargaining process where policies are struck by largely secret negotiative techniques.

[81] See, for example, the British government report, known as the "Bains Report" (1972) after its chairman, that sought to apply "corporate" management structures to reorganized local authorities.

[82] Daintith 1979, p. 41; 1985.

[83] See Middlemas (1979); Newman (1981). Compare Unger (1976). Unger describes the phenomenon of corporatism in his analysis of the decline of the rule of law in "post-liberal society" and sees corporatism as influencing the breakdown of the traditional distinction between public law and private law. Unger associates the bureaucratization of corporate institutions with their ability to become relatively independent power centers with decisive influence over governmental agencies.

J. T. Winkler,[84] accepting this thesis, considers the process to reflect a state role that he calls directive (rather than supportive). The directive role attempts positively to guide and control the economy to improve national economic performance. The state does this by allowing businesses to remain in private hands, but directs their behavior by attempting to specify or limit their decisions. Examples are general financial powers—to tax, spend, lend, grant, subsidize, borrow, levy, license, issue, purchase, and raise tariffs as well as other financial controls—over prices, incomes, dividends, rents, credits, interest rates, investment, exports and imports, and capital movements.

Any one of these devices of implementation of economic policy may be in use at a particular time. The point made by Winkler is that they are increasingly used, selectively against particular firms, and, for the state to utilize them effectively it must be able to act flexibly. The powers normally granted are therefore discretionary. Thus, in Britain at least, dividend control was used to stimulate industrial reorganization, export credit guarantees to bolster incomes policy, employment subsidies to induce companies into negotiated planning agreements, and state purchasing contracts to encourage racial equality in employment and workers' participation. None of these purposes could have been achieved with rule-bound forms of organization and administration.

CONCLUSION

Implementation and enforcement pose enormous challenges to law and the legal order. For too long the cry "there ought to be a law" was not followed by any attempt to analyze the machinery of enforcement or implementation, the capacity of a law to achieve the desired goals, the consequences of the grant of power to officials, and the manner in which that discretion should be exercised and controlled.

One aspect of the problem has been largely ignored in this essay, namely, the initiation of the remedy by individuals. We have discussed problems surrounding official enforcement, but it should by no means be assumed that aggrieved individuals will have the knowledge, capacity, time, or energy to use laws provided for their benefit, or to challenge what may seem impossible odds. Nor should it be assumed even that officials will necessarily know the general principles or specific rules of administrative law that are meant to guide their behavior.

Until fairly recently, legal contribution to enforcement has been content to deal with questions about a law's sanction, criminal or civil, and the effectiveness of either, with little attention to nonjudicialized remedies or those based upon conciliation. With the growth of interest in administrative justice, attention focused on the capacity of legal techniques to deliver services and to affect the process of enforcement. It is at this point that further and better particulars of the workings of organizations become necessary, and the division of legal and organizational studies becomes a hindrance to a proper understanding of the process of implementation and enforcement.

There are still wider questions to be asked that move away from the traditional concern depicted in the black box diagram with nondistorted implementation of purpose. We have seen how purpose is in any event frequently defined in its implementation. Further, there is a more recent concern with issues of accountability, responsiveness, and the

[84] Winkler 1981, pp. 82–134.

control of discretion that deal not only with the merits and defects of law. They force examination of the administrative culture in which law operates, in the context of given social, political, and economic structures.

Any understanding of implementation and enforcement today must understand not only the micro-legal issues dealing with the day-to-day interaction of official and client and the hierarchical and incentive structure within organizations. It must also attend to the macro-legal issues that treat not only the nature and limits of legal devices, but also the context of law and administration in its wider institutional setting.

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7

PUNISHMENT AND DETERRENCE: THEORY, RESEARCH, AND PENAL POLICY

Jack P. Gibbs
Vanderbilt University

The doctrine of deterrence—the argument that legal punishments deter crime—has long been a subject of controversy. Studies carried out in the 1950s, largely limited to the death penalty, indicated that severe legal punishments have no deterrent effects. Toward the end of the 1960s there was a renewal of interest in the subject; and while the research findings did not wholly corroborate the deterrence doctrine, they did suggest that it had been dismissed prematurely in the 1950s. Another turning point may have come about in 1978, when social scientists again began to raise doubts about the doctrine's validity. So, after decades of research, compelling evidence is still wanting. To substantiate or invalidate the deterrence doctrine once and for all, it is necessary to develop research strategies that will solve or avoid several evidential problems.

This essay describes the findings of deterrence studies largely in terms of evidential problems, but the subject transcends the academic. The findings have been duly noted by those who debate penal policy. Thus, the opinions of the Supreme Court pertaining to capital punishment since 1970 show substantial consensus among the Justices that evidence of the deterrent efficacy of legal punishments, the death penalty especially, is simply inconclusive (see Supreme Court Reporter 1976; United States Reports 1973). Perhaps as a result, several of the Justices entertain retribution as a rationale for capital punishment; and several prominent scholars champion a retributive penal policy (notably

Newman 1978; van den Haag 1975; von Hirsch 1976). So, insofar as American criminal justice is governed by any identifiable penal policy, it appears that in one decade the underlying rationale shifted from rehabilitation to retribution; but the seeming demise of the rehabilitative ideal cannot be attributed to the findings of deterrence research.[1] Had the findings conclusively invalidated the deterrence doctrine, they might have furthered the shift to retribution. If both rehabilitation and deterrence are abandoned, retribution becomes the only conspicuous alternative; but the failure of deterrence investigators to solve evidential problems precluded a clear-cut impact on penal policy.

Given the piecemeal character of deterrence studies, their shortcomings are not surprising. The evidential problems are so complicated that their solution may require an intricate division of labor; and without extensive funding of one major project, deterrence research will never encompass all the possibly relevant variables in one design. The allocation by an agency or foundation of a large sum of money for deterrence research will not improve the situation if the money is used to support numerous independent projects, each of limited scope.

SOME QUESTIONS ABOUT LEGAL PUNISHMENTS

Observations on deterrence do not remotely speak to all questions about legal punishment, let alone crime and criminal justice. For that matter, only two seemingly indisputable arguments justify concern with deterrence in the social sciences. First, deterrence periodically becomes a major issue in debates over penal policy, and social scientists can ill afford an indifference to policy issues. Second, judged in terms of amount of research, questions about deterrence have no rival among questions about legal punishment. Both arguments are the principal rationale for the focus of this essay, but more needs to be said about the second argument.

Theories of Punishment

What have come to be recognized as "sociological theories of punishment" have little bearing on deterrence. Rather, the theories ostensibly purport to answer the question: Why does the severity of legal punishments vary over time and among social units? Space limitations alone preclude more than the briefest summary of the answer provided by the theories (for more extensive commentary and references to the literature, see Grabosky 1984).

Emile Durkheim attributed punitiveness to a low degree of division of labor and a postulated concomitant high degree of normative consensus, but he did not provide a coherent argument as to why normative consensus (or a "strong" collective conscience) is supposedly conducive to severe legal punishments. A much more psychological explana-

[1] There is a danger in alleging that the rehabilitative ideal has been abandoned, for such a claim could become a self-fulfilling prophecy. Nor is there a basis to assert categorically that rehabilitation programs "do not work." Evidence of the inefficacy of "correctional treatment" in general (notably Lipton et al. 1975) is not denied; but an assessment of that evidence is beyond the scope of this essay, and nothing short of a major research project will be required for that assessment. However, if only in recognition that recent evaluations of rehabilitation programs (again, notably Lipton et al. 1975) appear to have had an enormous impact on opinions in governmental and scholarly circles, some agency or foundation should promote a replication of those evaluations.

tion is offered by the "scapegoat theory," which interprets punitiveness as the sublimation of socially repressed aggressive and sexual urges. The "cultural-consistency" theory is actually a very loose argument that depicts punishment as reflecting general cultural features and conditions of life (where life is harsh, the death penalty is common, for example). From the Marxist perspective (Rusche and Kirchheimer 1939, in particular), punitive legal sanctions stem from fluctuations in the labor market and the efforts of the dominant economic class to maintain exploitative control, with imprisonment supposedly flourishing when the labor market is glutted and capital punishment common when social dissent becomes intense. For Svend Ranulf, punitive legal sanctions are concealed expressions of the moral indignation of the middle class, which is generated by the assiduous conformity required for members of that class to maintain their social position. Finally, Pitirim Sorokin viewed punitive legal sanctions as the manifestation of social ("ethicojuridical") heterogeneity in values and concomitant antagonistic relations along class, ethnic, racial, or religious lines.

Sociological interest in these theories effectively ended long ago, but not from obvious difficulties in bringing evidence to bear on the theories or even apparent exceptions to them. Rather, sociologists are prone to think of social control as "that which contributes to social order"; and, rightly or wrongly, many evidently believe that legal sanctions are not essential for social order. As long as that belief persists, no work on punishment (including deterrence research) is likely to be recognized by sociologists as within the mainstream of their field. Hence, it appears that there is no central question about punishment (legal or otherwise) that truly captures the attention of sociologists, without which there can be no viable "sociology of punishment."

Michel Foucault's work (1977) does have a following among intellectuals and social critics; but it has not given rise to a nomothetic question about legal punishment, nor is it a theory by any conventional standard. Foucault has done nothing more than offer an interpretive description of the transition in Europe from corporal punishment to imprisonment in the period 1750–1850. That transition, widely recognized by penologists long before Foucault, had never been explained in the context of a general theory. Foucault can be said to have explained the transition only if explanation is equated with the use of evocative descriptive terminology, as when he depicts the transition from corporal punishment to imprisonment as a shift in concern with the "body" to a concern with the "soul" (Foucault 1977, p. 16). However intellectually satisfying such description, or "explanation," may be, it is a far cry from a generalization about the sociocultural conditions under which a similar transition should be found outside the European historical context. Further, even if it were granted that Foucault's work is explanatory rather than descriptive, his interpretation throws no light on a subsequent transition in penal measures away from imprisonment nor on a return to imprisonment in the United States during the 1970s.

Whatever the significance of the question as to why the predominant *kind* of legal punishment varies among societies and over time, neither the deterrence doctrine nor most of the six sociological theories (*supra*) bear directly on it. Variation in the predominant kind of punishment (such as corporal as against incarcerative) does not necessarily entail variation in the severity of punishment; and, historical trends in Western countries notwithstanding, there is no obvious reason why there should be an association between bases of penal policy (for example, retribution versus deterrence) and predominant kinds

of legal punishment. So variation in the predominant kind of legal punishment poses a distinct question; but it cannot be the central question in the sociology of punishment, since sociologists are not likely to recognize it—any more than they do deterrence research—as within the mainstream of their field.

The Question of Coercion

Unlike questions about deterrence, questions about coercion and social order are central to sociology, primarily because of the long-standing debate between sociologists who subscribe to the Marxist or conflict perspective and those who subscribe to functionalism. One remarkable feature of that debate is the failure of the protagonists to recognize the relevance of deterrence research. Granted that the coercive powers of the state cannot be described fully in terms of legal punishments, the latter is nevertheless a conspicuous manifestation of the former.

Since functionalists emphasize the role of normative consensus in the maintenance of social order, their indifference to questions about the deterrent efficacy of legal punishments is somewhat understandable; but the indifference of Marxist or conflict sociologists borders on a contradiction. Insofar as there is a Marxist theory of criminal law, it tacitly attributes validity to the deterrence doctrine. Legal punishments can be used as a repressive instrument by a dominant class only if the threat of punishment does deter. The curious argument that legal punishments are not really necessary to control dissidents would cast doubt on Marxist ideas about the origin of criminal law. A more cogent argument claims either (1) that legal punishments deter dissidents but not apolitical criminals or (2) that legal punishments prevent crimes through means other than deterrence. There is no rationale for the first claim, which grants limited validity to the deterrence doctrine; and evidence to support the argument will not be forthcoming if Marxists remain indifferent to deterrence research. The alternative (second) claim is justified because punishments may prevent crimes in nine ways other than deterrence (Gibbs 1975); but Marxist writers commonly stress the intimidating character of criminal law, and intimidation is a central notion in the deterrence doctrine. Hence, advocates of the Marxist theory of criminal law cannot pretend that the theory is unrelated, let alone contrary, to the deterrence doctrine. Yet none of the "critical" criminologists emphasize the importance of deterrence research in connection with Marxist theory. The word deterrence does not appear in the subject index of Ian Taylor et al. (1975); and Richard Quinney (1976, p. 415) castigates works on deterrence as "a defense of punishment applied in order to protect a late capitalist social order."

Toward a Central Question

The debate between Marxists and functionalists over social order rests on the dubious presumption that in all societies social order is based on either normative consensus or coercion. Even casual observations suggest that (1) two bases of social order are not mutually exclusive and (2) the predominance of one over the other is a matter of degree, which varies appreciably among societies. The hoary Marxist-functionalist debate should be transformed into this question: In what type of society is social order predominantly based on coercion and in what type of society is social order predominantly based on normative consensus?

While the question may inspire theories, it is far too vague to guide research. The notion of social order defies numerical expression, and coercion appears in such diverse forms that systematic research is possible only by focusing on particular manifestations. While legal punishments are strategic in that regard, it will not do to assert simply that legal punishments reflect a coercive social order. According to that claim, order is coercive in virtually all societies—surely in all literate ones. A much more defensible argument holds that certain properties of legal punishments (for example, their perceived severity, their objective certainty, and their range of application) are indicative of the coerciveness of social order. That argument can be restated as the immediate central question for the sociology of punishment: What properties of legal punishment reflect a coercive social order?

The question will be much more difficult to answer than it may appear. Even if it were possible to express numerically the "severity" of all legal punishments, statutory and/or actual, it would not follow that societies with the most severe punishments are also characterized by the most coercive social order. Durkheim's theory (*supra*) implies that especially severe legal punishments may reflect nothing more than a high degree of normative consensus, but it also implies that in societies with especially severe legal punishments the public favors such severity. By contrast, the Marxist argument appears to be that severe legal punishments reflect the will of a dominant class, and that claim is at least a tacit denial of public support of harsh penal measures.

Perhaps the two arguments can never be resolved because of their nebulous formulations; nonetheless, taken together, they suggest the possibility that social order is coercive to the extent that legal punishments in the society are more severe than the public demands. "Public support" should therefore be treated as a strategic property of legal punishments. While sociologists have done extensive research on preferred penalties (for example, Hamilton and Rytina 1980), the research has not been truly comparative; nor have investigators treated the ratio of severity of legal punishments to the severity demanded by the public as the salient variable.

The statement of a central question for the sociology of punishment need make no reference to deterrence, but legal punishments cannot maintain social order coercively unless they are efficacious to some degree. Accordingly, while the deterrence doctrine may not pose the most important question for the sociology of punishment, it does bear on a central question for sociology as a whole: To what extent can coercion or the threat of it maintain social order?

A BRIEF STATEMENT OF THE DETERRENCE DOCTRINE

Deterrence research has suffered from the seeming belief of investigators that defensible tests of the deterrence doctrine can be conducted without stating it as a systematic theory.[2] Of course exploratory research has a bearing on the doctrine—it may indeed be necessary for the formulation of a theory; but, by itself, exploratory research cannot yield compelling evidence. In any event, from Beccaria and Bentham to the present, the

[2]For instances of steps toward the statement of a deterrence theory, see Becker (1968), Zimring and Hawkins (1973), Andenaes (1974), Gibbs (1975), Geerken and Gove (1975), and Blumstein et al. (1978, pp. 3–90). Economists do not recognize any need to state the deterrence doctrine as a systematic theory, evidently because they regard the principles of classical economics as sufficient.

doctrine has remained little more than a collection of vague ideas; consequently, it is grossly oversimplified when reduced to one proposition, such as that certain, swift, and severe legal punishments deter crime. The proposition ignores (inter alia) the point that potential offenders' perceptions of legal punishments are the decisive consideration in deterrence.

Accordingly, it may appear that the deterrence doctrine reduces to this proposition: legal punishments deter crime to the extent that potential offenders perceive them as certain, swift, and severe. But that proposition ignores the "objective" properties of punishment—meaning those that can be described without considering how those punishments are perceived by potential offenders. Unless objective properties of legal punishments (for example, the prescribed maximum prison term for robbery) are treated as components of the deterrence doctrine, it has scarcely any implications for penal policy. Legal officials attempt to promote deterrence largely by manipulating objective properties of legal punishment, with the tacit assumption that such manipulation alters the perception of potential offenders.

In this light, the deterrence doctrine cannot be reduced to one simple proposition; rather, as shown in Figure 1, the doctrine encompasses at least three premises and two corollaries bearing on general deterrence. They are:

Premise I. A direct relationship obtains between the objective properties of punishments and their perceptual properties.

Premise II. A direct relationship obtains between the perceptual properties of punishment and deterrence.

Premise III. An inverse relationship obtains between deterrence and some kind of crime rate.

Therefore:

Corollary I. An inverse relationship obtains between the perceptual properties of punishments and some kind of crime rate.

Corollary II. An inverse relationship obtains between the objective properties of punishments and some kind of crime rate.

Even Figure 1 formulates the doctrine in an oversimplified manner, since it does not

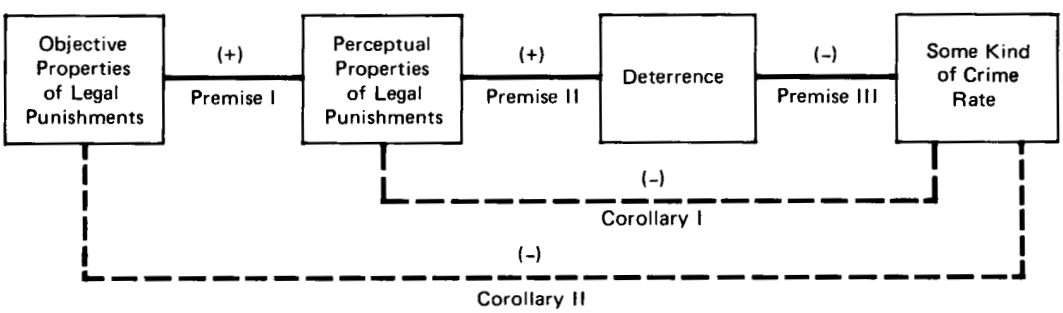

FIGURE 1

Major Components of the Deterrence Doctrine As It Applies to General Deterrence*

*(+) signifies the assertion of a direct relation; (−) signifies the assertion of an inverse relation; ——— signifies an underived proposition; and ---- signifies a derived proposition.

identify particular objective and perceptual properties of punishment that could be relevant. What follows, therefore, bears largely on Premise I, after a brief conceptualization of legal punishment, deterrence, and crime rates.

Legal Punishment

Fortunately, the definition of a "legal punishment" has not been a real issue in debates over the deterrence doctrine. Legal punishment cannot be much further defined than this: it is a punishment prescribed and administered in accordance with law. The vague phrase "in accordance with law" is crucial, for it touches on a criticism that social and behavioral scientists seldom consider. The promotion of deterrence is conducive to the punishment of innocent individuals and falsely publicizing punishments. If the goal is the overall promotion of deterrence, due process becomes secondary to creating the impression that the punishment of alleged offenders is certain, swift, and severe.

The question of the extent to which the pursuit of deterrence leads to violations of due process should draw the attention of specialists in the sociology of law. Deterrence may cease to be advocated as the panacea for the control of crime if it can be shown that its implementation subverts accepted principles of justice.

The simple definition of legal punishment does not clarify the notion of punishment itself; and just as any conceptualization of sanctions (Gibbs 1966) gives rise to problems and issues, so does the conceptualization of punishment. The most pressing problem stems from the recognition of two distinct factors—the intention of those who undertake some punitive action and the perception of the actual or potential objects of that action. An action may be said to be punitive if it is intended to inflict pain or promote fear. The argument against that "narrow" view of punishment is that an action by a legal official may deter if the object of the action perceives it as punitive. So the safest course is to define punishment as an action that (1) is intended to inflict pain on its object or to promote the object's fear of such infliction and/or (2) is perceived by the object as painful or as threatening the infliction of pain.[3] In the case of legal punishments, the actions of officials may take the form of either actual reactions to suspected offenders or the prescription of such reactions (enactment of criminal laws).

Although arrests, indictments, and trials may deter if they are perceived by the accused and by potential offenders as punitive, it would be disputable to identify such actions as legal punishments if the intention of legal officials is the only criterion. Viewed in that context, the definition of legal punishment gives rise to an issue in penal policy—whether officials should employ "procedural punishments" (arrests and the like) to promote deterrence; indeed, the extent to which they actually do so.

Deterrence

As emphasized by Bedau (1970), writers commonly equate deterrence with any way or means by which legal punishments can prevent crimes. Since that practice makes the notion of deterrence a hodgepodge, the proper definition is much more narrow. In a legal context, the term "deterrence" refers to any instance in which an individual contem-

[3] Throughout this chapter the word "punishment" is to be understood as referring to legal punishment, but in a few instances the latter term is used for emphasis.

plates a criminal act but refrains entirely from or curtails the commission of such an act because he or she perceives some risk of legal punishment and fears the consequence. Although brief, the definition is consistent with all careful, elaborate conceptualizations of deterrence from Bentham to Bedau because of its emphasis on fear of punishment and perception as the principal factors in deterrence. Granted, so defined, deterrence cannot be observed or measured; therefore, Premises II and III of the deterrence doctrine (Figure 1) cannot be tested directly. But there is no basis to suppose that deterrence ever can be defined so as to make the phenomenon subject to direct observation or measurement.

Types of Deterrence Although most writers recognize the distinction between specific deterrence—the deterrent impact of punishment on those who have been punished—and general deterrence—the deterrent impact of the threat of punishment on those who have not been punished—two other types should be recognized. In the case of absolute deterrence, the individual has contemplated the crime in question at least once but has refrained each time because of his or her fear of punishment. In the case of restrictive deterrence, an individual contemplates the crime and does not refrain from it because of fear of punishment; he or she does, however, curtail commissions of that crime because of fear of punishment and with a view to reducing the risk and/or severity of the punishment.

Given the conventional general-specific distinction and the additional absolute-restrictive distinction, four types of deterrence can be posited: absolute-general, restrictive-general, absolute-specific, and restrictive-specific. Thus, the deterrence doctrine suggests four distinct theories, each pertaining to only one type of deterrence. The theories are distinct in that evidence for or against one of them will not necessarily be evidence for or against the others.[4] Moreover, the distinctions bear on penal policy.

The deterrence doctrine can bear on penal policy only to the extent that it is empirically valid; but it distorts to argue that deterrence "works" or "does not work," nor is it realistic to think of the doctrine as either true or false. The point is not merely that the deterrent impact of legal punishments may largely be a matter of degree; no less important, the validity of the doctrine may well be related to types of deterrence. Even if all individuals who have been imprisoned for theft, for example, repeat their crime on release, that fact would not preclude substantial restrictive-specific deterrence.

Those who contemplate the policy implications of the doctrine of deterrence should recognize the possibility that legal punishment has the greatest impact on individuals who do commit crimes, perhaps frequently. Moreover, the distinctions bear on attempts to reduce the crime rate by special legal reactions to so-called habitual offenders and professional criminals. Insofar as the goal of those special reactions is deterrence, the consequence is likely to be only restrictive deterrence.

Crime Rates

In testing deterrence propositions, investigators have compared (1) territorial units, such as states; (2) types of crimes within the same territorial unit; or (3) individuals, typically coresidents. In all but the last kind of comparison, the dependent variable has

[4]Nonetheless, some writers (such as Blumstein et al. 1978, pp. 3–63) do not use the term "specific deterrence," and others (Zimring and Hawkins 1973, for example) attach no significance to the notion.

been the CCR (conventional crime rate), where CCR = C/P (100,000), C being the number of instances of a given type of crime reported as having been committed in the unit during some designated period (the average annual number if the period is more than a year), and P being the population size of that unit (for example, number of city residents). The CCR numerator is virtually always an official statistic, such as crimes reported by the police, and the major doubt about any CCR is the reliability of those statistics. Because that doubt amounts to virtual preoccupation, criminologists seldom recognize that, even if all the component statistics were absolutely reliable, the CCR is so uninformative as to render its use virtually indefensible.

If, for example, police records in a city of 50,000 residents report twenty rapes during 1984, the CCR is 40.0; but that rate would reveal very little, not even whether any rapist or victim resided in the city. The police cannot even supply the statistics required to compute a *residential* CCR for offenders, since many investigations fail to identify a suspect. That limitation of the CCR is a serious matter when contemplating a relation between the crime rate of a territorial unit (in the example, a city) and some characteristic of the unit (unemployment rate, racial composition, certainty of legal punishment for crimes, and the like). It is difficult to see how the characteristics of a territorial unit can have the *same* impact on residents and nonresidents, both of whom may enter into the CCR numerator.

Even if the police in the hypothetical city had identified all twenty rapists as residents, it would still not be clear from the CCR whether all rapes were committed by one individual or whether each offense was committed by a different rapist. But the difference is relevant in virtually any study of crime rates. In particular, a determination of twenty rapes by one individual would indicate negligible restrictive deterrence, but absolute deterrence is another matter.

Criminologists should therefore abandon the CCR in favor of special rates. Four such rates are needed in deterrence research, each corresponding to a particular type of deterrence. The impunitive repetitive rate is computed by the formula Ci/Ni, where Ni is the number of members of a population (for example, residents of a city) who have committed the type of crime in question at least once during some stipulated period without having been legally punished before or during the period, and Ci the total number of such crimes committed by the Ni individuals during the period.[5] The impunitive categorical rate is computed by the formula Ni/Ne, where Ne is the total number of members of the population excluding those legally punished at least once before or during the stipulated period. The impunitive repetitive rate is relevant when contemplating restrictive general deterrence, and the categorical rate is relevant when contemplating absolute general deterrence.

With a view to inferences about restrictive specific deterrence, the relevant special rate is the repetitive recidival rate Ca/Na, where Na is the number of members of the population who have been legally punished at least once before or during the stipulated period and who repeated the offense at least once during the stipulated period but after

[5] All special rates are described here in only very general terms; but any one of several versions of each rate could be used in research, depending on theoretical interests and resources. Thus, the "stipulated period" could be a particular year or throughout the life of each individual, and "impunity" could be defined so as to exclude punishments for crimes committed outside the jurisdiction in question.

the punishment, and *Ca* the total number of such offenses committed by *Na* individuals. Finally, the categorical recidival rate is *Na/Np*, where *Np* is the total members of the population who were legally punished before or during the stipulated period.

Special crime rates have been used in only one deterrence study, which found that tests of deterrence propositions are more positive when the crime rate is special rather than conventional (Erickson et al. 1977a). Moreover, special rates have implications beyond the validity of the deterrence doctrine. Any attempt to reduce the high incidence of particular types of crime by policies aimed at so-called habitual offenders or professional criminals is predicated on the assumption that high incidence is largely attributable to a substantial repetitive rate (impunitive or recidival). While that assumption may or may not be valid, the conventional crime rate throws no light on it.

Criminologists have used CCRs almost entirely, scarcely contemplating alternatives. Statistics on previous arrests can be used to compute recidival rates; but since it is ludicrous to suppose that there is a close relation between recidivism and arrest, only data on self-reported crimes are suited for computing the special crime rates in question. Gathering these data entails all manner of problems, resources being only one; and that is all the more the case because the traditional procedure must be expanded to the solicitation of self-reports of legal punishments. To be sure, there are many reasons for questioning the reliability or validity of such data (see, for example, Hirschi et al. 1980); but self-reported data offer the only opportunity to answer various important policy questions, including the validity of the deterrence doctrine.

The Properties of Punishments

Any attempt to restate the doctrine as a systematic theory should recognize the possible relevance of ten properties of punishments. While a bold theorist may exclude some of them, the choice would have to be based far more on intuition than on research findings. In any event, all of the properties bear on penal policy.

The Presumptive and Perceived Severity of Prescribed Punishments Some of the various punishments prescribed in a criminal code (statutory penalties) differ only in magnitude, such as a five-year maximum prison term for burglary but twenty years for robbery. While twenty years is obviously greater than five years, potential offenders may not perceive the severity of the former as even approximately four times that of the latter. Hence, the magnitude of a prescribed punishment is an objective property in that it is logically distinct from the perceptions of potential offenders, and it is designated here as the *presumptive severity* of prescribed punishments.[6]

The deterrence doctrine assumes a connection between the presumptive severity of a prescribed punishment and its *perceived severity;* otherwise, the doctrine's implications for penal policy would be considerably diminished. For example, in doubling the maximum statutory prison sentence for a particular type of crime with a view to promoting deterrence, legislators assume that potential offenders will become aware of the change and perceive it as a substantial increase in the severity of the threatened punishment. Again, however, the relation between presumptive severity and perceived severity is an empirical rather than a logical relation.

[6]For a discussion of the appropriate definition of potential offender, see below, p. 346.

The meaning of presumptive severity can be expanded to encompass judgments about the severity of qualitatively different punishments; but such judgments are clearly assumptions about perceptions of severity by potential offenders. Hence, all such judgments (comparing the relative severity of serving one month in jail and paying a $2,000 fine, for example) are much more questionable than judgments of two punishments that can be compared by reference to a given metric (paying a $100 fine versus paying a $200 fine, for example).

Whereas a prescribed punishment's presumptive severity is given by the wording of a statute, its perceived severity can be determined numerically by asking potential offenders a question worded something like this: If 100 represents the amount of pain or discomfort of serving one year in jail, what number would you say represents the pain or discomfort of paying a $10,000 fine? Without going into the technical problems and issues involved in posing perceptual questions, note that any particular punishment could be taken as the standard of comparison. Thus, in the illustrative question the standard for comparison with all other punishments (regardless of kind or metric) could be "execution" rather than "one year in jail."

The distinction between presumptive and perceived severity is all the more important because some punishments, such as a $500 fine and thirty days in jail, cannot be compared as to presumptive severity; and some punishments (the death penalty, for example) have no presumptive severity. Hence, early death-penalty studies (see references in Bedau 1982) were predicated on the implicit assumption that potential offenders perceive execution as more severe than life imprisonment. Without that assumption, the deterrence doctrine does not imply that the murder rate is lower in capital states than in abolitionist states.

In the revival of deterrence research since 1967, attention shifted from prescribed punishments to actual punishments, perhaps as a reaction against the virtual preoccupation in earlier studies with statutory penalties. The slighting of prescribed punishments may also reflect the implicit judgment that those punishments scarcely play a role in deterrence. Yet when legislators criminalize a particular kind of behavior by stipulating a statutory penalty, that action is surely a threat of punishment. The majority of potential offenders may never learn of the legislative action, but that is only one of many reasons why threatened punishments may not promote deterrence (see Ross 1976). Moreover, if prescribed punishments are not a genuine threat, efforts to publicize them—signs in stores stipulating the penalty for shoplifting, for example—are pointless. Yet the negligible effort devoted to publicizing statutory penalties is a remarkable feature of penal policy in Anglo-American jurisdictions.

Perhaps legislators refrain from widely publicizing statutory punishments because such action would be costly and/or because it would be intimidating to the point of creating a police-state climate. If cost is the consideration, legislators are penny-wise and pound-foolish. As for the distasteful image created by publicizing statutory penalties, it is naïve and politically dangerous to suppose that criminal law can be free of intimidation.

The failure of legislators to publicize prescribed punishments widely is all the more remarkable in that the presumptive severity of prescribed punishments is the only property legislators can manipulate readily. As long as there is judicial discretion in sentencing and parole boards, legislators will not directly control the magnitude of actual punishments. In the United States during the 1970s, legislators responded to the national

clamor for "law and order" by increasing statutory prison terms. Such endeavors represent the "cheap" strategy for promoting deterrence. It costs little to threaten punishment; but if prescribed punishments deter only to the extent they are actually applied, then promoting deterrence can be very costly.

Given statutory penalties that can be described in terms of some common metric (a $200 fine, a $1,000 fine, or the like), the relation between presumptive severity and perceived severity is direct but perhaps curvilinear (for example, potential offenders perceive ten years of incarceration as appreciably less than twice as severe as five years). However, the most significant question pertains not to the form of the relation but to the amount of variance among potential offenders in their perception of the severity of a prescribed punishment for a particular type of crime. To the extent that those perceptions vary, the deterrent impact of the punishment is not likely to be even approximately the same for all potential offenders.

Of course, the severity may be such that all potential offenders are deterred. But from Bentham to the present, only fierce retributivists have regarded punishment as other than an evil; and Benthamites argue that punishments should be no more severe or frequent than is required to deter. Even accepting the principle that a prescribed punishment should be so severe as to deter all potential offenders, legislators are not likely to adopt the requisite Draconian criminal code. Should it be known, for example, that the threat of twenty years of imprisonment would deter 95 percent of those who contemplate shoplifting, while the threat of thirty days in jail would deter say 50 percent, the former measure probably would not be adopted. The implementation of a deterrent penal policy forces a consideration of trade-offs. To that end, the central question is not merely the role of the perceived severity of punishments in deterrence, but also the amount of variance among potential offenders as regards those perceptions.

Variance is all the more a problem because statutory penalties in Anglo-American jurisdictions ostensibly apply to all offenders. While there is every reason to suppose that the perceived severity of punishments varies considerably by social class, age, and sex, Anglo-American legislators are not about to make prescribed punishments explicitly contingent on such characteristics of offenders.

American penal policy is a mishmash, a quality reflected in statutory penalties. For most types of crimes, there are alternative penalties—imprisonment or fines—and there is no defensible rationale for not recognizing probation as a punishment. Each alternative penalty is commonly either indefinite or indeterminate—for example, not less than one year of imprisonment nor more than ten years. Such diversity of statutory penalties is necessary for judicial discretion and the "individualization" of criminal justice.

Although judicial discretion determines the presumptive severity of sentences in particular cases, that discretion is consistent with a principle of deterrent penal policy only insofar as the maximum or minimum of any of the statutory penalties for a type of crime presumably promotes as much deterrence as the maximum or minimum of any alternative. Yet in American jurisdictions even maximum fines are so low that the deterrent principle appears violated, although data on perceived severity would be needed to ascertain the extent. Similarly, limiting the length of probation to the maximum possible term of imprisonment violates the principle.

Contrary to conventional wisdom among American legislators, a deterrent penal policy does not require mandatory prison sentences. If the evil of excessive punishment is to

be avoided and the cost of punishments reduced, alternative punishments are essential to a deterrent penal policy. Nothing whatever in the deterrence doctrine precludes a fine of not less than $100 nor more than $10,000 for shoplifting rather than a jail sentence of not more than, say, thirty days—provided always that the perceived severity of any amount of one penalty can be roughly equated with a certain amount of the other penalty. Qualitatively different penalties can, however, be equated only in terms of perceived severity.

Such a strategy would pose problems and generate controversy. Legislators could not revise statutory penalties rationally without systematic data on the severity of various kinds of punishments as perceived by a representative sample of potential offenders, but it would be hard to defend the alternative—to continue setting statutory penalties largely by intuition and precedent. Although systematic perceptual data would not reveal the minimum amount of any penalty required for an "acceptable" level of deterrence, that level cannot be identified without those data. In any case, the assumption would not be that all potential offenders can be deterred by the same amount of a particular kind of penalty, such as a $5,000 fine. While there may be, at least for some penalties, a certain level that would deter everyone, applying that punishment in all cases would be intolerably Draconian.

That consideration is precisely the rationale for stipulating a range for each alternative penalty. The strategy requires judicial discretion in sentencing, of course, especially since the imposition of fines implies the capacity to pay. The statutory provision for fines raises the specter of the poor suffering from relative deprivation. However, the purpose of a statutory provision for an enormous range in fines would not be merely to make it possible for the offender to pay, but also to pay money that "smarts." The assumption that the perceived severity of a fine varies inversely with income is another reason for setting statutory penalties by reference to systematic data on the perceived severity of punishments.

The prospect of giving judges enormous discretion in imposing fines may seem dangerous, but less so in light of two arguments. First, judges still have enormous discretion over the liberties of convicted offenders; and, second, their discretion in imposing fines could be limited by requiring them to follow a fixed schedule related to the offenders' estimated annual income.

Of all properties of punishment, the numerical expression of perceived severity poses the most difficult problem. When potential offenders are asked a "magnitude ratio" question, in which they are instructed to compare each of several punishments (five years of imprisonment or execution, for example) with a particular "standard" punishment (such as a one-year jail sentence), the problem is not that respondents are confused by such a question (experience indicates otherwise). However, selecting a standard and assigning a fixed value to it (100 or 1,000, for example) are inherently controversial. There is no truly compelling rationale for selection or assignment, and regardless of the choice it can be argued that the strategy is flawed if respondents differ appreciably in their perceptions of the severity of the standard. For example, if respondent *A* assigns a value of 50 to five years of probation (relative to 100 for one year in jail, the standard) and respondent *B* assigns a value of 75 to that term of probation, the difference would be misleading if it were known that *B*'s absolute perception of the severity of such a jail term (the standard) was approximately one half greater than *A*'s perception.

One possible solution is the use of an instrument that enables respondents to express their perceptions of the severity of a designated punishment by the pressure of a "hand squeeze," where the instrument reading for each punishment can be converted to a proportion of the maximum reading for that respondent (that obtained when he or she is instructed, at the outset, to exert maximum force). The use of such an instrument in an extensive survey would not be feasible; but its exploratory use for a small sample of respondents may reveal a very close correlation between values obtained with the physical instrument and those obtained through magnitude questions, thereby justifying those questions.

Objective and Perceived Certainty There is every reason to assume that the relation between the severity of prescribed punishments for a type of crime and the rate for that crime is contingent on the certainty that those punishments will be applied. The importance of that contingency cannot be grasped without recognizing the distinction between the objective and the perceived certainty of punishment.

Objective certainty can be expressed by the formula Np/Ni, where Ni is the number of instances of a type of crime during a given period and Np the number of such instances that resulted (during or after the period) in the application of the punishment in question. If, for example, 50 out of 200 recorded robberies in a particular city during 1984 eventually result in the imprisonment of an alleged offender, the objective certainty of imprisonment for robbery in that city during 1984 is .25.

Two problems complicate the application of the formula. First, the commonly available figure for Ni is derived from police records; but it has been demonstrated that many crimes (especially victimless crimes) go unreported. Thus, use of police figures is likely to result in an artificially inflated objective-certainty index. Second, arrests and convictions do not necessarily occur within the same year as the commission of the reported crime. For example, it may be 1986 before some offender who committed a burglary in 1984 is imprisoned.

This difficulty may be somewhat alleviated by use of the estimational formula Np_t/Ni_{t-1}, where t denotes a particular year (1984, for example) and $t-1$ the previous year. But even such an estimation does not allow for plea bargaining, whereby offenders are sentenced for a lesser crime.

Whatever procedure is employed for the numerical expression of the objective certainty of punishment, the notion itself is distinct from perceived certainty. The numerical expression of perceived certainty can be realized in a systematic way only by soliciting answers from potential offenders to a question worded something like this: "How many times do you think you could commit [type of crime] in this [city or state] before being sentenced to prison?" The reciprocal of the number given in the answer would represent that respondent's perceived certainty of imprisonment for a particular type of crime, and additional questions would be required to solicit perceptions as to the certainty of other types of punishment (for example, arrest).

It is entirely possible that neither the perceived certainty value for any potential offender nor the average of those values even remotely reflects the objective certainty of punishment for the type of crime in question. That possibility creates a problem when it comes to interpreting Premise I of the deterrence doctrine (Figure 1). Propositions about the relation between particular objective and perceived properties are necessary to assess

the empirical validity of Premise I, but the step from that premise to specific propositions entails conjecture. No matter how certain in an objective sense, punishments deter crime only to the extent that they are perceived as certain by potential offenders.[7] Accordingly, if only with a view to policy implications, the deterrence doctrine should be construed as asserting a direct relation among types of crimes or among territorial units between the objective certainty of punishment and average or median certainty of punishment as perceived by potential offenders. If such a relation is found to hold, it will greatly simplify stating the deterrence doctrine as a systematic theory with important policy implications. Legal officials—the police and legislators—will have some justification for anticipating that the crime rate will decline as the result of increase in the objective certainty of punishment.

But even if no relation between objective and perceived certainty can be demonstrated, the demise of the deterrence doctrine, or even the rejection of Premise I, would not follow. A close direct relation seemingly requires that potential offenders have some cognitive basis for assessing the certainty of punishment, which is likely to depend appreciably on the extent to which actual punishments are publicized. It is further possible that perceptions partially reflect the intensity of police surveillance (the frequency of patrols, for example) or other enforcement activities that are distinct from actual punishments (see Lempert 1981–82). So it could be that the relation between objective certainty and perceived certainty is not close, being contingent on publicizing actual punishments and/or on enforcement intensity. If such should prove the case, the only option for stating the deterrence doctrine as a theory[8] will be to recognize the publicizing of punishments and the intensity of law enforcement as objective properties in addition to objective certainty. That procedure will be even more necessary if research findings indicate that both publicizing punishments and enforcement intensity are directly related to perceived certainty, independently of objective certainty. In any case, converting the deterrence doctrine into systematic theories cannot be a simple task.

Even if a close direct relation between objective and perceived certainty holds without controls for publicizing of punishments or enforcement intensity, it would be an illusion to assume that the objective certainty of punishments can be furthered by merely increasing the number of police officers. The research undertaken to date clearly indicates that the relation between objective certainty of arrest and the relative size of the police force is not close by any means (see Wilson and Boland 1978; Riccio and Heaphy 1977).

Objective and Perceived Celerity Objective celerity (swiftness) is simply the time elapsed between the commission of an offense and the administration of a punishment. While offenders who are punished have some sense of that interval, it would require long experience with criminal justice to appreciate not only the long average time between offenses and the administration of substantive punishments but also the enormous variation from case to case. Systematic data on perceived celerity can be gathered only by

[7] For reasons that are not clear, economists and those who employ the "econometric approach" in the study of deterrence do not emphasize perceptual variables. In contrast, most sociologists treat perception as the central consideration in deterrence (see, especially, Henshel and Silverman 1975).

[8] Here, as elsewhere, it simplifies matters to speak of restating the deterrence doctrine as a single theory; but in fact the doctrine should be restated as four distinct theories, one for each of the four types of deterrence.

soliciting responses of potential offenders to a question worded something like this: "If someone like yourself should commit [designated offense] and be [designation of punishment], what is your guess as to the amount of time between the [designated offense] and the [designation of punishment]?"

It has not been clearly established whether a short interval between an offense and its punishment (commencing with arrest) is necessary, sufficient, or both to establish a "neurological connection" between the events. Moreover, a delay in punishment could heighten the offender's perception of the punishment's severity. In any event, there is little justification for arguing that swift punishment promotes *general* deterrence. When a potential offender learns that someone has received a life sentence for rape one year after commission of the crime, it is not obvious that the potential offender's fear of punishment is lessened by learning of the delay.

Despite these caveats, the conclusion suggested by the literature on experimentation with punishment is entirely consistent with Bentham's argument; for it does appear that in some conditions punishments applied more than a few seconds after a particular behavior do not effectively repress or extinguish that behavior (see Johnston 1972; Van Houten 1983). The symbolic basis of human behavior and the perceived severity of some legal punishments may preclude the extension of the conclusion to specific deterrence in the criminal justice system; but a demonstration that anything remotely approaching that conclusion does apply would have an enormous impact. It would suggest why there is scarcely any systematic evidence of specific deterrence; and it would cast doubts on efforts to promote specific deterrence, since not even a disregard for due process would make the average celerity of legal punishments a matter of hours, let alone seconds.

The Presumptive and Perceived Severity of Actual Punishments What applies to the properties of prescribed punishments applies equally to the properties of actual punishments, but the distinction between prescribed and actual must be emphasized. To illustrate, if the maximum statutory term of imprisonment for burglary in one jurisdiction, *A*, is five years, while in another jurisdiction, *B*, the statutory maximum is ten years, it may be that the average prison term served on a conviction for burglary in jurisdiction *A* is greater than that actually served in jurisdiction *B*. Such a seeming inconsistency would have nothing to do with alternative punishments for burglary in the two jurisdictions (such as a greater number of probated sentences for burglary in *B* than in *A*); rather, the difference could be due primarily to plea bargaining, judicial discretion in sentencing (which presupposes indefinite or indeterminate prescribed terms of imprisonment), and/or parole policies. In any case, legislators in jurisdiction *B* would have accomplished little in prescribing ten years for burglary, not only because of the possibility that prescribed punishments alone do not deter but also because legislators do not necessarily control the presumptive severity of *actual* punishments.

Even the elimination of plea bargaining, judicial discretion, and parole boards would not enable legislators to reduce the crime rate by increasing the presumptive severity of prescribed punishments. Granted the distinct possibility that individuals are deterred only by actual punishments, legislators do not control the *perceived* severity of those punishments.

The numerical representation of the perceived severity of punishments, prescribed or

actual, for a type of crime is more complicated than it may appear. Those who conduct deterrence research are unlikely to have the resources required to pose two separate questions about perceived severity, one for actual and one for prescribed punishments; nor is there any obvious way to phrase a clearly intelligible survey question about the severity of prescribed punishments as distinct from actual punishments. For that matter, it will not do to speak of "receiving such-and-such sentence of incarceration," for some respondents may think of it as meaning time actually served, while others allow for the possibility of parole.

Even when responses to a single "severity" question are used to assign values to both prescribed and actual punishments for a type of crime, the procedure differs. The illustrative formula for computing the composite value of the perceived severity of prescribed substantive punishment is: $\Sigma Sx + \Sigma Si + \Sigma Sd + \Sigma Sq$, where Sx is the median or mean severity value of the maximum presumptive severity of some prescribed punishment (such as twenty years of imprisonment), Si the value of the minimum presumptive severity of one of the prescribed punishments, Sd the value of the definite presumptive severity of one of the prescribed punishments (a statutory penalty of some particular magnitude, rather than indefinite or indeterminate), and Sq one of the prescribed punishments, if any, that can be described only in qualitative terms (such as execution). Thus, if a jail sentence, a fine, and probation are mutually exclusive statutory penalties for shoplifting, and if each has stipulated maximum-minimum, then six values would enter into the composite value pertaining to the perceived severity of prescribed punishments. By contrast, the formula for arriving at a composite value for actual punishments of a particular type of crime is: $\Sigma(PS)$, where P is the proportion of all actual punishments of a particular kind (including magnitude, if relevant, such as 4.4 years of imprisonment), and S the median or mean perceived severity value of that particular kind of punishment.

Since limited resources may preclude computation of a composite value that represents all prescribed or actual punishments for a type of crime, investigators may have to consider only the maximum or minimum punishment. For that matter, the formulas (*supra*) are only suggestive; and the choice among alternatives is not necessarily dictated by resources, nor is it a purely technical matter. Thus, while it may be true that only *maximum* punishments (prescribed and/or actual) promote general deterrence, such a conclusion should not be assumed uncritically.

Knowledge of Prescribed and Actual Punishments Individuals will not be deterred by any punishment, prescribed or actual, if they do not know of it; and knowledge of punishments is different from perceptions about certainty and severity. One survey question for potential offenders bears on the "applicability" of a particular kind of prescribed punishment: "Can a person who is found guilty of burglary be sentenced to prison?" A second question, presuming an affirmative answer to the first, pertains to the magnitude of the prescribed punishment: "What is the maximum prison term a person can serve for burglary?" The first corresponding question about *actual* punishments can be: "Do you know of cases during the past five years where persons were sent to prison for burglary?" The second question, presupposing an affirmative answer to the first, asks: "What is your guess of the average amount of time those persons will remain in prison?"

No answer to the foregoing questions would reveal the respondent's perception of the certainty or the severity of imprisonment; but when questions are posed about the

certainty or severity of some designated punishment for a designated type of crime, it is assumed that the respondents knew that such a punishment can be or has been applied to the particular type of crime. That consideration gives rise to a problem in attempting to state the deterrence doctrine as a theory—stipulating the logical relation between knowledge of punishments and perceptions of the certainty and severity of punishments.

In stating a deterrence theory, a theorist can ill afford to ignore two issues about knowledge of punishments. The first pertains to what appears to be an indisputable principle: no individual can be deterred by a prescribed or actual punishment without knowing of that punishment. That principle becomes troublesome if a distinction is granted between total ignorance of punishments (not knowing that the behavior in question is subject to any kind of punishment) and incorrect beliefs about the kinds of punishments that apply (or have been applied) to the type of crime in question. Even if potential offenders hold incorrect beliefs about the punishments prescribed for some type of crime, they can be deterred by those beliefs, especially if they perceive those punishments as severe and fairly certain. Accordingly, a deterrence theory may imply that the rate for some type of crime is, *ceteris paribus*, an inverse function of the perceived severity of the punishments that potential offenders believe apply to that type of crime. The beliefs in question can be accurate or inaccurate, but the generalization may be valid even if all the beliefs are incorrect.

Nonetheless, a purely perceptual version of the deterrence doctrine—one that assumes nothing about the accuracy of potential offenders' beliefs and makes no assertions about the relation between objective and perceived properties of punishments—can have no particular implications for penal policy. After all, when legal officials prescribe or administer punishments with a view to promoting general deterrence, they surely assume that numerous potential offenders will come to know of those punishments. Therefore, deterrence theories or tests of them have no obvious policy implications unless they bear on that assumption.

Yet not even a demonstration that the beliefs of potential offenders are totally inaccurate would preclude a deterrence theory that has some policy implications. Even if potential offenders do not know the kind or magnitude of the punishment, appreciable deterrence could be realized by correct beliefs that certain types of behavior are subject to some legal punishment. The argument holds that the functioning of the criminal-justice system as a whole sustains the beliefs. Needless to say, a deterrence theory incorporating that argument would be quite different from one predicated on the assumption that potential offenders have accurate knowledge about kinds and (possibly) magnitudes of punishments, and the policy import of the difference would be enormous. If tests of the two theories should indicate that deterrence is furthered primarily through the functioning of the criminal-justice system as a whole, legislators would be hard pressed to justify attempts at promoting deterrence by prescribing particular magnitudes of punishment to particular types of crimes.

The other issue bears on the very meaning of "accurate knowledge." One of the very few systematic studies of the public's knowledge of punishments in which the findings were interpreted as bearing on the validity of the deterrence doctrine (California Assembly Committee on Criminal Procedure 1968) serves as an illustration. The study surveyed California residents about their knowledge of statutory prison sentences for particular types of crimes. By any reasonable sampling standard, ignorance of those sentences was

widespread; but the California investigators' conclusion that the findings invalidate the deterrence doctrine is disputable because the survey was concerned with the public's knowledge of the magnitude of prescribed punishments, not with their applicability. Not to know the maximum prison term for a particular type of crime is a quite different matter from not knowing that some term of imprisonment is possible. The distinction is all the more important if large numbers of potential offenders are deterred by nothing more than knowledge that the crime is subject to *some* term of imprisonment.

In the case of magnitudes of punishments (for example, the maximum prescribed prison term for possession of marijuana), two distinct methods can be used to assess "accuracy" knowledge. The distinction is illustrated by hypothetical figures on four types of crimes, the first figure representing the statutory maximum prison term and the second figure the average "guess" about that maximum by a sample of potential offenders: rape, 25, 32.5; robbery, 20, 26.5; burglary, 10, 8.5; and grand theft, 5, 2.7. Such figures would indicate that the absolute accuracy of knowledge is negligible (especially since the "guesses" are averages and hence underestimate the ignorance of numerous individuals); but when it comes to *proportionate* accuracy, the situation is quite different. The rank-order correlation between actual statutory maximums and the average guesses is +1.00.

A deterrence theory can be predicated on the assumption of substantial proportionate accuracy of knowledge rather than on absolute accuracy—a distinction not emphasized by the California investigators. Of course, even the assumption of proportionate accuracy may turn out to be indefensible; but to the extent the assumption is valid, a theory that incorporates the assumption can justify legislative concern with graduated statutory penalties. For that matter, a theory predicated on certain assumptions about knowledge of the applicability of punishments (not their magnitudes) can have policy implications, especially if any magnitude of the punishments in question (imprisonment, for example) is perceived by potential offenders as severe.

Both the validity and the policy implications of the deterrence doctrine depend on the way the doctrine is stated as a theory. Deterrence theories may differ in many ways, but the contrast in assumptions about potential offenders' knowledge of punishment is likely to be salient.

On the Relations Among Properties of Punishment

An inventory of variables is not a theory, and a defensible deterrence theory cannot be formulated by an uncritical substitution of specific properties of punishment for the designations of generic classes in Figure 1. A theorist may conclude that some of the properties are irrelevant and that the exclusion of some properties would be desirable, if only to simplify the theory; but to date putative tests of the deterrence doctrine do not provide a firm rationale for exclusion.

Whatever properties of punishment are recognized in a deterrence theory, the reduction of Premise I (Figure 1) to specific propositions will be difficult. A deterrence theory is likely to assert a direct relation between the objective certainty and the perceived certainty of punishment, and the same may be said of objective and perceived celerity; but there will be a problem in wording the specific proposition about the relation between the presumptive severity of prescribed or actual punishments and perceived severity. To speak of potential offenders' perception of the severity of a prescribed punishment for a

type of crime presupposes that they know of that punishment; and articulating that presupposition in a specific proposition will be complicated. For that matter, whatever the nature of the knowledge variable—whether it pertains to applicability of punishments, their magnitudes, or both—there is no basis for assuming that it is solely a function of any of the objective properties of punishment.[9] Accordingly, while it may be necessary to extend the objective properties of punishment to include the publicizing of actual punishments, the immediate problem is that potential offenders may come to know of prescribed punishments independently of actual punishments. All such problems can be circumvented by stipulating that the theory is to be tested in a condition where all potential offenders have accurate knowledge of the punishments; but since accurate knowledge of all punishments by all potential offenders is unlikely in any jurisdiction, treating knowledge as though it is not problematic would strip the test findings of policy implications.

Even if the issue of knowledge of punishments could be ignored, reducing Premise I to a simple bivariate proposition ignores the distinct possibility that the relation between any objective property of punishment and any perceived property is markedly contingent on one or more conditions (the relation between objective certainty and perceived certainty is contingent on publicizing punishments, for example). The possibility of markedly contingent bivariate relations is no less likely for Corollaries I and II, where some kind of crime rate is the dependent variable. Bentham himself implied that the relation between the severity of punishment and the crime rate is contingent on the certainty of punishment, and there is no basis for arguing that the contingent quality of the relation is peculiar to severity and certainty taken as objective properties. However, Bentham failed to stipulate the exact nature of the contingent relation; and there are at least two possibilities: (1) the relation between the severity of punishment and the crime rate becomes more inverse as the magnitude (level) of certainty increases or (2) the relation becomes more inverse as the *variance* in certainty decreases. Yet a theorist can ill afford to ignore the possibility that the relation between the perceived or objective certainty of punishment and the crime rate is itself contingent on the severity of punishments, with the nature of the contingency also a matter of conjecture.

This litany of complexities is more than a burden for theorists. If a deterrence theory is to have policy implications, the contingent nature of the postulated relation between properties of punishment and the crime rate must be communicated to those who shape policy. The point is well illustrated by the actions of American legislators in reintroducing the death penalty during the 1970s. Ostensibly, these attempts were made in whole or in part to further deterrence; but the mere reintroduction of a statutory penalty does not assure any level of certainty. Moreover, the death penalty may have a lesser deterrent effect than does life imprisonment simply because the objective certainty of execution is substantially less than the objective certainty of imprisonment. Such can be the case even if potential offenders perceive the severity of the death penalty as greater than life imprisonment (see Bedau 1982, p. 110). Yet legislators appear insensitive to the contingent impact of the presumptive severity of prescribed punishments, perhaps because there

[9]For an elaborate treatment of the "knowledge problem" and a report of numerous strategic research findings, see Kirk Williams (1977).

is no legislative formula for increasing objective certainty, especially without abandoning a concern for due process.

EVIDENTIAL PROBLEMS PERTAINING TO GENERAL DETERRENCE

There are all manner of alternative methods and kinds of data for the numerical expression of properties of punishment, and the outcome of tests of a deterrence theory is likely to depend on the choice among those methods. Moreover, tests of any deterrence theory may differ as to types of punishment (perhaps only imprisonment), types of crimes (probably those with victims), and types of units of comparison (individuals, territorial units, or types of crime). A theorist may elect to leave the choice in such matters to researchers; but some evidential problems transcend all such considerations, including measurement methods, and a theorist should strive to stipulate a test procedure that avoids those problems.

The Attribution of Assumptions

The immediate evidential problem stems from a common practice in the assessment of social science theories. Rather than test a theory, critics purport to identify the assumptions about human nature or social life underlying the theory. If the putative assumptions are rejected by the critic—that is, they run contrary to the critic's preconceptions—then so much the worse for the theory. The identification of the assumptions of a theory, however, is typically no less disputable than the critics' judgment of them.

The Question of Free Will One traditional but waning criticism of the deterrence doctrine begins with attributing to it the assumption of free will (see, for example, Schuessler 1952, p. 55). The argument seems to be that the doctrine depicts potential offenders as weighing the risk of punishment against the benefits of the contemplated crime before making a calculated choice. That criticism is mercifully brief, for it does not go beyond the *suggestion* that any theory of human behavior is somehow defective if it assumes free will.

The attribution of the assumption of free will to the deterrence doctrine is strange, if only because the doctrine can be construed as thoroughly deterministic. The following is an oversimplified reduction of the doctrine to one proposition. If in contemplating a crime, the potential offender perceives the legal punishment for that crime as certain, swift, and severe, he/she will refrain from the crime. In what sense does that proposition attribute free will to potential offenders? Even if the proposition suggests that potential offenders experience a choice, that experience cannot be equated with free will. While consistently positive test findings could blunt the particular criticism, demanding such findings is grossly unrealistic, especially in the social sciences. Since no test procedure or outcome can induce critics to cease the attribution of the assumption of free will to the deterrence doctrine, the issue is beyond constructive debate.

The Question of Rationality A more common criticism attributes the assumption of rationality to the deterrence doctrine. This criticism is truly difficult to assess, if only

because "rational human behavior" is a vague notion. Surely the term means more than the simple assertion that human beings commonly engage in behavior with a view to consequences; yet, at least in connection with criminality, it is very difficult to go beyond that idea. If it is claimed that the deterrence doctrine depicts potential offenders as weighing the "costs" of a contemplated crime in terms of punishments against the anticipated benefits, the implied criticism is similar to the argument about free will.

Evidence that some individuals commit crimes without regard to the consequences would not resolve the issue, since the deterrence doctrine does not assert that all individuals consciously contemplate the risk of punishment. The doctrine can be construed as resting on some assumption about accurate knowledge of punishments, but that assumption cannot be equated with the assumption of rationality. Accuracy of knowledge is not even relevant if the deterrence doctrine is stated as a purely perceptual theory, excluding anything akin to Premise I (Figure 1).

Even instances of offenses without prior contemplation of legal consequences would not refute the deterrence doctrine, since it does not reduce to the naïve claim that "punishments prevent crimes through deterrence." Rather, it pertains to *the conditions* in which punishments will deter crime. Surely it is one thing for murderers to kill without previously contemplating the consequences when the objective certainty of the death penalty, or any other punishment, has been, say, 5 percent over several generations; but quite another for them to kill without prior contemplation of legal consequences when the objective certainty of execution has been, say, 90 percent for generations, with all executions widely publicized. Instances of murder in the latter condition would undeniably constitute much more damaging evidence against the deterrence doctrine, but the frequency of "crimes without prior contemplation of legal consequences" may be a function of properties of punishment.

Finally, even if the deterrence doctrine does rest squarely on some assumption about the rationality of criminal behavior, it is not at all clear how that assumption invalidates the doctrine. To deny that human behavior is rational is scarcely more credible than to deny the opposite. The point is that categorical judgments as to the rationality of human behavior (all individuals, behaviors, and situations) are indefensible; and the point is relevant because the deterrence doctrine pertains to criminal behavior, not behavior in general. Accordingly, the fact that human beings have been known to starve rather than eat cattle (a common but ethnocentric illustration of irrational behavior) has no bearing on the deterrence doctrine.

The debate is likely to endure. If critics insist that the deterrence doctrine assumes that criminal behavior is rational and reject that assumption out of hand, there is no assurance that even consistently positive test findings would silence them.

Extralegal Conditions

Defenders of the deterrence doctrine have never claimed that the crime rate is a function of legal punishments only, and that claim is denied explicitly whenever critics present what appears to be contrary evidence. If the robbery rate is appreciably greater in jurisdiction *A* than in *B*, despite appreciably greater certainty, celerity, and severity of punishment in *A*, defenders of the doctrine can argue that *A*'s robbery rate would be even greater if the legal punishments in *A* did not counteract extralegal conditions that

generate robbery in A. The argument thus appears to be simple: properties of legal punishments are *not* the only determinants of the crime rate. While no one questions that argument, acceptance of it gives rise to a horrendous evidential problem. The correlation between properties of punishment and the crime rate is indicative of the deterrent efficacy of legal punishments only if all relevant extralegal conditions (such as, possibly, unemployment) have been controlled. Until relevant extralegal conditions are controlled, therefore, the interpretation of tests of any deterrence theory will be inherently disputable.

Extralegal Generative Conditions Excluding the deterrence doctrine, no well-known theory of criminality treats legal punishment as a determinant of the crime rate; those theories therefore pertain largely if not exclusively to extralegal conditions. If those theories commanded confidence, a major evidential problem in deterrence research could be circumvented by controlling for variables identified by the theories as determinants of the crime rate. Unfortunately, the theories have never been tested systematically, and they appear untestable.

Recognition that extralegal determinants of criminality cannot be identified defensibly has led some deterrence researchers to examine the relation between properties of legal punishments and the crime rate without introducing controls. That strategy is obviously not a solution, but the alternative strategy—introducing extralegal variables as controls without justification—is hardly more defensible. Yet in examining the relation among states between properties of punishment, numerous investigators have introduced measures of education, income, racial composition, urbanization, and other conditions as control variables without reference to any well-known etiological theory, let alone one that commands confidence. The strategy cannot be defended by pointing to a statistical association between extralegal variables and the crime rate in a particular set of units for a particular time (such as the United States during 1980), since that justification is no more than crude induction. Most of these studies have employed powerful statistical techniques to control for extralegal variables (see, for example, Ehrlich 1975), but it is an illusion to assume that the evidential problem can be solved without reference to an explicit and defensible etiological theory about the type of crime in question.

Extralegal Inhibitory Conditions The vast majority of well-known theories of criminality purport to identify extralegal conditions that generate crime, and only a few theories postulate particular inhibitory conditions—extralegal conditions that prevent crime. One of those conditions can be identified as *normative* in that it pertains to what is variously identified as the social disapproval, social condemnation, or "seriousness" of criminality. The normative variable is especially relevant because of the distinct possibility that social disapproval of crime varies inversely with the crime rate but directly with the objective certainty and severity of punishment. The argument in the case of the relation with objective certainty is that legal officials invest more resources in the investigation and prosecution of types of crimes that are subject to intense social disapproval. That possibility creates a major evidential problem.

Only recently have deterrence researchers examined the interrelations among measures of social disapproval of crime, the crime rate, and the certainty of punishment—and their findings are disconcerting. Briefly, among types of crimes or delinquencies,

there is a substantial negative correlation between the crime rate and the perceived certainty of punishment but a substantial positive correlation between measures of social disapproval and the crime rates. The measures of disapproval are correlated positively with both the perceived and the objective certainty of punishment (Erickson and Gibbs 1978). While the negative correlation between the crime rates and the perceived certainty of punishment is consistent with the deterrence doctrine, the findings suggest that potential offenders perceive the certainty of punishment of particular types of crime in terms of what it should be (that is, the more the social disapproval, the greater the perceived certainty). In any case, the correlation between perceived certainty and the crime rate is negligible when social disapproval of types of crime is controlled. Those findings underscore the reality of the evidential problem.

Policy Implications If positive tests of deterrence propositions without controls for extralegal conditions prompt those who shape penal policy to manipulate properties of punishment with a view to reducing the crime rate, the outcome can be contrary to expectations in one of two ways. Either the manipulation of properties of punishment (increasing the presumptive severity of prescribed punishments, for example) is not followed by a decline in the crime rate, or it is followed by a negligible decrease in the crime rate. The first outcome is especially likely if the relevant extralegal generative variables vary directly with the properties of punishment, in which case no decline in the crime rate would be misleading. The second outcome would indicate no relation between extralegal generative variables and properties of punishment.

Misleading evidence of deterrence is especially likely to stem from research on the cross-sectional (synchronic) relation between properties of punishment and the crime rate rather than the relation between *change* in the two variables over time (a diachronic relation). Virtually all deterrence research has been limited to cross-sectional comparisons, but those who shape penal policy are not likely to appreciate the distinction. For that matter, the most pernicious myth in social science methodology is that path analysis or so-called causal models justify causal inferences from synchronic statistical relations.

If those who shape penal policy are to be guided by a deterrence theory, they should demand that tests of the theory take the form of diachronic comparisons. However, if such tests exclude controls of extralegal variables that can be justified by reference to theory about the extralegal conditions that generate or inhibit criminality, the findings will simply be inconclusive.

Preventive Mechanisms Other Than Deterrence

Regardless of the thoroughness of controls for extralegal conditions, not even repeated demonstrations of an inverse relation between change in some property of punishment and subsequent change in the crime rate would constitute conclusive evidence of deterrence. That is the case because there are no less than nine ways other than deterrence that punishments can prevent crimes (Gibbs 1975). This survey will restrict itself to a few observations on what appear to be the three most important nondeterrent preventive mechanisms as regards evidential problems and policy implications.

Incapacitation If the police in a particular metropolitan area arrest a gang of well-organized, active burglars and if those arrests all result in imprisonment, the objective

certainty of incarceration for burglary is likely to increase and the burglary rate decrease. Such a temporal relation would appear to be a dramatic manifestation of deterrence, but it is also possible that the decline in the burglary rate reflects only the incapacitation of potential burglars.

No imagination is required to appreciate the argument that some punishments—imprisonment and execution in particular—have an incapacitating effect, but it is less obvious that what appears to be evidence of deterrence may reflect only incapacitation. The most consistent evidence of deterrence has been an inverse relation among states between the objective certainty of imprisonment for a type of crime and the rate of that crime. That relation is consistent with Corollary II (Figure 1) of the deterrence doctrine; however, the conclusion that the relation verifies the premises of the doctrine commits the fallacy of affirming the consequent. The relation can always be deduced from premises that pertain to the incapacitating effects of imprisonment rather than deterrence.

The vast majority of deterrence researchers have recognized the need to control for incapacitation when testing deterrence propositions; but efforts at control confront many problems, some of which transcend the obvious (for example, only execution incapacitates absolutely, and imprisonment for one type of offense may prevent other types of offenses). The less obvious problems stem from recognition that estimates of the incapacitating effects of any kind of punishment entail conjecture.[10] If, for instance, an individual who committed four rapes during 1980 was imprisoned during 1981–84, the suggested conclusion is that his imprisonment prevented sixteen rapes. The conjectural quality of the conclusion is undeniable even if the individual had been convicted for the first rape in 1980 and placed on probation, in which case it could be argued that his three subsequent rapes would not have occurred had his conviction resulted in a long prison sentence. In any event, when attempting to compute an average "incapacitation figure" for a particular set of individuals (such as all persons arrested for rape in Los Angeles during 1980), it is pointless to assume that their previous arrests or convictions even approximate the actual number of previous offenses. Even if arrests or convictions could be equated with the actual number of offenses, an average of those official recidival statistics for particular individuals cannot be justifiably generalized to all offenders. Apprehension may select those who commit the offense frequently and/or those who are inept and are apprehended early in their careers. Nonetheless, in assessing the implications of incapacitation for penal policy, a generalization to *categories* of perpetrators must be entertained.

The only obvious alternative to the use of official recidival statistics is a survey of self-reported crimes, including self-reports of legal reactions (such as arrest, plea bargaining, and substantive punishments). Data from such a survey in only a few metropolitan areas could be used to test deterrence propositions. The immediate use, however, would be to examine the repetitive rates to reach inferences about incapacitation. Generally, to the extent that imprisonment is not selective (and self-reported data provide a systematic basis to examine selectivity), the incapacitating effect of imprisonment on the conventional rate for some type of crime is a direct function of the repetitive rate for that crime.

[10]Given the inevitable conjectural quality of estimates of the incapacitating effect of punishments, imprisonment in particular, it is not surprising that investigators have employed divergent methodologies and commonly disagree in their conclusions about the impact of incapacitation on the crime rate (see Cohen 1983).

Both the impunitive repetitive rate and the repetitive recidival rate are crucial in assessing penal policy as it applies to repeaters. In the 1970s legislators increasingly prescribed longer terms of imprisonment for recidivists, but their rationale was not entirely clear. In any case, there is a general issue, one best introduced by the question: "How many instances of each type of crime are committed by recidivists and other repeaters (those who have not been punished)?" The justification of the concern of legal officials with so-called habitual offenders or professional criminals hinges on the answer, but there can be no defensible answer without *unofficial* repetitive and recidival rates.

Until researchers gather unofficial statistics on crimes and legal reactions, controls for incapacitation in tests of deterrence propositions require special strategies. One strategy is to focus on categories of offenses seldom subject to incapacitating punishments. The category of traffic violations is especially strategic, because researchers can employ both official and unofficial incidence figures, the latter from field studies.

Normative Validation Emile Durkheim's antipathy to utilitarianism (1949 [1893]) led him to emphasize the expressive or symbolic function of legal punishments rather than deterrence. However, because of his inconsistent terminology and garbled arguments, it is not commonly recognized that Durkheim identified a mechanism by which legal punishments may prevent crimes other than through deterrence. That mechanism is designated here as normative validation, and the argument was succinctly illustrated by Sir James Stephens: "The fact that men are hanged for murder is one great reason why murder is considered so dreadful a crime" (quoted in Zimring and Hawkins 1973, p. 80).

Stating the argument more abstractly, legal punishment generates, reinforces, or sustains the condemnation of crime; and individuals are unlikely to commit a type of crime if they intensely disapprove of it. Assuming, for example, that the typical American male condemns rape to the point of never contemplating its commission, it is entirely possible that legal punishments played a part in forming that condemnation and/or in its maintenance. To illustrate another possibility, students may enter a university with a deep-seated condemnation of smoking marijuana; but on coming to know of numerous impunitive reactions to smoking pot, these students engage in the very behavior that they previously deplored.

Some critics reject the distinction between deterrence and normative validation, especially since deterrence researchers commonly do not recognize any nondeterrent preventive mechanism other than incapacitation (see, for example, Blumstein et al. 1978, pp. 3–90). Yet the central notion in deterrence is fear of punishment; and some individuals refrain from committing certain types of crimes, not out of fear of punishment, but ostensibly because they condemn such crimes. Thus, legal punishments could prevent crimes indirectly by maintaining or reinforcing the social condemnation of criminality.

The only reason for ignoring the distinction between normative validation and deterrence is that it creates still another evidential problem. Specifically, since the very properties of punishment that supposedly give rise to deterrence also supposedly promote normative validation, controls for the validating effects will be even more difficult than controls for incapacitating effects. There is no doubt that execution or imprisonment incapacitates to some extent, but whether legal punishments generate, maintain, or reinforce the condemnation of crime is debatable; and no research bears directly on the question, nor is there an obvious research methodology. Even if legal punishments do

validate the social condemnation of crime, the extent to which the rate for any type of crime is a function of social condemnation is unknown. Nonetheless, the idea of normative validation is scarcely incredible.

The possibility that legal punishments prevent crimes through normative validation can be taken into account in testing deterrence propositions, providing researchers are willing to employ a limited control strategy not free of conjecture. The conjecture is that the social condemnation of some offenses (such as parking violations) is so negligible that there is "nothing" for legal punishments to sustain, and the punishments are perceived as so mild that they probably do not generate social condemnation.

Stigmatization Depending on the community and/or social class of offenders, their associates may view a legal punishment as the ultimate criterion of offenders' guilt, and the severity of any punishment symbolizes the enormity of the offense. Such considerations are especially relevant in contemplating what appears to be indisputable—that some crimes result not merely in the legal punishment of alleged offenders but also in their *stigmatization,* as manifested in an offender's loss of friends, spouse, job, license to practice an occupation, reputation, credit, and the like. Some offenders may perceive such extralegal consequences as more painful than the legal punishment itself; and to that extent legal punishments prevent crimes indirectly, through offenders' fear of extralegal correlates.

The distinction between deterrence and stigmatization gives rise to still another evidential problem. As in the case of incapacitation or normative validation, the very properties of legal punishment that supposedly generate deterrence may further stigmatization; and the similarity also extends to methodological questions. There is no obvious general strategy of controls for stigmatization in deterrence research, meaning one that can be applied regardless of the type of crime in question. The only obvious limited strategy is to focus deterrence research on parking violations, the assumption being that potential offenders scarcely anticipate a stigmatizing correlate of the legal punishment.

Controls for stigmatization are necessary only if it is assumed that numerous potential offenders refrain from crime in anticipation of both legal punishment and painful extralegal consequences. But no research findings establish the importance of stigmatization as a preventive mechanism.[11] Nonetheless, when it comes to publicizing legal punishments to promote fear of stigmatization, policy makers should confront the possibility of a counterproductive policy. Briefly, if there is merit to the theory of secondary deviance (Lemert 1972), legal punishments may increase the recidival rate perhaps to an even greater extent than the reductive effect that fear of stigmatization has on the impunitive categorical or repetitive rate.

That result is distinctly possible in regard to the lower class and to certain racial-ethnic minorities. The fear of stigmatization may be negligible in such divisions of the population, for it is a testimonial to the solidarity of the politically powerless that they attach no significance to legal punishments. Nonetheless, while the "have nots" may see no inherent value in their means of livelihood, the deprivation of employment opportunities or

[11] Some suggestive findings (see, especially, Tittle 1980, and Zimring and Hawkins 1973, pp. 190–94) do exist, however.

credit as a consequence of a felony conviction could induce them to resort to illegal means.

Evidence that legal punishments have no preventive functions would give rise to wonderment. It is far more plausible to assume that legal punishments both generate and inhibit criminality. When that assumption is seriously entertained, the stigmatization mechanism will receive a more serious hearing than is now the case.

Nondeterrent Preventive Mechanisms and the Target Population Nondeterrent preventive mechanisms present particularly serious evidential problems in tests of Corollary II of the deterrence doctrine (Figure 1). However, while a demonstrated inverse relation between the objective certainty of imprisonment and the crime rate may reflect incapacitation rather than deterrence, the same cannot be said for the relation between the perceived certainty of imprisonment and the crime rate (which bears on Corollary I of Figure 1), especially if no relation exists between objective certainty and perceived certainty. The latter relation is all the more important since it bears directly on Premise I and gives rise to fewer evidential problems than do tests of corollaries. Yet a test of any propositional version of Premise I or of Corollary I requires surveys of potential offenders about their perceptions of the properties of legal punishments.

The term "potential offenders," used throughout this essay, is ambiguous. Attempts to clarify the term's meaning raise another issue, since there are opposing ideas about the appropriate definition for purposes of deterrence research. The few surveys that have gathered data on perceptual properties of punishment used for their respondents a presumably representative sample of adults or juveniles. That "representative" strategy has been expressly or tacitly rejected by certain critics (see, for example, Cousineau 1973) on the grounds that some individuals are not really potential offenders. The argument is hardly naïve, since most citizens may be so "law-abiding" that they never seriously contemplate certain types of crimes (for example, rape or murder); and individuals can be deterred by the threat of punishment only if they contemplate committing crimes. In strictly logical terms, however, virtually all members of a population above a certain age are potential offenders, especially when the conventional crime rate is the dependent variable in research on general deterrence, for the total population is the denominator of that rate. In any event, it is by no means clear what alternative the critics propose. It will not do to speak of "hard-core offenders" or "professional criminals," since extant definitions of either term are either extremely vague or arbitrary. Moreover, the critics do not indicate how one can justify testing the deterrence doctrine by focusing on those individuals who have been least deterred.

Nonetheless, the identification of "potential offenders" does constitute a serious problem in deterrence research, and it will become even more crucial when researchers attempt to test Premise I and Corollary I (Figure 1). However, the use of the repetitive rate in research on general deterrence may resolve the problem. While its use would avoid the idea that a hard-core or professional class of criminals can be defined and identified, the conclusions would have to be limited to restrictive deterrence. This is not necessarily a crippling restriction, for restrictive deterrence may be the only significant kind of deterrence in American criminal justice. In any case, it is surely pointless to search for evidence of categorical general deterrence among those who obviously have not been deterred.

A Radical Solution of the Mechanism Problem The only alternative to limited strategies of controls for nondeterrent preventive mechanisms is to abandon all pretense of testing deterrence propositions and to formulate a theory about the general preventive effects of legal punishments. In that light, all previous purported tests of the deterrence doctrine (including the early death penalty studies) are tests of an implicit theory of general preventive effects; and such will remain the case as long as nondeterrent mechanisms are left uncontrolled.

In formulating a theory of general preventive effects, it may be feasible to ignore perceptual properties of punishments because they appear truly crucial only in attempts to distinguish preventive mechanisms. Nonetheless, distinctions as to kinds of preventive mechanisms will remain relevant for penal policy. Should it ever be demonstrated that increases in the certainty and length of imprisonment are the only mechanisms regularly followed by a decrease in the crime rate, then it would surely appear that incapacitation is a major preventive mechanism, since incapacitation operates only through actual punishments. Such a possibility has real import for penal policy. If legal punishments prevent crimes primarily through the incapacitating effects of imprisonment, a substantial reduction of the crime rate will be very costly (see Cohen 1983). Similarly, should it be shown that changes in legal punishment (reintroduction of the death penalty, for example) are followed by changes in the crime rate only some twenty years later (a period effect), the notion of normative validation would become a central consideration in penal policy. Finally, given evidence that the preventive impact of legal punishment is markedly contingent on social class, race, or ethnicity, the notion of stigmatization would warrant more theoretical attention; and those who shape penal policy would be haunted by the incompatibility of democratic principles and "effective" criminal justice.

A BRIEF SURVEY OF RESEARCH FINDINGS ON GENERAL DETERRENCE

The early studies of the death penalty and most studies on deterrence after 1967 supposedly pertained to general deterrence.[12] However, since those studies took the conventional crime rate as the dependent variable, the research designs did not distinguish between general and specific deterrence, nor between restrictive and absolute general deterrence. Additionally, five more obvious defects marred the designs of these studies. First, they were limited to one or two properties of legal punishments—predominantly objective certainty and presumptive severity. Second, the vast majority of researchers considered only one type of substantive punishment—either execution or imprisonment. Third, virtually none of the studies attempted any controls for nondeter-

[12] Because of space limitations, this review of research findings and the subsequent review concerning specific deterrence focus primarily on the American literature. Deterrence research currently does not have a large following outside of North America—an unfortunate circumstance for two reasons. First, comparable studies in various countries are needed to ascertain whether the validity of deterrence propositions is contingent on the cultural context; and, second, official crime statistics in several European countries offer greater opportunities for deterrence research than do statistics for the United States. No attempt is made here to improve on Zimring's incisive survey (1978) of experiments in law-enforcement practices (such as the volume and locus of police patrols) in connection with general deterrence. Readers should also look to Ross (especially, 1984) for an extensive treatment of deterrence and traffic violations.

rent preventive mechanisms. Fourth, in the few instances where researchers attempted to control for extralegal conditions, the rationale for the selection of the control variables was obscure and dubious at best. And, fifth, few studies examined the relation between *change* in properties of punishment and *change* in the crime rate.

The Early Death Penalty Studies

Systematic and extensive research on general deterrence commenced with studies in the 1950s of the relation between the death penalty and the criminal homicide rate. With remarkable consistency, it was found that abolitionist states tend to have lower rates than retentionist states and that there is no relation between the abolition or reintroduction of the death penalty and trends in the homicide rate. (For extensive critiques of these studies, see Bailey 1976 and Bedau 1982.)

In recognition of the defects of the early studies on the death penalty—especially failure to consider objective certainty—an investigator conducted an econometric analysis of annual trends in the United States homicide rate between 1932 and 1968 and reached a startling conclusion: "On the average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933–67 in the United States" (Ehrlich 1975, p. 398).

Despite Ehrlich's introduction of a crucial variable—the estimated objective certainty of execution—his study promptly attracted critics (see the latest review by Forst 1983). For the most part criticism focused on the reliability of Ehrlich's data and his vast array of complex statistical manipulations. Less attention was devoted to the fact that, as in the early studies of the death penalty, Ehrlich's incidence figures pertain to criminal homicide and not to capital murder, raising questions not only about his dependent variable but also about his estimates of the objective certainty of execution. It should also be pointed out that, first, Ehrlich's independent variables did not encompass several possibly relevant properties of punishment, perceptual properties in particular; second, his control for incapacitation was based on an arbitrary estimate of the repetitive murder rate; and, third, he introduced various extralegal variables, such as per capita income, that cannot be justified by reference to a theory. Finally, the most specific and perhaps most telling criticism of Ehrlich's conclusion is suggested by Glaser (1977, p. 244): "The . . . data . . . show a direct relationship between use of the death penalty and homicide rates during 1933–63 . . . and an inverse relation thereafter." Even the nature of the association between the increase in the homicide rate and the decline in the estimated objective certainty of execution in the 1960s (the only period of an obvious inverse relation between the two variables) is disputable. The same increase in the homicide rate took place in states where the death penalty was abolished long before 1960—indeed, even before 1933 (Zeisel 1976).

Policy Implications Granted that the early studies of the death penalty excluded numerous possibly relevant properties of punishment and rested on the unstated assumption that execution is perceived by potential murderers as a more severe punishment than life imprisonment, those studies are nonetheless more relevant in assessing recent penal policy trends than is Ehrlich's study. The latter is hardly relevant, because legislators

have only reinstated execution as a statutory penalty, which in itself assures no objective certainty. By contrast, because the earlier studies were concerned primarily with the association between statutory provision for execution and the criminal homicide rate, the findings of these studies are relevant; and they provide no basis for expecting that the reinstatement of capital punishment will be followed by a decline in the criminal homicide rate.

Even though the findings of deterrence research do not provide answers to several questions about penal policy, they surely suggest an argument American legislators persistently ignore when they reinstate the death penalty to promote deterrence. Briefly, quite apart from any humanitarian objections, the deterrence doctrine in itself supplies an argument against reinstating the death penalty. It is not possible to arrive at a truly defensible estimate of the objective certainty of execution before its de facto or de jure abolition in 1967; but all estimates suggest that it was several times *less* than the objective certainty of imprisonment for murder. Accordingly, granted that some systematic but limited data now show that the public perceives execution as more severe than life imprisonment (Bedau 1982, p. 110), the difference in perceived severity does not remotely approach a conservative estimate of the difference in the objective certainty of the two punishments. The point is all the more relevant since there is no basis for anticipating that the objective certainty of the death penalty will be remotely equal to its estimated level in the 1950s. Thus, while deterrence is a common rationale for reintroducing the death penalty, the deterrence doctrine itself casts doubt on that rationale.

The Objective Certainty of Imprisonment

Since 1967, a series of deterrence studies (for surveys, see Gibbs 1975; Blumstein et al. 1978; Cook 1980; and Tittle 1980) has reported an inverse relation between the objective certainty of imprisonment and the crime rate. The findings, which bear on Corollary II of the deterrence doctrine, are noteworthy in that the relation holds for several types of crimes and among various kinds of territorial units (such as states and counties). Nonetheless, the significance of the findings is disputable.

The most crippling doubt is the possibility of a statistical artifact, stemming from the fact that the relation is between the two ratios (Ni/C) and (C/P), where P is the population size of a territorial unit, C the official number of crimes reported as having occurred in the territorial unit during some period, and Ni the estimated number of such crimes that resulted in the imprisonment of an offender. Since C is the numerator of one ratio (the crime rate) and the denominator of the other (certainty of imprisonment), the argument holds that an inverse relation between the two ratios can be expected on grounds of probability alone (or, a different argument, because of measurement error in C). Considerable attention has been devoted to the problem (Logan 1982, for example), but there appears to be no technique of analysis that can resolve the issue, largely because in such a situation the notion of probability is especially ambiguous.

Several deterrence researchers have raised still another doubt about the relation by suggesting that the causal direction could be opposite to that implied by the deterrence doctrine. According to the "overload model" (Geerken and Gove 1977), a relatively high crime rate exhausts the resources of the criminal justice system for investigation, apprehension, prosecution, and imprisonment; hence, a relatively high crime rate results

in relatively low objective certainty of punishment. Treatments of the problem indicate that the findings of deterrence research are likely to be misleading if limited to synchronic analyses (see, for example, Nagin 1978 and Greenberg and Kessler 1982).

While the inverse relation between the objective certainty of imprisonment and the crime rate is statistically significant for several types of crimes (robbery, for example), no study has shown that the certainty of imprisonment explains more than 50 percent of the variance in the rate for any type of crime; and the variance explained for some types of crime is negligible. Perhaps more important, for no type of crime is the relation between the certainty of imprisonment and the rate even approximately uniform over time (for example, 1950, 1960, 1970, 1980), although the same kinds of data, research procedures, and territorial units have varied little over time.

Resolving doubts about the findings will require both diachronic analysis and controls for extralegal variables. However, the suggestion is not that the identification of relevant extralegal variables should be the goal of deterrence research. That identification is the office of criminological theory, and deterrence researchers should concentrate on more immediate doubts about the relation between the objective certainty of imprisonment and the crime rate. Those doubts center primarily on (1) the relevance of punishment properties other than objective certainty, (2) the impact of plea bargaining on estimates of the certainty of imprisonment, (3) the reliability and utility of the conventional crime rate, and (4) the temporal lag between change in the variables (see Chiricos and Waldo 1970 and related commentary by Gibbs 1975, p. 172).

Should future research yield compelling evidence that there is no relation between the objective certainty of punishment (or any other punishment property) and the rate for particular types of crime, a theory of general deterrence would still be feasible. Deterrence theorists should recognize the distinct possibility that legal punishments deter some types of crime much less than others. The argument for recognition of that possibility extends to the assertion that "instrumental-low commitment" types of crimes are more deterrable than "expressive-high commitment" types (Chambliss 1967). Unfortunately, it is doubtful if agreement can be reached in the application of the typology, especially in classifying official types of crimes, such as larceny, rather than particular crimes; and insofar as types of crime can be fitted into the scheme, the findings of deterrence studies do not support the argument (see Gibbs 1975, p. 212).

Policy Implications Not even proof of a truly close inverse relation between the certainty of imprisonment and the crime rate would have immediate policy implications, for while legislators can readily increase statutory terms of imprisonment, they cannot raise objective certainty in some direct way. Indiscriminate allocation of more resources to the criminal justice system would not assure an increase in the objective certainty of punishment. Given the fact that the specific reasons for the very low certainty of imprisonment (in some United States jurisdictions, as low as 25 percent even for criminal homicide) are not obvious, allocation of more resources to a particular division of the criminal justice system (such as increasing the quality and/or quantity of police officers) may not increase the objective certainty of imprisonment. A substantial increase would require major changes in procedures or practices (those governing plea bargaining, for example) that are somewhat independent of resources. In any event, jurisdictions probably differ as to the locus of the resource shortage in the criminal justice system (under-

staffed prosecutorial offices in some states, overcrowded prisons in others, and so on). Accordingly, if deterrence studies are to have real policy implications, there is a pressing need for research on alternative strategies for manipulating the objective certainty of punishment.

The ultimate question revolves around the point at which the allocation of resources to the criminal justice system has diminishing returns for any given type of jurisdiction. But the answer, which requires a cost-benefit analysis, bears on a much larger problem. The deterrence doctrine supposedly identifies, albeit vaguely, changes sufficient to reduce the rate for a given type of crime to some specified level. Legislators have yet to stipulate a "tolerable" crime rate and its acceptable cost. A substantial reduction in crime may require an increase in the objective certainty of imprisonment far beyond the resources legislators are willing to allocate to criminal justice. Indeed, it may prove that only a radical abandonment of due process would raise the level of objective certainty to that point.

Controls for extralegal variables are just as essential to assess policy implications as to assess the validity of the deterrence doctrine. In assessing implications, however, regression rather than correlational analysis is needed if those who shape penal policy are to have some idea about the proportional relation between change in the objective certainty of imprisonment and subsequent change in the crime rate. Though the deterrence doctrine will have policy implications even if extralegal conditions cannot be manipulated along with properties of punishment, a defensible estimate of the deterrent efficacy of changes in punishment requires at least statistical controls for extralegal conditions in tests of the doctrine. Such controls are no less important with a view to distinguishing types of crimes as to potential deterrence. If legislators ever undertake a thoughtful application of the deterrence doctrine, it would be strategic to focus on the type of crime that is seemingly most amenable to deterrence. The inability of deterrence theorists to identify that type is unfortunate; and its identification may have to be inductive, making controls for extralegal variables in research all the more essential.

Presumptive Severity: Length of Imprisonment

With remarkable consistency, deterrence researchers have reported no significant inverse relation among states between the average prison sentence served for a type of crime and the rate for that crime (for references, see Gibbs 1975; Blumstein et al. 1978; Cook 1980; and Tittle 1980). True, the vast majority of studies has analyzed only the synchronic relation between the two variables, and inferences from that kind of analysis as to the diachronic relation would be little more than conjecture. Yet the lack of evidence of an inverse relation between change in average sentences served and change in crime rates (Chiricos and Waldo 1970) is all the more puzzling in view of the belief that both deterrence and incapacitation are functions of actual incarcerations.

The most immediate doubts about the evidence stem from unanswered questions concerning the reliability of the official crime rates and the impact of plea bargaining on estimates of the length of prison sentences served. Other doubts about the length of prison sentences served stem from theoretical considerations, one of which is suggested by the deterrence doctrine itself. While there is some evidence that the relation between the presumptive severity of actual punishments and the crime rate may be somehow

contingent on the objective certainty of punishment (see commentary in Tittle 1980), it is doubtful if partial correlation can reveal its nature. In some instances, the relation between length of imprisonment and the crime rate is inverse when objective certainty is partialed (that is, subjected to statistical control); but even in those instances the inverse relation is not substantial for any type of crime and absent entirely for other types. The outcome is not really surprising, since partial correlation or any similar statistic cannot reveal a "threshold effect," which would obtain if a substantial inverse relation between severity of punishment and the crime rate appears only when all units of comparison (such as states) exceed a particular level of objective certainty. There is also evidence of a more complex contingency in which the expected inverse relation between length of imprisonment and the crime rate becomes truly substantial only when variance in objective certainty among the units of comparison is literally reduced to a negligible level (Erickson and Gibbs 1973). However, the evidence is limited to criminal homicide and stemmed from an unconventional mode of analysis; therefore, the findings are only suggestive. Since the data required for extensive research on the possibility of a contingent relation are readily available, it is unfortunate that deterrence researchers have slighted the subject.

The other possible explanation of a negligible relation between length of imprisonment and the crime rate pertains to a general principle concerning any behavioral theory: whatever the variables, the relations among them do not hold for extreme values. The principle directs attention to the possibility of a "ceiling effect" in the relation between length of imprisonment and the crime rate—the expected inverse relation may not hold beyond some point in the duration of incarceration. Since prison sentences served for felonies are appreciably greater in the United States than in certain European countries, that possibility is not truly far-fetched, especially since even one year of imprisonment is hardly a slap on the wrist. Long prison sentences supposedly promote general deterrence, specific deterrence, and incapacitation. However, since there are many ways in which prolonged incarceration can offset the specific deterrent impact, if any, of the initial year, it is possible that recidivism is checked more effectively by short prison sentences (see Gibbs 1975, p. 73).

Policy Implications The lack of evidence of an inverse relation between length of imprisonment and the crime rate casts doubts on recent actions by American legislators to impose mandatory prison sentences without possibility of parole for various types of felonies. While those actions will increase the length of prison sentences actually served, research findings provide no basis whatever for anticipating a subsequent decrease in the crime rate.

If the presumptive severity of actual punishments does have some ceiling effect and if actual prison sentences in the United States have already exceeded that point, further increases will not reduce the crime rate. For that matter, if an increase in the presumptive severity of imprisonment decreases the crime rate only when the objective certainty of imprisonment exceeds some critical level, recent actions of legislators will not decrease the crime rate, because those actions do not assure an increase in the objective certainty of imprisonment.

Individuals as the Units of Comparison

Given the widespread belief that only individual correlations reveal causation, critics are likely to regard tests of the deterrence doctrine at the aggregate level (for example, interstate comparisons) as inadequate. The contrary argument holds that a thorough assessment of the deterrence doctrine requires various kinds of comparisons. In any event, there is now a substantial literature on deterrence research in which individuals have been taken as the units of comparison (see references in Paternoster et al. 1982).

While the data and the procedures of these studies vary considerably from one to the next, certain general shortcomings and merits of deterrence studies at the individual level can be identified. The most conspicuous shortcoming is that virtually all studies have been limited to juveniles or college students and to a few types of crime or delinquency, including status offenses (the exclusion of homicide, robbery, and rape is especially conspicuous). The major merits of the studies are their focus on the perceptual properties of punishment and the use of offense rates based on self-reported delicts (crimes or delinquencies); hence, the studies have expanded the range of evidence beyond that generated by studies at the aggregate level. However, the two kinds of studies (aggregate and individual level) share a shortcoming. Both supposedly bear on general deterrence; but because the data may include individuals who have been punished, the distinction between general and specific deterrence has not been maintained.

On the whole, the findings of studies at the individual level are consistent with deterrence doctrine. Yet the findings are far from consistent when it comes to the relation between perceived severity of punishment and self-reported offenses (compare, for example, Tittle 1980 and Grasmick and Bryjack 1980); and on balance the studies indicate that the relation is insubstantial at best. Moreover, the relation between the perceived certainty of punishment and self-reported offenses at the individual level is far less substantial than is that relation in the few perceptual studies at the aggregate level (Erickson et al. 1977b; Erickson and Gibbs 1978). The familiar explanation—measurement error is less of a problem at the aggregate level—is not informative; hence, another explanation should be entertained—that extralegal conditions are more nearly random at the aggregate level. However, when the social condemnation of crime is controlled (statistically) at the aggregate level, at least in comparing types of crime, there is scarcely any evidence of deterrence (Erickson and Gibbs 1978). By contrast, in numerous comparisons of individuals the control of extralegal variables did not eliminate the inverse relation between perceptual properties of punishment and self-reported offenses, but the relation is much more likely to be eliminated in the case of perceived severity than in the case of perceived certainty. Note, however, that the extralegal variables, whether construed as generative or inhibitory, are no more defensible than the extralegal variables in aggregate studies.

Additional Considerations The deterrence doctrine cannot be used to reduce the crime rate if the propositions subsumed under Premise I (Figure 1) are falsified. Conventional deterrence studies at the individual level do not bear on the proposition that asserts a direct relation between the objective certainty and the perceived certainty of punishment. The objective certainty of some kind of punishment (such as imprisonment) for

some type of crime (for example, rape) does not vary among coresidents of the same territorial unit, such as a city or state; rather, the objective certainty of punishment is a characteristic of a territorial unit (the same for all residents). What has been said of objective certainty applies to other objective properties; hence, the shift in deterrence research since about 1975 to comparisons of individuals has reduced the scope of the evidence and lessened the policy implications.

The deterrence doctrine could be construed as implying that residents of a territorial unit who do not commit the offense in question perceive the certainty of punishment more accurately than do residents who do commit the offense. However, the few relevant findings (for references and commentary, see Gibbs 1975, pp. 207–9; Henshel and Silverman 1975) indicate that offenders more nearly perceive the objective certainty of punishment for what it is, while nonoffenders tend to overestimate it grossly. That difference is consistent with the deterrence doctrine only if the doctrine is construed as implying that, apart from accuracy of perception, offenders perceive less risk of punishment than do nonoffenders. Yet the argument has no policy implications other than suggesting that legal officials should conceal the objective certainty of punishment and be thankful that only offenders perceive it somewhat accurately.

Unfortunately, the findings in question are flawed because they commonly pertain only to apprehended offenders, whose perceptions may have been influenced by actual punishment. Yet if actually being punished increases perceived certainty, then the perception of the typical offender and that of the typical nonoffender differ more before the offender's punishment than after that punishment. Nonetheless, confirmation must await a panel study commencing prior to the commission of the type of crime in question (for example, shoplifting) by any individual in the cohort. If such a study were to show that the typical offender's perception of the certainty of punishment comes to differ from that of the typical nonoffender only after a first offense, the evidence would be inconsistent with the deterrence doctrine.

Panel studies are needed all the more because there is now evidence (Paternoster et al. 1983) that the relation among individuals between the perceived certainty of punishment and self-reported *previous* offenses is substantially influenced by the impact of previous experience on *present* perceptions. Since that evidence creates doubts about virtually all findings of deterrence research on individual differences, future research must examine the relation between perceptions of punishment (whether certainty *or* severity) and *subsequent* offenses.

Rare Lines of Research on General Deterrence

Some lines of general deterrence research are so rare that the findings cannot be taken as even suggestive, let alone conclusive. While space limitations make it necessary to treat those lines of research only very briefly, there is a special reason for at least recognizing them. Given all of the evidential problems, conventional lines of research may prove to be wholly inadequate.

Experimental Work There are two major possibilities in the way of experimental research (some kind of nonstatistical control over conditions or variables) on general deterrence. In one of those the researcher attempts to manipulate perceptions of punish-

ment without (1) changing statutory penalties, (2) altering enforcement practices, or (3) imposing actual punishments. Virtually all such experiments have taken the frequency of some kind of extralegal deviance (for example, cheating in school) as the dependent variable (for some references and commentary, see Gibbs 1975, pp. 190–203), and there have been so few comparable experiments that there is scarcely any basis for a summary of the findings. Moreover, attempts to design punishment experiments such that the findings will have some bearing on the deterrence doctrine (for example, Gray et al. 1982) are discouraged by the reluctance of critics (for example, Pettigrew 1983) even to entertain the possibility.

When statutory penalties or enforcement practices are altered in some conditions but not in others and the incidence of crime is taken as the dependent variable, the research can be characterized as a "policy experiment" (see Zimring 1978). Only a few of the experiments have been designed in a defensible way; and in the best known, the Kansas City experiment (see commentary by Zimring 1978), the manipulation of the patrol intensities in various police beats did not produce significant changes in the official or unofficial crime rate.

Before-and-After Research Any new statutory penalty, any alteration of enforcement practices, or any actual legal punishment provides an opportunity for testing propositions about general deterrence, though not such that the researchers can create experimental-control conditions. Hence, the research should be designated as before-and-after (or an interrupted time series), because it always entails a comparison of the incidence of crime before and after some change in or event pertaining to criminal law.

Since the early death penalty studies, much of the before-and-after research has focused on a change in statutory penalties for driving while intoxicated (DWI) and/or related enforcement practices (for example, the police commence using a "breathalyzer"). After several very careful studies, the leading researcher, Ross (1984), concluded that in numerous instances an increase in the objective certainty of punishment has reduced the DWI incidence; but the decline is commonly transitory because of a failure to maintain enforcement intensity.

Numerous researchers have interpreted the idea of general deterrence as implying this proposition: shortly before and/or shortly after a severe and widely publicized punishment, the incidence of the related type of crime declines. Virtually all tests of that proposition have considered daily or weekly homicide trends before and after the execution of a convicted murderer (see references in McFarland 1983), and the findings have been markedly divergent. For example, some researchers have reported a decline in homicides just before the execution and an increase just after, while other researchers have reported just the opposite. The most recent researcher (McFarland 1983) reported a significant decline in homicides in conjunction with only one of four U.S. executions; and there is compelling evidence that the decline in the one case—Gary Gilmore's execution—was due to a severe blizzard (an illustration of the complexities of evidential problems, needless to say). So it appears that the deterrent impact, if any, of an execution is contingent on unidentified conditions. Nonetheless, before-and-after research should be continued if only because *negative* evidence (as in McFarland's study) cannot be attributed readily to extralegal conditions; of the major possibilities, only weather appears to change substantially from week to week.

THE DETERRENCE DOCTRINE AS IT APPLIES TO SPECIFIC DETERRENCE

If only because that part of the deterrence doctrine pertaining to specific deterrence has yet to be stated as a systematic theory, all reported evidence on the subject is disputable. Indeed, authors of research reports commonly write as though there is no need to confront this question: What is the basis for expecting that the punishment of an individual for an act will prevent his/her repetition of the act? Nothing less than a theory is needed for a defensible answer, but the formulation of a systematic specific deterrence theory will be difficult. All that can be done here is to introduce some of the possible components of such a theory, as shown in Figure 2.

Particular Components

Virtually all research on specific deterrence has been limited to this propositional version of Corollary II: Among individuals who have been punished for a crime, the frequency of recidivism varies inversely with the presumptive severity of the punishment. An implied illustrative hypothesis (prediction) states: Of all individuals convicted of burglary in a particular jurisdiction and sentenced to varying terms of incarceration, the proportion of those who commit the same crime again after serving less than a year of incarceration will be greater than the proportion committing the crime again after more than five years of incarceration.

Virtually all tests that bear on presumptive severity in connection with Corollary II have been negative. Hence, it appears that one or more of the three premises must be false, although there is no way to identify which one or ones.

Premise I No tests pertaining to Premise I have been conducted, perhaps because of the difficulty of gathering data on change in the perceptions of punishment (the

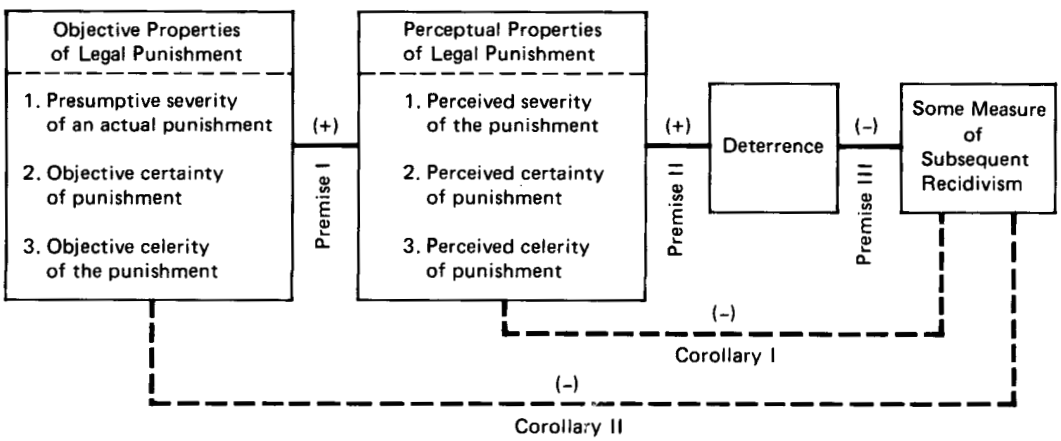

FIGURE 2

Major Components of the Deterrence Doctrine As It Applies to Specific Deterrence*

*(+) signifies the assertion of a subsequent increase; (−) signifies the assertion of a subsequent decrease; ——— signifies an underived proposition; and - - - - signifies a derived proposition.

difference between perception before committing the offense and perception after punishment). Nonetheless, it is pointless to ignore the perceptual character of specific deterrence. The claim that someone refrained from recommitting a crime after punishment because the punishment acted as a deterrent clearly implies that the punishment increased the individual's perception of the certainty and/or severity of punishment.

The problem is that various questions bearing on Premise I are still unanswered. If an individual was ignorant of the prescribed punishment for a type of crime at the time of commission (for example, he or she believed the maximum punishment to be six months in jail, whereas it was actually two years in prison), then an actual punishment could increase that individual's perception of the severity of the risk. Beyond that point, however, the rationale for Premise I is obscure. In particular, while an actual punishment may increase an individual's perception of the *celerity* of punishment, it is not clear how that increase furthers deterrence. Nor can objective certainty be interpreted readily in the context of specific deterrence, for the notion of probability scarcely applies to a single case (the one punishment in question). One interpretation is suggested by the formula: Np/Nc, where Nc is the number of crimes committed by an individual and Np the number of such crimes that resulted in the legal punishment of the individual, including the present punishment.

If the formula is applied only to crimes of a particular type (such as burglary), still another unanswered question is raised: Does punishment for one type of crime deter the offender from other types of crimes, and does avoidance of apprehension for one type of crime lessen deterrence from other types? While it is more feasible to state a specific deterrence theory as though tests of it would be limited to punishments for one particular type of crime, such tests must control for differences among the individuals in question as to additional types of crimes and punishments for them.

Other Components As long as deterrence itself is not subject to measurement, Premises II and III (Figure 2) cannot be tested directly. Evidence can be brought to bear on the premises through tests of Corollary I; but those tests would require data on each individual's perception of punishment before the crime was committed and after the punishment (in the case of perceived severity, after the punishment has been fully imposed).

The only conspicuous theoretical problem in testing Corollary I is stating a proposition so as to indicate how the perceived celerity is relevant in specific deterrence. The measures of recidivism used to test Corollary II can be used to test Corollary I as well, but there is no defensible rationale other than expediency for basing those measures on official data (such as records of subsequent arrests, subsequent convictions, probation revocations, parole violations). The official figures that have been used in research on specific deterrence are scarcely defensible; and the only viable alternative is a set of rates based on self-reported offenses, especially since self-reports can be used to compute categorical or repetitive recidival rates.

Possible Test Outcomes

An empirical assessment of the validity of specific deterrence theory would require tests of Premise I, Corollary I, and Corollary II. Yet the outcomes of the tests would not have the same implications, either with a view to reformulating the theory or with a view to penal policy.

If credence is placed in past test findings, none of the propositions pertaining to presumptive severity (Corollary II) are likely to be supported. While that outcome would simplify the reformulation of the theory, it would pose a dilemma for those who shape penal policy. It would mean that specific deterrence can be furthered only by increasing the objective certainty of punishment, a goal that is likely to be extremely costly and difficult to realize.

Finally, if the tests support only Corollary I, the theory will become purely perceptual, ceasing to have any particular policy implications. Specific deterrence can then no longer be the rationale for manipulating objective properties of punishment.

A Brief Survey of Evidence

Although numerous investigators have conducted research on specific deterrence, the designs of all those studies are defective in several respects. Briefly, none of the studies considered perceptual properties of punishment, let alone change in such properties; and most of the studies have considered only official figures on recidivism.

Studies with a Particular Conspicuous Design Defect In one of the earliest and best-known studies, Robert Caldwell (1944) analyzed the recidival rates up to 1943 of individuals who were sentenced in the courts of New Castle County, Delaware, during 1920–39 on conviction for an offense that could have resulted in imprisonment and/or whipping. He reported the recidival rate—percentage subsequently convicted for any type of crime in Delaware or elsewhere—for four categories of offenders: (1) those placed on probation during 1928, 42 percent; (2) those imprisoned but not whipped during 1928, 54 percent; (3) imprisoned and whipped once during 1920–39, 62 percent; and (4) those imprisoned and whipped at least twice during 1920–39, 65 percent. Although Caldwell did not employ measures of perceived severity, the presumptive severity of those punishments appears to form an ordinal scale. Contrary to the idea of specific deterrence, the study shows presumptive severity to vary directly with the categorical *official* recidival rate.

Following Caldwell's study, many studies of specific deterrence were undertaken. Since several surveys of these studies (notably European Committee on Crime Problems 1967; Cramton 1969; Doleschal 1969; Wilkins 1969; Levin 1971; Zimring and Hawkins 1973; Gibbs 1975; Friedman and Macaulay 1977; Moffitt 1983) offer detailed commentary, a few summary observations will suffice. One kind of official recidivism rate or another has been found to be greater for (1) individuals imprisoned, as compared with those placed on probation; (2) individuals who served longer prison sentences; (3) individuals convicted of drunkenness who were incarcerated, as compared with those who were fined; and (4) individuals who received a warning for a traffic offense, as compared with those incarcerated or fined. In all these studies, as in the case of Caldwell's study, the presumptive severity of the punishment appears to vary *directly* with the recidivism rate.

None of the studies employed measures of the perceived severity of punishments or unofficial data on recidivism. Another and perhaps much more crippling defect mars the designs of those studies. Penologists generally agree on two points concerning recidivism and sentencing practices. First, regardless of the punishment (or "correctional treatment"), recidivism appears to be greatest for those individuals who have the "worst

record of previous criminality"; and, second, the presumptive severity of sentences tends to be greater for those who have the worst record. Accordingly, since the design of the studies did not incorporate randomization (that is, the selection of the punishment for each individual was not random), it can be argued that the common finding—a direct relation between the presumptive severity of punishment and the recidivism rate—is not compelling.

While the findings indicate that presumptively severe sentences do not overcome all other factors, including previous criminality,[13] the direct relation between previous record of criminality and recidivism scarcely bears on any theory. Yet a criminological theory would be strengthened if it could account for the relation, and the idea of specific deterrence is relevant in that connection. If two individuals have been convicted and imprisoned for the same type of offense, one after the twentieth offense and the other after the second offense, the objective certainty for the "experienced" offender is only 5 percent, while it is 50 percent for the novice. The experienced felon may not perceive the certainty of imprisonment less than does the novice, but the doctrine of deterrence surely suggests that difference. Hence, the exclusion of measures of the certainty of punishment, objective and perceived, has been a major defect in research on specific deterrence.

Research on specific deterrence along the lines suggested requires a panel study of a cohort of potential offenders in which data are gathered at various points over a long period of time on (1) self-reported offenses, (2) self-reported legal punishments of the offenses, (3) perceptions of the certainty of punishment, and (4) perceptions of the severity of punishments. Such a study, though costly and laborious, could yield crucial evidence.

Studies in Which Punishments Have Been Randomized Given the understandable reluctance of magistrates to randomize punishments, it is not surprising that few studies of specific deterrence have randomized. Again, a few summary observations will suffice to suggest the variety of studies and the preponderant direction of the findings. One kind of official recidivism rate or another has been reported as (1) greater for individuals who were incarcerated, as compared with those placed on probation; (2) not different for individuals who were fined for driving while intoxicated, as compared with those placed on probation; (3) not different for individuals who served a longer prison sentence; and (4) greater for juveniles fined for a traffic offense, as compared with those required to write a paper on traffic safety. The only recent exception (that is, evidence of specific deterrence) is a lower recidivism rate for "domestic assaulters" in Minneapolis who were arrested than for those not arrested (see Sherman and Berk 1984).

The findings of such "superior" studies of specific deterrence are insufficiently compelling for a reason beyond the fact that the randomization of punishments was not always complete (see commentary in Levin 1971). Since none of the studies employed measures

[13] It would be misleading to suggest that all studies of specific deterrence have reported negative evidence (see especially, the survey in Moffitt 1983), and the typical negative finding is "no significant relation" between the presumptive severity of punishment and recidivism rather than a significant direct relation. However, the few exceptions (for example, the FBI's "Careers in Crime Program") have been widely criticized for numerous defects in methodology (see Zimring and Hawkins 1973, p. 236), and the negative evidence continues to mount (for example, Klemke 1978).

of the perceived severity of punishment, all judgments of differences in the severity of punishment are questionable except those pertaining to varying lengths of incarceration. But in even one of those exceptions (Berecochea et al. 1973), an approximate six-month difference in length of prison sentence was not sufficient to generate evidence of specific deterrence. True, since the experimental group served 31.5 months and the controls 37.9, the proportionate difference may not appear substantial, and by any reasonable standard the difference in the punishments applied to the control and experimental groups in other studies was even less substantial.

Because randomizing punishments to make them differ markedly in severity would be wholly unjust, the problem appears beyond solution. Worse still, no kind of randomization may be an ideal test. Complete randomization would ostensibly eliminate differences between the experimental and control groups as regards all correlates of recidivism, such as previous offenses, previous punishments, age, employment record, marital status. But consider two groups created by randomized sentences—those who served at least five years in prison and those who were fined the minimum amount prescribed for the felony conviction in question. Surely those who serve at least five years will face greater stigmatization, loss of occupational skills, and disruptions of social relations. Once the punishments have been administered, the extralegal conditions of the experimental and control groups would not be even approximately the same. In view of all these problems, an examination of changes in perceptual properties (both those pertaining to severity and certainty) concomitant with punishment may well turn out to be not merely a desirable feature of research on specific deterrence, but perhaps the only way to arrive at compelling evidence (albeit limited to Premise I).

OCCASION FOR DISBELIEF

This essay has identified little evidence to support the doctrine as it applies to general or specific deterrence, and to question the doctrine's validity is to question not only classical economics but also common sense.[14] After all, virtually all experience demonstrates that some individuals are deterred from some types of crimes in some situations by the threat of some kind of legal punishment. But an informed penal policy requires more than existential propositions.

For those social critics who are determined to defend the deterrence doctrine despite inconclusive evidence, the most effective strategy is to emphasize the defects of research on deterrence. Some defects are debatable and limited to particular studies, such as the exclusion of perceptual properties of punishment. Attention should therefore be directed to two indisputable limitations of deterrence research as a whole. First, for all practical purposes, the distinction between absolute and restrictive deterrence has yet to be recognized in research designs. Second, the same may be said of the distinction between marginal and nonmarginal deterrence.

Elaborating on the second limitation, all deterrence studies have compared either jurisdictions or individuals that differ with regard to some property of punishment (for

[14] "Most economists who have given serious thought to the problem of crime immediately come to the conclusion that punishment will indeed deter crime. The reason is perfectly simple: Demand curves slope downward. If you increase the cost of something, less will be consumed. Thus, if you increase the cost of committing a crime, there will be fewer crimes" (Tullock 1974, pp. 104–5).

example, the objective certainty of imprisonment is greater in some jurisdictions than in others); and all such comparisons bear only on marginal deterrence. Evidence of nonmarginal deterrence requires either a comparison of the frequency of some type of act in two jurisdictions—one in which the act is subject to no legal punishment—or a comparison of the criminality of individuals, some of whom have been punished and others who have not been even apprehended. There has never been a study of nonmarginal deterrence, and the findings might sober critics of the deterrence doctrine.

RETRIBUTION AND DETERRENCE

Despite evidence that severe punishments do not further marginal deterrence, they will be defended by an appeal to the doctrine of retribution.[15] That doctrine is enjoying a revival in the United States, one promoted by jurists, legislators, and a few distinguished scholars. Unless future research findings provide more support for the efficacy of deterrence, the drift toward a retributive penal policy may well accelerate.

It has been suggested that the retributive doctrine and the deterrence doctrine are complementary, evidently because both doctrines are interpreted to call for certain and severe legal punishments—that is, both are "punitive" (van den Haag 1975). However, for centuries advocates of retribution have depicted their doctrine as superior on moral or ethical grounds to deterrence. Briefly, they argue that whereas the only end of retribution is justice, the deterrence doctrine uses the individual as a means and is conducive to the punishment of the innocent with a view to promoting general deterrence. The importance of the debate beggars exaggeration.

Some Major Questions, Problems, and Issues

A truly complete and rational penal policy would answer all the questions about legal punishments that now haunt the American criminal justice system. The doctrines of retribution and deterrence are not complementary if they imply different answers to those questions or suggest different bases for seeking answers.

What Is the Appropriate Punishment? The question calls for a principle that would enable the deduction of the appropriate punishment for any given type of crime. The retributivists have no principle other than "just desert"—at least, none that will bear examination. As a case in point, there is the retributive idea that the severity of the punishment should match the "gravity" of the offense; but a defensible procedure for measuring either variable is wanting. Moreover, even if there were defensible measurement procedures, there is no obvious basis for equating a particular gravity value for a type of crime and a particular severity value of punishment, which is necessary if the punishment is to "match" the offense.[16]

[15] For a review of and commentary on the various arguments that may be considered as components of the retributive doctrine, see Fingarette (1977) and Bedau (1978). It is particularly noteworthy that retributivists do not agree as to why "criminals should be punished because they deserve it," but the lack of agreement does not make the retributive doctrine meaningless.

[16] Among contemporary retributivists, Andrew von Hirsch (1976) has most nearly confronted these problems directly; but his strategy is suggestive at best. While von Hirsch eschews the use of the term, he and his colleagues are clearly making an argument for retribution (see commentary by Bedau 1978, p. 602, n. 4).

The alternative strategy of allowing legislators or the public to determine the appropriate punishment for each type of crime is not entirely consistent with the retributivists' tireless concern with justice. When legislators prescribe legal punishments, the political character of crime is glaring; and one must surely wonder how criminal law is "just" if it is enacted by legislators whose cultural background, socioeconomic positions, or ideologies are not representative of those subject to the punishments. Thus, time and again the death penalty has been prescribed by American legislators including not one representative of the black population, whose members have been executed in disproportionate numbers throughout the history of the United States.

While statutory penalties can be determined or guided by some manifestation of public opinion—such as direct voting, referenda, or opinion polls—any proposal along that line gives rise to all manner of problems and issues.[17] One of these bears directly on the retributive doctrine. While the doctrine seems to call for the legal punishment of a crime as an end in itself (criminals are to be punished only because they deserve it), equating retribution with "satisfying the public's demand for vengeance of crimes" is a disputable interpretation. The "lawless" quality of vengeance would make it alien to retributivists' concern with justice. Ordinarily, vengeance is associated with the citizenry's taking the law into its own hands; but allowing public opinion to dictate statutory penalties or judicial rulings is not an altogether different matter. An army of distinguished legal philosophers has argued that criminal law must protect both accused and convicted individuals from the transitory and violent passions of the public. No thoughtful retributivist rejects that argument, but it casts doubt on the proposal to base statutory penalties solely on public opinion. It is therefore hardly surprising that, when speaking to the "appropriate punishment" question, retributivists can say little more than "whatever is the just desert." There is no distinct alternative because from Kant and Hegel to the present it has been recognized that punishments can "resemble" few types of crimes; hence, the *lex talionis* principle has limited applicability, and the death penalty for murder has an ad hoc quality.

Advocates of the deterrence doctrine can approach the question from a quite different perspective. To the extent that the maximum "acceptable" rate for a given type of crime and the maximum "tolerable" cost for realizing that rate are stipulated, it is possible to identify the requisite severity and certainty of punishment. Of course, such an equation is possible only in principle; nonetheless, whereas advocates of the deterrence doctrine can look to empirical findings for an answer to the "appropriate punishment" question, retributivists can do so only if they are willing to abide by the answer to this question: "What does the public want in the way of legal punishments?" Advocates of deterrence will not abide by the answer because public opinion may call for punishments that are more severe than needed to deter (in which case, the punishments would be Bentham's "evil") or far too mild.

[17]Most of the problems have to do with feasibility, such as the sheer cost of soliciting public opinion about the appropriate punishment for all types of crime and the frequent alteration of statutory penalties that may be required. However, some of the problems actually give rise to issues, especially in stipulating criteria of "effective consensus." Any criterion is likely to be arbitrary, and it will not do to ignore the distinction between aggregate consensus and structural consensus. To illustrate, even if a substantial simple majority of survey respondents or voters approve of the death penalty, the penalty might be overwhelmingly opposed by some racial-ethnic minorities.

Are More Severe Punishments for Recidivists Justified? Confronted with the question of increasingly stringent punishment of repeat offenders, contemporary retributivists do not answer in unison (compare, for example, Newman 1978 and von Hirsch 1976). Their divergent opinions are understandable, since recidivism poses a dilemma for anyone who would make justice the central concern in penal policy. Retributivists do agree that criminals should be punished as moral beings fully responsible for their actions; but it is by no means clear how a second offense is any more wrong than a first, especially when the offender has "paid the price" for the first offense.

Unlike retributivists, advocates of deterrence can hope to justify more severe punishments for recidivists on empirical grounds, by attempting to show that specific deterrence requires more severe punishment of repeaters than of first offenders. Advocates of deterrence can regard the question in that light because they view the purpose of punishment as crime prevention, a purpose retributivists do not emphasize. However, the deterrence doctrine is not free of dilemmas. Given evidence that more severe punishments are required for general than for specific deterrence, the decision to employ the more severe punishment would be to use recidivists as means to an end.

Should There Be Judicial Discretion in Sentencing? It is not surprising that contemporary retributivists admit to dissension in answering the question of judicial discretion (see Newman 1978). No imagination is required to appreciate an offender's feeling of injustice on being punished more severely than someone who was convicted for the same type of crime, especially given a similarity in previous convictions. Yet it is idle to presume that all instances of any type of crime are equally heinous or that types of crimes can be differentiated to assure such homogeneity. Accordingly, if the severity of punishment is to match the gravity of an offense (as the retributive doctrine would have it), exemplary punishments are justified. In that view, the retributive doctrine appears to require judicial discretion in sentencing; but, unlike "individualization of treatment" in efforts at rehabilitation, the sole object of retributive discretion is to equate the gravity of the offense with the severity of punishment.

Two questions remain unanswered—whether an assessment of the gravity of an offense should consider previous offenses and whether such assessments are intolerably subjective. Those questions will haunt the retributive doctrine even if its advocates should all come to endorse judicial discretion in sentencing.

The Essential Difference

The retributive doctrine is an empty formula, since contemporary retributivists either cannot answer specific questions pertaining to penal policy or fail to agree in their answers (for elaboration, see Gibbs 1978 and Bedau 1978). However, it does not follow that the deterrence doctrine is superior, since it, too, fails to provide specific answers to any of the previous questions.

Nonetheless, the argument that the two doctrines are complementary is disputable. Whereas advocates of deterrence appeal primarily to empirical evidence, retributivists clearly base their arguments purely on metaphysical abstractions. Should advocates of deterrence ever be able to provide empirically defensible answers to questions, the difference between the two doctrines may become clearly incompatible. Given evidence that

more severe punishments are required for general deterrence than for specific deterrence, advocates of a deterrent penal policy will tend to recommend the more severe punishments (especially given evidence that it would insure even greater specific deterrence), while retributivists, if they are to remain true to Kant and Hegel, will reject that recommendation.

CONCLUSION

While the findings of deterrence research are inconclusive, further research cannot be justified unless conventional research strategies are abandoned. The scope of research must be expanded to encompass all properties of legal punishments, and all manner of evidential problems should be confronted in designing research. An even more immediate need is a sophisticated statement of the deterrence doctrine as a set of systematic and testable theories, each with implications for penal policy.

What is rapidly becoming a popular argument among scholars and those who shape penal policy requires no additional work on the deterrence doctrine to justify an increase in the presumptive severity and the objective certainty of legal punishments. The argument claims, in brief, that even if increases do not promote deterrence, they will at least be consistent with the retributive doctrine. Yet the doctrines of deterrence and retribution are less complementary than they appear to be, as will become obvious if the advocates of the two doctrines are pushed to answer specific questions about penal policy.

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8

LAWYERS

Richard L. Abel
University of California, Los Angeles

SOCIOLOGY OF THE PROFESSIONS

The sociology of the professions has been dominated until recently by the structural functionalism of Talcott Parsons (1951, 1954a, 1954b, 1968; Nonet and Carlin 1968; Roth et al. 1973), which simultaneously has furnished the prevailing professional ideol-

NOTE: I am grateful for the editorial suggestions of Lawrence Friedman and Leon Lipson. This chapter was completed in the fall of 1981 and submitted to the editors at that time. It is reasonably comprehensive up to then but necessarily omits anything published subsequently. A number of important books and articles appeared between 1981 and Spring 1985 (when this note was added) on women lawyers (Epstein 1981; Chester 1985; Couric 1984), black lawyers (Segal 1983), entry barriers (Rhode 1985; D. White 1984); legal education (Stevens 1983; Kennedy 1983; Hedegard 1982; Pipkin 1982; Van Alstyne 1982), legal ethics (Luban 1983; Simon 1984; Abbott 1983), the social structure of an urban bar (Heinz and Laumann 1982), rural lawyers (Landon 1982), late nineteenth-century lawyers (Gawalt 1984), a statistical survey of American lawyers (Curran 1985), legal aid (Katz 1982; Cooper 1983; Cappelletti 1981; Garth 1983; Menkel-Meadow 1984; Menkel-Meadow and Meadow 1983; Abel 1985a; Abel 1985b), business lawyers (Gilson 1984), lawyers in the New Deal (Irons 1982), radical lawyers (Gabel and Harris 1982–83; Kinoy 1983), lawyers and doctors (Dingwall and Lewis 1983), large-firm lawyers (Hoffman 1982; Stewart 1983; Nelson 1983), professional associations (Schneyer 1983; Cappell and Halliday 1983; Halliday 1982), the image of lawyers (Mindes and Acock 1982), the regulation of lawyers (Blair and Rubin 1980; Evans and Trebilcock 1982; *Law and Human Behavior* 1983; Rottenberg 1980; Slayton and Trebilcock 1978; Trebilcock, Tuohy, and Wolfson 1979; Nieuwenhuysen and Williams-Wynn 1982; Boreham, Pemberton, and Wilson 1976), English lawyers (Thomas 1982; Flood 1983; Duman 1983; Cocks 1983; Abel 1986; Abel 1987), Australian lawyers (Hetherton 1978; 1981), third-world lawyers (Dias et al. 1981; Lynch 1981; Merryman et al. 1979; Abel 1982), and the comparative sociology of lawyers (Abel 1985c; Abel and Lewis 1987–88).

ogy (Blaustein and Porter 1954; American Bar Association 1974, p. 1c; Royal Commission on Legal Services 1979, vol. 1, pp. 28, 30). In the past decade or so, however, this dominance has been challenged by an empirically grounded critique (Freidson 1970; Johnson 1972, 1977; Roth 1974; *Sociology of Work and Occupations* 1974–date; Berlant 1975; Larson 1977), which offers an alternative theoretical framework for understanding those occupations that claim professional status.

This introduction contrasts functionalism with critical legal theory (Beirne and Quinney 1982; Kairys 1982). Functionalism defines a profession as an occupational category uniquely endowed with a body of theoretical knowledge, the paradigm for which is the natural sciences. This criterion implies that professionals autonomously and progressively elaborate their shared expertise, and it focuses attention on those deviants who lack it and on the threats arising from specialization and routinization. Critical legal theory emphasizes the struggle of occupations to attain professional status and regards theoretical knowledge as a social construct serving to legitimate professional perquisites rather than as the inevitable outgrowth of the cognitive tasks of the occupation. It therefore directs empirical research toward the conditions under which an occupation successfully advances its exclusive claim to such knowledge, the segments within the profession that are active in this campaign, the consequences of the struggle for power relationships within the profession and between it and potential rivals, and subsequent challenges by groups asserting competing bodies of theory (Bucher and Strauss 1961).

Functionalism derives a second professional criterion—formal training—from the centrality of theoretical knowledge. It explains the length of training and the shift from apprenticeship to the university in terms of the quantity and complexity of knowledge to be communicated. A central research issue, then, is the tension between the development and transmission of theoretical principles and training in practical skills (Twining 1967). Critical legal theory hypothesizes, instead, that an occupation institutionalizes and protracts training in order to justify its claim to theoretical knowledge. This condition inevitably creates tension between academics and practitioners (Auerbach 1971) and confers on educational institutions a central role as the gatekeepers allocating entrants to the hierarchy within the profession and justifying that hierarchy.

Functionalism explains professional controls over entry in terms of the need to ensure that entrants receive formal training and acquire essential theoretical knowledge. The empirical question, therefore, addresses the correlation between formal qualifications and competence (Carlson and Werts 1976). Critical legal theory posits market control as the fulcrum for explaining the core of collective occupational behavior (Larson 1977, chap. 2; Abel 1979a). Because it is so difficult for those who sell their services in a market to control the quantity or price of those services or the demand for them, control over the production of producers is the most effective instrument of market control. This conceptualization directs research toward the way in which control is attained and preserved and the efficacy of control, as measured, for example, by the price of professional services.

Functionalism explains the rise of professional associations as an expression of the unique capacity of professionals to maintain technical and ethical standards of performance (Millerson 1964). These associations establish prerequisites for entry, police unauthorized practice, oversee formal training, and promulgate and enforce a code of conduct, performing both prosecutorial and adjudicative functions. The crucial research question is the extent to which any professional association can preserve its autonomy in the face

of a double threat—destructive competition fostered by uncontrolled market forces and bureaucratic interference by the state. Critical legal theory sees the professional association as the political instrument through which the occupational category pursues the central goal of market control. Divisions within that category and conflict over how broadly it should be defined initially obstruct the creation of a single association and lead to subsequent fission and external challenges (Kronus 1976). Professionals do not spontaneously eschew competition; they are prevented from engaging in it by the association. And the profession is not autonomous; it is wholly dependent on state authority for its exercise of market control. Research, therefore, concentrates on the extent to which professional segments are able to use state authority to further their parochial self-interest and to disguise that purpose by invoking collective opposition to the market and the state.

Finally, functional theory sees the professional association as the vehicle for mobilizing and expressing altruistic impulses that are claimed to be inescapably associated with the possession of theoretical knowledge. Because functional theory defines altruism as any behavior that lacks an immediate visible material reward, research is directed toward ways of amplifying such behavior. Critical legal theory, by contrast, sees apparently altruistic acts as serving ends that nevertheless are selfish even if the reward may be less obvious (for example, generating future demand by rendering present services at little or no cost) and as legitimating professional privileges (economic, political, and social) by providing symbolic reassurance that their enjoyment is not self-interested. Thus, attention is directed to the ways in which ostensibly altruistic behavior benefits the individual professional and the profession as a whole rather than the client or the public.

This essay will organize recent research on the American legal profession (see Abel 1980), using the framework of critical legal theory. I chose this theoretical paradigm not only because I believe it to be more accurate and powerful, but also because it is consistent with my ethical preference. Functionalism assumes that formal rationality is a superior form of knowledge, entitling those who possess it to exercise domination over others and to enjoy privileges. Critical legal theory asserts that different forms of knowledge cannot be ranked and that the distribution of knowledge can justify neither political, social, or economic inequality nor the abrogation of democracy. Functional theory finds community within the professional association; critical legal theory rejects the possibility of founding community on the domination of others. Functional theory accepts professional paternalism as altruism; critical legal theory insists that altruism can be expressed only between equals.

Given that all definitions are stipulative and that debates over the definition of a profession frequently are little more than ideological smoke screens (Elliott 1972, chap. 1; Habenstein 1963; Office des Professions du Québec 1976, chap. 2), some working concept nevertheless is necessary to limit the phenomenon to be studied, isolate what is theoretically salient, and allow social-structural and temporal comparisons. I will use the notion of a profession to refer to an occupation that produces services for consumption by another and that has attained some degree of control over the market for those services. It is thus a concomitant of the division of labor, which presupposes greater specialization among producers than among consumers (Friedman 1962, p. 143; Johnson 1972, p. 41). Relatively undifferentiated societies may lack most professions, including the legal profes-

sion; many tribal societies offer examples (Nagel 1962; Schwartz and Miller 1964), but so does England before Henry II, when litigants represented themselves (Carr-Saunders and Wilson 1933, pp. 30–31). Although the division of labor differentiates producers and consumers, it does not require that the transaction between them involve a sale (Johnson 1972, chap. 3): in premodern Europe, many lawyers were functionaries of the Church (Bouwsma 1973, p. 309); at a later period they were dependents of an aristocratic patron (Larson 1977, chap. 1); under welfare capitalism, legal services may be provided free of charge by lawyers employed by the state.

This definition deliberately makes problematic a number of issues, thereby helping to focus the inquiry. First, what are the services: what has been defined as requiring action by another? The outer boundaries are constituted by the concept of law (itself historically specific)—the formulation, modification, and application of norms (Hart 1962)—but within those limits, there is room for considerable historical variation. Second, who are the producers: what are the categories of the division of labor and the relations within and between each category? How, and to what extent, have the producers attained market control? Third, who are the consumers of legal services; what are their numbers, characteristics, and organization? Fourth, what is the relationship between producers and consumers: how do they compare in power and status; on what basis is service provided; is the relationship mediated or continuous? Finally, what is the ideological foundation of this entire structure: how is it explained, criticized, and justified by producers, consumers, and others?

I will explore these issues by means of a narrative divided—with inevitable arbitrariness—into three periods: Colonial America (the adaptation of English institutions to the radically different circumstances of the New World); the antebellum period (severance of ties with England, the impact of a new ideology, and the growth of commercial capitalism); and the years before World War I (the triumph of industrial capitalism). By this last date the American legal profession had acquired many of its present characteristics. Later sections detail these qualities as well as subsequent changes, especially those that have occurred since World War II.

HISTORY OF THE AMERICAN LEGAL PROFESSION

Colonial Lawyers

The emergent American legal profession of the seventeenth and eighteenth centuries was necessarily colored by its transatlantic origins (Prest 1981). There was no concept of a *lawyer* in England at that time, much less of a single unified profession. Instead, many occupations specializing in legal affairs struggled—often with little success—to close their ranks to outsiders, resist incursions by competing occupations, and expand their own spheres of operation. At the pinnacle stood the Bar, within which each Inn was self-regulating (Carr-Saunders and Wilson 1933, p. 40); but, by 1750, the Inns possessed little collegial life, offered scant training, and exercised minimal control over entry (Abel-Smith and Stevens 1967, pp. 16–17). Below the Bar was an array of specialties—scriveners, pleaders, conveyancers, proctors in admiralty, doctors of canon law, attorneys, and solicitors (Plucknett 1956, pp. 224–30). Most of these specialists were functionaries of a particular court, by which they were regulated and over which they sought a

monopoly. Others were defined by function, such as conveyancing or acting as general agent for an aristocratic household. Qualification for entry to the functional specialties was by apprenticeship; this method was loosely enforced during the seventeenth century and only formalized in 1729, when attorneys and solicitors were given a monopoly by the state and sought an alliance through the Society of Gentlemen Practicers for the purpose of policing it (Carr-Saunders and Wilson 1933, pp. 43–45; Abel-Smith and Stevens 1967, p. 20). The society first discussed formal training through lectures in 1794, and examinations did not begin until the 1830s (Carr-Saunders and Wilson 1933, p. 46; Abel-Smith and Stevens 1967, p. 54). This sequence illustrates a recurrent pattern in the development of professions: state monopoly preceded, and appears to have been a prerequisite for, the creation of a professional association; both antedated formal training, which served, among other purposes, as a post hoc rationalization for the grant of monopoly and the existence of the association.

The English legal occupations, then, offered little for American lawyers to emulate. The Inns of Court could not be reproduced because few colonial judicial institutions played a role as central as that of the Law Courts in London. Nor was there the congeries of specialized courts—the product of a lengthy feudal history—around which occupational subcategories could accrete. Furthermore, local conditions inhibited functional differentiation. There were few legal tasks that the laity could not perform for itself. Because of the largely agricultural economy, the recent origin of title to land (and the plenitude of land), the localized nature of most commerce, and the immaturity of colonial government, American law was less technical than English. Not only were many judges legally untrained, but the laity also had access to and read legal treatises (Boorstin 1958, pp. 197–202). For American lawyers, then, the struggle for professional status was not a competition among occupational subcategories but an effort to convince potential consumers that specialists were useful and should be permitted to represent others (Aumann 1940, pp. 19–26; Day 1973).

The lack of occupational differentiation is demonstrated by the qualifications for entry. Though training for law was generally by apprenticeship, many colonies, especially along the frontier, implemented this requirement laxly, if at all. Only in the larger commercial centers of Massachusetts, New York, Pennsylvania, and Virginia were there the makings of a professional elite, often consisting of graduates of one of the eight pre-Revolutionary American colleges, who then traveled to England to obtain admission to the Inns (Larson 1977, pp. 12–13; Stevens 1971, pp. 408–9; Hurst 1950, p. 266; McKurdy 1976; Klein 1958; Eaton 1951). But these were the exceptions; most lawyers, like most judges, were little differentiated from the laity in terms of origin, training, or even occupation, since many practiced only part-time.

In part, these characteristics of the producers of legal services reflected their market. Consumers were few, geographically dispersed, and relatively unstratified. Outside the cities, few were wealthy, and fees were small. Whatever stratification existed within the profession expressed differences between city and country, officeholders and those without government positions (Day 1973; McKurdy 1972). For similar reasons, lawyers and clients confronted each other as equals in technical expertise and social status; in the cities both tended to be members of the elite, while elsewhere neither was likely to be. Finally, despite the efforts of elite lawyers to raise entry barriers in a few colonies (see, for example, Klein 1958), colonial governments were more likely to remove all barriers or

restrict the fees a practitioner might charge (Nolan 1976; 1980, pp. 44–45; see generally Flaherty 1969; Murrin 1971; Nelson 1975; Presser 1976).

Independence to the Civil War

Political separation from England and the consequent internal and external economic adjustments had a considerable impact on American lawyers. After an initial period of disruption, transatlantic trade grew, and English dominance declined. To the ordinary perils of such commerce were added the dangers of the War of 1812. In response to these risks, marine insurance expanded rapidly but bred uncertainties of its own that could be resolved only by litigation. Indeed, litigation generally provided the economic foundation of American lawyers, in much the same way that conveyancing constituted—and still constitutes—the financial base for English solicitors (Abel-Smith and Stevens 1967, p. 23; Royal Commission on Legal Services 1979, vol. 1, chap. 21). The settlement of new territory, land speculation, the absence of good records, and controversies over land seized from Tories all fueled land litigation. Debt collection and, to a much lesser extent, criminal defense were other staples of practice (Bloomfield 1979).

Litigation simultaneously performed other essential roles. Advocacy was its own advertisement. Trials were a popular form of entertainment, not only on the frontier but also in the nation's capital. A reputation for oratorical skills quickly passed by word of mouth, attracting additional business (Friedman 1973, pp. 270, 273; Calhoun 1965). The lawyers' monopoly over courtroom litigation was relatively easy to enforce; encroachments were highly visible, and the regulatory power of the state was immediately available. Litigation also contributed to the development of an American *corpus juris*, assisted by a politically motivated rejection of English law (Nelson 1975). As this body of law became more elaborate and technical (Harris 1972), it transformed the demand for the services of some agent into a market for the services of a legally trained representative. Finally, litigation blurred the distinction between lawyer and client; the professional might purchase the claim to land or the outstanding debt and sue on his own behalf, rather than wait for an uncertain payment from his client (Friedman 1973, p. 269; Hurst 1950, p. 297).

The Revolution directly affected the producers of legal services as well, first by bringing about the departure of significant numbers of Loyalist lawyers (although there is dispute over the exact proportions, which undoubtedly varied from colony to colony) (see Warren 1911; Gawalt 1970; McKurdy 1972; Ely 1973; Nolan 1976). Chance events of this sort—which eliminate a substantial segment of producers, giving those who remain an unprecedented opportunity to gain control of the market as a base for further expansion—played a crucial role in the development of other professions (Kronus 1976). But though those who left were disproportionately officeholders and thus members of the elite (McKurdy 1972), the post-Revolutionary profession was by no means egalitarian. In Massachusetts, the proportion of lawyers with a college education was high and increasing, their social origins were privileged, and many grew wealthy from practice (Gawalt 1969, 1970, 1979; cf. Nash 1965)—though some had to supplement their legal income from other sources. Such stratification was much less pronounced on the frontier, where origins and education meant less and opportunities always beckoned in the next settlement. But even there, by the end of the period, a small number of lawyers had acquired control of a

disproportionate amount of business, leaving a mass of marginal practitioners to scramble for what was left (Calhoun 1965, p. 77; Bloomfield 1979; Brown 1970). It therefore is not surprising that Alexis de Tocqueville, visiting the United States in the 1830s, should make his oft-quoted remark:

> In America, there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar. [1958 (1835), p. 288]

Yet his observation was anachronistic even as he uttered it; the status of the profession rested upon traditional warrants (Larson 1977, pp. 68–69) in the process of being eroded by economic, social, and political change.

This transformation—the Jacksonian attack on privilege—is commonly offered as an explanation for the decline of professions generally, and especially of the legal profession, after 1840. But the effect appears to be exaggerated and the cause misplaced. True, barriers to entering the profession were lowered. The requirement of apprenticeship, which had grown in length between 1760 and 1820 (Barlow 1977, p. 11), was progressively abandoned; 14 out of 19 jurisdictions imposed some such prerequisite in 1800, but only 11 out of 30 did so in 1840 and 9 out of 39 by 1860 (Stevens 1971, pp. 412–13, 417). Attempts to institutionalize legal education in the universities failed, and the dozen private law schools operating in the early 1800s rapidly declined after 1840 (Stevens 1971, pp. 414–15; Reed 1921, p. 132; Hurst 1950, pp. 253–59). Because formal legal education was irrelevant to entry into the profession and inessential for advancement within it, the universities had difficulty attracting students and even more problems keeping them, once they were enrolled. Harvard's three-year degree was shortened to eighteen months; Yale's to two years, with a further reduction for college graduates (Stevens 1971, pp. 418–19, 430). Yet, though the criteria for entry seem lax by contemporary standards, it is not clear that they represented a decline from previous rigor. It has been estimated that the average lawyer in the 1800s received only a primary school education and a legal apprenticeship of 6 to 14 months; and though many states abolished examinations after 1840, those tests had often been a meaningless formality (Hurst 1950, p. 281; Friedman 1973, p. 276; Bloomfield 1971).

What requires explanation, then, is not the deprofessionalization of the bar as a result of the Jacksonian attack but its failure to professionalize until after the Civil War. Yet this may not be a meaningful question. Professionalization is always the result of an active campaign by an occupational category seeking market control, and in this period the prerequisites for such a campaign were lacking. First, the market pressures were relatively weak. Although the number of lawyers was growing much faster than the population—Massachusetts had 15 in 1740 but 640 a hundred years later—the economy was expanding even more rapidly (Barlow 1977, p. 9; Gawalt 1970; Hauser 1976). And the frontier continued to offer an outlet to lawyers who could not make a living in the cities of the eastern seaboard (Harris 1972; Bloomfield 1979).

If the economic impetus to seek market control was absent, so was the institutional foundation necessary to achieve it. The bar associations of this period were local—a

heritage of colonial social, economic, and political structures—whereas the market to be controlled and the political apparatus that might control it now were located at the state level. The frontier counterpart of the metropolitan or county bar association was the loose fraternity of lawyers riding the same circuit (Calhoun 1965). In each instance, the functions of the association were essentially social; it was, therefore, incapable of absorbing the large number of new entrants. Finally, there was a failure of leadership. The new elite that succeeded the Tories could not avail itself of the traditional warrants of status, whose legitimacy had been destroyed by the Revolution, and half a century passed before the emergence of new warrants (graduation from an elite school, corporate clients). This last factor may have been critical since, initially, market control always is an elite project. Therefore, after the Revolution, as control over entry passed from bar associations to courts (Friedman 1973, p. 276) and as requirements were eliminated, the associations themselves rapidly atrophied (Stevens 1971, p. 471).

Another prerequisite for market control was a legitimating ideology. As litigators, lawyers displayed oratorical skills that did not differ in kind from those of the ordinary person, though they were more highly developed. Furthermore, lawyers suffered from public opprobrium that had its origins in Puritan suspicion of professionals in general and lawyers in particular (Tabachnik 1976). This suspicion was intensified by the Revolution and its aftermath. If lawyers were prominent in that struggle (Boorstin 1958, p. 205; Surrency 1964; Klein 1974), a number also were visible Tories (McKurdy 1972). The Revolution appears to have imbued some citizens with utopian expectations of a society without lawyers (Nolan 1980, pp. 93–96; Warren 1911, pp. 212–33). The role of lawyers as debt collectors, in a period of economic depression that culminated in Shays' Rebellion, and as advocates for Tories seeking to recover confiscated property aggravated popular hostility (Friedman 1973, p. 265; Gawalt 1970; but see Nolan 1976; Ely 1973). Finally, Jacksonian democracy glorified the ideals of a free market, exemplified in the destruction of the Bank of the United States, as well as direct democracy and egalitarianism, illustrated by the widespread extension of election to, and rotation in, office, including judgeships (Stevens 1971, p. 416). The atmosphere hardly was conducive to the establishment of a professional monopoly.

The Rise of Industrial Capitalism and the Professionalization of Lawyers

The period from the Civil War through World War I saw major changes in all aspects of American society. The professionalization of lawyers proceeded in large part as a response to the emergence of new categories of clients seeking, or capable of purchasing, new kinds of legal services. In the private sector, these were the industrial capitalists (perhaps best exemplified by the railroads) and the financiers on whom they depended (Hurst 1950, pp. 249, 298, 309; Swaine 1946). These new clients needed a distinctive kind of legal service: counseling, planning, and negotiation. Because such services represent an investment for capitalists, whereas litigation is generally a consumable for individuals (cf. Johnson 1977), entrepreneurs were prepared to spend substantial amounts on legal fees. Lawyers were needed to create new forms of business organization and new methods for raising the vast amounts of capital necessary to undertake major projects. State intervention often was necessary to support, protect, and regulate business, or to make loans or grants of land. Since the state can act only through law, it has to be approached, and must respond, through lawyers.

If corporate clients actively sought legal counsel, they also generated a great deal of litigation, defending the numerous lawsuits brought by employees, customers, and others injured by capitalist activity (Hurst 1950, p. 300; Horwitz 1977, chap. 3; Schwartz 1981; Abel 1981a), fighting the battles that accompanied the push toward concentration and monopoly (Hurst 1950, p. 347; Swaine 1946, pp. 461–69), and opposing the formation and activities of labor unions. Therefore, it is not surprising that the contingent-fee system—a uniquely American institution permitting those without resources to initiate litigation (Royal Commission on Legal Services 1979, vol. 1, pp. 176–77)—rapidly expanded during this period (cf. Bloomfield 1979, pp. 269–73).

The public sector also grew, if less quickly, increasing its own use of lawyers and stimulating a reciprocal need in the private sector. The scope and apparatus of social control were transformed: criminal codes lengthened and were rationalized (Alschuler 1979, p. 234), and the personnel of the criminal-justice system was professionalized (Friedman 1979; Haller 1979). Just as a professional judiciary created the need for professional representatives in civil litigation, so professional prosecutors could be opposed effectively only by professional defense counsel. The federal government's legal capacity also expanded: in 1853, the Attorney General had only 3 employees—2 clerks and a messenger—but in 1870 the Department of Justice was created, and by 1897 it had a staff that included the Solicitor General, 4 assistant Attorneys General, 9 assistant attorneys, 3 law clerks, and 44 general clerks (Friedman 1973, p. 561; Eisenstein 1978, pp. 9–13).

Market Control These changes affected the market for legal services in several ways. Whereas most consumers previously had been individuals or small partnerships, corporations and government now entered the picture, adding heterogeneity and concentrating demand for lawyers in cities, especially the larger commercial and governmental centers. As new markets emerged, old ones were declining or being challenged: collection agencies and finance companies took over debt collection; banks and trust companies invaded estate work; and title-insurance companies displaced lawyers in routine land transactions (Hurst 1950, p. 319; cf. Johnstone and Hopson 1967, chaps. 5–10).

Differentiation among consumers intensified differences between elite and nonelite lawyers. The former developed characteristics that would facilitate the project of market control. They were few in number, they clustered in the major financial capitals, they shared a common background and education, and they served the same clients (Miller 1951; cf. Cain 1976). Because the demand for the services of these lawyers was expanding rapidly, competition did not take seriously antagonistic forms. Their practices generated substantial profits not only because of the wealth and needs of their clients, but also because these lawyers adopted a new form of organization. No longer individual professionals selling their own services, elite lawyers increasingly were capitalists selling the labor of others. Before the Civil War, it was rare for a law firm to have more than two partners, and salaried lawyers remained uncommon until after 1900 (Friedman 1973, pp. 554–55). Although apprentices constituted subordinated labor, there rarely was more than one per lawyer (Hurst 1950, p. 273). In the half-century after the Civil War, however, law firms expanded enormously: the number of partners grew, permitting greater specialization; they began to employ salaried lawyers—associates—many of whom never would become partners. Perhaps most important, the advent of office machines enabled them to replace apprentices, who had spent much of their time copying

documents, with low-salaried clerical workers, increasingly women (Hurst 1950, pp. 306–7; Stolz 1972). Finally, elite lawyers transferred their energies from advocacy—where their monopoly was difficult to justify, since "it's only a matter of words" (Morris et al. 1973, p. 310)—to counseling, which offered much greater scope for "technicality" (Jamous and Peloille 1970).

If elite lawyers were well situated to pursue market control, the base of the profession was largely disabled from doing so. The first obstacle was numbers; the 22,000 lawyers of 1850 had increased to 60,000 by 1880 and 114,000 by 1900 (Friedman 1973, p. 549). The second was a high, and growing, level of heterogeneity: class, birthplace, training (Nash 1965), and, after the turn of the century, national origin—though the latter ultimately became a rallying point for a xenophobic campaign to exclude immigrants from the bar (Auerbach 1974). Third, nonelite lawyers were geographically dispersed: they served individuals and small businesses, often located in rural areas and small cities; only with the rapid shift of population from country to city in the twentieth century (Hauser 1976, pp. 20–21) did these lawyers attain a level of concentration that allowed the development of bar associations, and these were more often local organizations than statewide groups (Hurst 1950, p. 314).

Market control in this period, therefore, was an elite project. Only after the elite showed that market control could be achieved and legitimated could subordinate strata emulate the example (Larson 1977, chap. 2). The first step was the creation of bar associations: initially in the major cities—New York in 1870 (Martin 1970), Chicago in 1874 (Kogan 1974)—and then nationwide, with the establishment of the American Bar Association in 1878 (Friedman 1973, pp. 561–62). The last was founded by 75 of the nation's 60,000 lawyers at Saratoga Springs, an exclusive resort, where it continued to meet for the next ten years, thereby ensuring that its membership remained small and homogeneous—1.3 percent of the bar in 1900, 3 percent in 1910, and 9 percent as late as 1920 (Hurst 1950, pp. 287, 289; Friedman 1973, p. 563; Stevens 1971, p. 456). Its functions were as much social as political, and those professional tasks it did undertake—law reform and especially proposals for uniform state laws—are best understood as efforts to legitimate the sudden increase in wealth and influence enjoyed by elite lawyers.

Education Limitations on the size and membership of the professional elite occurred through formal education. At first sight, apprenticeship and professional regulation of entry to the bar might seem to provide much more direct ways of exercising power, and the rise of formal education might appear to signify a loss of professional control. But apprenticeship asked too much of the supervising attorney, could not produce enough lawyers to satisfy expanding demand, and was not a cost-efficient source of subordinate labor. It also was too particularistic (cf. Gower and Price 1957, pp. 330–31; Royal Commission on Legal Services 1979, vol. 1, pp. 644–45; vol. 2, pp. 48, 441) in a society that legitimated professional success as an expression of meritocracy (Larson 1977, chap. 8; Bledstein 1976). Finally, since the university alone could elaborate and rationalize the corpus of technical expertise that grounded the claim of American lawyers to constitute a profession, criteria for entry to the bar could only establish minimum standards and were an inadequate means of controlling elite membership.

We still do not know exactly how graduation from an elite university law school became the preferred path for entry to the professional elite during the last quarter of the

nineteenth century, but, once established, the dynamic was self-perpetuating. The demand for university legal education allowed the universities to increase the length of the required course. Reversing the trend of the Jacksonian era, Harvard Law School extended its program from eighteen months to two years in 1871 and to three in 1895; other elite schools anticipated or followed its example (Stevens 1971, p. 427). Although only 4 percent of the population of law school age held college degrees (Auerbach 1974, p. 29), by 1896, Harvard required a baccalaureate for admission to its law school; four other schools introduced this requirement by 1921; and still others insisted on several years of college (Stevens 1971, pp. 431–32). The purpose of these prerequisites sometimes was quite explicit: "either a college diploma or an examination including Latin . . . will keep out the little scrubs (German Jew boys mostly) whom the school [Columbia] now promotes from the grocery counter . . . to be 'gentlemen of the Bar'" (Taft 1938, p. 146).

But if elite schools were exclusive, the growth of nonelite law schools had just the opposite effect. Apprenticeship had limited the number and characteristics of those who could aspire to legal careers, since it required both financial sacrifice and good connections (Hurst 1950, p. 256). Nonelite law schools offered an almost unlimited number of places, with few prerequisites and minimal financial demands. Their growth during this period was phenomenal: 21 law schools existed in 1860, 28 in 1870, 61 in 1890, 102 in 1900, and 143 in 1920 (Stevens 1971, pp. 425, 429–30; Woodworth 1973, p. 497). In 1917, Chicago had 9 schools, Washington 8, New York 5, and St. Louis and San Francisco 4 each (Reed 1921, pp. 193–95). Of the 61 law schools operating in 1890, only 18 imposed any requirements for entry, and only 4 of those were as rigorous as most colleges (Hurst 1950, p. 268). Consequently, the number of students grew even more rapidly. There were 345 in 1840; 1,200 in 1860; 4,500 in 1890; 12,500 in 1900; 19,500 in 1910; and 41,400 in 1930 (Stevens 1971, pp. 425, 428–29; Woodworth 1973, p. 497).

Nonelite schools also were financially more accessible: Iowa State University inaugurated public low-tuition legal education in 1868 (Stevens 1971, p. 427), and part-time afternoon and evening schools accepted working men at a tuition as low as $40 a year (First 1976, p. 143). The last category grew most rapidly: 10 such schools enrolled 537 students in 1890; 64 enrolled 10,734 in 1916 (Stevens 1971, p. 429). The proportion of all students in full-time day law schools in New York State fell from 79 percent in 1890 to 15 percent in 1930 (Woodworth 1973, p. 501). The result was the rapid displacement of apprenticeship by law school as a means of qualification: by 1922 only 9 of the 643 students taking the New York bar examination had no law school training (First 1978, p. 361, n. 294).

The reason for this dramatic shift was not pedagogic; apprenticeship had not suddenly become inadequate, and law school indispensable, to transmit essential professional skills. Indeed, law schools devoted relatively little effort to conferring technical competence (Gordon 1980). Rather, the explanation was political; just as law schools had declined during the Jacksonian era as entry to the profession was eased, so they revived as barriers were raised. The proportion of jurisdictions requiring formal training—either law school or apprenticeship—increased from 9 out of 39 in 1860 to 23 out of 49 in 1890 and 36 out of 49 in 1917, of which 28 required 3 years of law school (Stevens 1971, p. 459). In some states, law schools even were able to acquire a "diploma privilege" that automatically entitled their graduates to practice; but the American Bar Association opposed this

abdication of control to educators, and the number of schools enjoying it declined after 1908 (Stevens 1971, pp. 457–58). In all other jurisdictions, bar examinations became more rigorous; written tests were introduced in 1876 and became more common after 1900, following the precedent of law school examinations (Hurst 1950, p. 283). Responsibility shifted from the local level to the state; the 4 state boards of bar examiners before 1890 multiplied, until they were found in 37 of the 48 jurisdictions by 1917 (Friedman 1973, p. 564; Stevens 1971, pp. 458–59). This trend was part of a more general movement at the end of the nineteenth century toward occupational licensing, in which the more prestigious occupations often succeeded in securing state sanction for control over entry (Friedman 1965).

But, despite the increased stringency of bar examinations, there was little, if any, reduction in the supply of lawyers. Between 1850 and 1900 their numbers rose much faster than the growth of population (cf. Friedman 1973, p. 549, and Hauser 1976, p. 16)—and the ratio of population to lawyers increased only slightly thereafter—704:1 in 1900, 863:1 in 1920, 764:1 in 1930, and 745:1 in 1940 (Friedman 1973, p. 549; Hurst 1950, p. 314). It is not that lawyers were unconcerned about this trend; as early as 1881, Wisconsin lawyers expressed dismay over the numbers being admitted to the bar (Hurst 1950, p. 314). The proliferation of professional associations attests to the same concern. The 8 state and territorial bar associations in 1878 rose to 20 by 1890, 40 by 1900, and 48 by 1916; in addition, there were nearly 600 other local associations (Hurst 1950, pp. 287–88). But these, like the ABA, remained minority organizations. State bar associations enrolled only 20 percent of all practicing lawyers; state and local groups combined enrolled only 30 percent (Hurst 1950, p. 289). One reason for the continuing failure to control supply may have been the enormous wave of European migration (Hauser 1976, p. 18) with the consequent pressures for routes of upward mobility (see Ben-David 1963–64, pp. 275–77).

Legitimation The change in the structure of producers during the half-century under consideration affected both the profession's needs for legitimation and the means by which these needs might be satisfied. Legitimation, like market control, was an elite project. First, elite lawyers had to justify their wealth, status, and power, not only in the face of the prevailing egalitarian ethos but also against the jealousy of the mass of the profession, who enjoyed few of those privileges. Second, they had to distance themselves from the clients through whom the privileges had been attained, for the banks, railroads, and other corporations were seen by many as illegitimate—malefactors of great wealth (Berle 1933, p. 341).

Elite lawyers pursued this goal by promoting the concept of legal science (Gordon 1980). First, the ABA created the National Conference of Commissioners on Uniform State Laws and the American Law Institute, both of which fostered the rationalization and unification of substantive and procedural law (Hurst 1950, pp. 362–63; Friedman 1973, pp. 563–64). Second, the ABA supported university legal education, establishing a Section on Legal Education in 1893 and helping to launch the Association of American Law Schools in 1900 (Hurst 1950, p. 362). The appointment to the Harvard faculty of James Barr Ames—the first law teacher who had never practiced—symbolized the new trend (Stevens 1971, p. 455; Seligman 1978a, chap. 2). But if the university carried with it the cachet of science, the price to the profession was some loss of control to a rising

professoriate (First 1978; Auerbach 1971). Third, lawyers also legitimate their status through conspicuous public service; for most of the period from the Revolution through 1930, they constituted two thirds of the Senate, one third of the House of Representatives, half to two thirds of all state governors, and a significant proportion of southern state legislators (Hurst 1950, p. 352; cf. Podmore 1977, 1980a). Thus, elite lawyers were active in progressive politics at the national, state, and local levels (Gordon 1980).

Inherent tensions troubled each of these attempts at professional legitimation. One segment of the profession frequently sought to justify itself by delegitimating another (Bucher and Strauss 1961; Podmore 1980b). Meritocracy—the claim that privilege was earned by acquisition of a university degree—necessarily denigrated the competence of those who lacked this credential. Yet, the chasm between the strata could not be acknowledged explicitly; when the Reed Report (1921) recommended recognition of the fact that the two tiers of law schools prepared graduates for two distinct professions, the proposal was vehemently rejected (Stevens 1971, pp. 461–64). Elite participation in progressive politics also accentuated this division, since it was directed largely toward reforming local government by eliminating the political machines through which nonelite ethnic lawyers sought advancement (Hurst 1950, p. 268; Barlow 1979).

Market Control Through Restricting the Supply of Lawyers After World War I

The decades preceding World War I saw the emergence of a legal elite, defined by graduation from certain recognized law schools—which constantly were raising the standards for admission and performance, thus restricting the number and diversity of their students—accompanied by a dramatic expansion of the base of the profession. The most significant change in the postwar period was the reversal of this latter trend. There were fewer law students at the beginning of the 1960s than there had been at the end of the 1920s, despite the fact that the population to be served had increased by nearly half (Hauser 1976, p. 16) and the economy had expanded even more rapidly (cf. Pashigian 1977, p. 72). Limitation was effected by imposing the standards adopted by the elite on nonelite law schools. Although professional associations of law teachers and lawyers were the prime agents in this movement, it ultimately received the backing of the state (First 1978). Yet, these efforts might not have succeeded without the adventitious interruptions in supply caused by the Depression and World War II (cf. Kronus 1976).

Physicians took the lead in market control, as they did in so many phases of the professional project (Larson 1977, chap. 3). When Abraham Flexner began his investigations into medical education in 1900, there were 160 medical schools with a total of 25,213 students. In 1910, mere anticipation of the publication of his study reduced the number of schools to 131 and of students to 21,394. As his recommendations were implemented and the admissions requirements of medical school rose from a high-school diploma (1914) to one year of college (1916) and then to two (1918), the number of schools fell to 85, with 13,798 students, by 1919–20—half what they had been 20 years earlier, although population had increased 40 percent during that period (Stevens 1971, pp. 459–60; Larson 1977, pp. 162–66).

The legal profession had begun moving in the same direction a decade earlier. In 1892, the ABA recommended that all future lawyers receive a minimum of two years of either

apprenticeship or law school; by 1897, it urged three years of law school. The Association of American Law Schools, founded by the ABA in 1900, limited its membership to two-year schools and, in 1905, to three-year schools. In 1912, it started to squeeze out night schools by raising standards, and it excluded part-time schools altogether in 1920. Beginning in 1909, the ABA Section on Legal Education and Admission to the Bar proposed a minimum of four years of apprenticeship or three years in a law school and an additional graduate year in a law school or law office; by 1916, it had narrowed this recommendation further to three years of full-time or four years of part-time law school study (Stevens 1971, pp. 453–56).

But these were no more than recommendations. As late as 1917, no state required attendance at a law school. In 1919–20, there were 18 two-year schools and even a one-year school; of the 127 three-year schools, 69 (enrolling 13,318 students) were part-time. Furthermore, in 1916–17, only 7 of the nearly 150 law schools required even three years of college. It is not surprising that the Flexner Report and its aftermath made a strong impression on lawyers. Three years after its publication, the ABA Section on Legal Education expressed interest in a comparable study, and the Carnegie Foundation, which had supported the earlier inquiry, readily agreed to do so again. But the Reed Report (1921; see Stolz 1972) was a grave disappointment to the organized bar. Alfred Z. Reed acknowledged that one- and two-year law schools were fated to disappear, but he maintained openly what everyone acknowledged tacitly—the American legal profession was highly stratified. If the value of elite lawyers was obvious, the base also performed essential functions, satisfying aspirations to social mobility through the attainment of professional status and providing legal services to individuals and small businesses. Different schools with different standards therefore were appropriate (Stevens 1971, pp. 457–59).

The legal profession appeared to accept this situation as unavoidable for the moment and sought to raise the standards for both categories. The Root Committee on Legal Education, established by the ABA in 1921 in response to the unsatisfactory Reed Report, recommended that aspiring lawyers complete at least two years of college and attend law school for four years if they were doing so part-time. The ABA adopted this recommendation and then obtained the endorsement of a conference of state and local bar associations—important political allies, since the 1920s also saw the rise of the integrated bar (McKean 1963), a professional association with compulsory membership, endowed with state authority to control entry. The Association of American Law Schools (AALS) continued to take the lead in differentiating elite institutions (First 1978). It readmitted part-time schools but simultaneously raised the requirements for full-time schools (1922); it imposed a maximum ratio of 100 students to each teacher (1924); it insisted that its members require two years of college (1925); and it added criteria for law school libraries (1927–28). In 1923, the ABA issued its first list of approved schools—39 in Category A and 8 in Category B—and otherwise gradually endorsed the more stringent AALS criteria (Stevens 1971, pp. 461–64, 493–96).

Yet the promulgation of standards by voluntary associations did little more than reaffirm the practices of elite law schools and encourage others that aspired to elite status. The base continued to grow rapidly. Part-time law students outnumbered those in full-time institutions in 1923; four years later, the 106 part-time schools enrolled 57 percent of all law students. Only half the law schools satisfied the ABA requirements, and only

one third of the law students attended AALS-approved schools. Only 9 schools required a college degree, and another 9 demanded three years of college; but 32 of the 49 American jurisdictions had no prelegal requirement, and 11 more required only a high school diploma. Finally, although all jurisdictions but Indiana required passage of a bar examination, 9 had no other formal requirements, and only 4 actually required attendance at a law school (Stevens 1971, pp. 496–97).

It was an external event, the Depression, that interrupted this steady growth. Between 1928 and 1931, the number of law students dropped suddenly by 7,000, or 15 percent. This loss was recouped only partly by 1935. The Depression naturally had a different impact on the two major strata of law schools. The aggregate decline of 5,000 students between 1928 and 1935 actually was a composite of a decrease of 10,000 at schools not approved by the ABA and an increase of 5,000 at approved schools; the latter figure is explained only partly by the approval of additional schools. As a result, approved schools expanded their share of the student population from one third to half. Simultaneously, states began to impose the requirements the ABA long had been recommending. Between 1934 and 1936, 11 states instituted a prerequisite of two years of college, and by 1938, 40 of the 48 states had done so. The influence of the ABA increased even more dramatically as states required graduation from the schools it approved.

The consequence of these convergent events was dramatic. In 1938–39, law school enrollment declined by another 3,000 (nearly 10 percent) to 34,539—approximately 12,000 fewer students than before the Depression (a drop of about 25 percent in a decade of rising population). In 1938 alone, 7 schools closed their doors. The upshot was a very substantial extension of the barriers the ABA had sought to impose. In 1938, the 101 schools approved by the Association enrolled 63.7 percent of all law students; 150 law schools required two years of college, and only 30 accepted less. These proportions reversed those of a decade earlier (Stevens 1971, pp. 500–504).

The process was completed by World War II. Law school enrollments fell to a low of 6,422 in 1943–44, a drop of 86 percent from the pre-Depression peak of 1928, and a number of schools failed. The postwar period saw a large influx of students as a result of the imbalance between supply and demand (Pashigian 1977, 1978), the booming economy, and the financial assistance given returning veterans. But of the 51,015 law students in 1947, 36,999 attended full-time ABA-approved schools (73 percent; in 1927, only 43 percent of all students had attended full time), and 86 percent attended ABA-approved schools (compared with 33 percent in 1927). The proportion of students in unapproved schools grew briefly from 14 percent in 1947 to 19 percent in 1949 but then fell to 8 percent (3,502) in 1958. This trend was reflected in, and doubtless largely caused by, state support for ABA control. In 1947, 17 states required graduation from an ABA-approved school, and 2 others gave preferential treatment to such graduates; by 1970, 33 states required graduation from an approved school. Prelegal requirements were also raised. In 1950, ABA-approved schools had to require three years of college; by 1970, 8 states required four years of college, and another 30 demanded three (Stevens 1971, pp. 504–9).

A substantial transformation thus was wrought in little more than 30 years. In 1927, there were 46,384 law students, of whom only a handful were college graduates, more than half attended law school part time, and more than two thirds were enrolled in schools not approved by the ABA. In 1960, there were only 43,695 law students,

virtually all of whom were college graduates and attended ABA-approved schools full time (York and Hale 1973, p. 1). If the absolute decline in numbers was slight, it was huge relative to the increase in population and the growth of the economy; the ratio of population to law students rose by 55 percent.

LAWYERS AND CLIENTS IN CONTEMPORARY AMERICAN SOCIETY

The remainder of this essay will present a structural analysis of the current relations between producers and consumers of legal services, the ways in which these relations are mediated by other social institutions, and the means by which the legal profession is legitimated. My focus will be on the methods by which lawyers control, or fail to control, the production *of* producers—that is, their own reproduction—and *by* producers—that is, the supply of legal services (Larson 1977, chap. 4; Abel 1979a). The subsidized redistribution of lawyers' services—simultaneously the principal source of legitimation for lawyers and an increasingly important mechanism for controlling the market by creating and regulating demand—will occupy the following section.

Consumers of Legal Services

The present structure of the demand for legal services is an extrapolation of trends already visible at the turn of the century. In the private sector, the dominant tendency is a radical separation between the markets generated by large corporations (and wealthy individuals) and by individuals (and smaller businesses); in a sample of the Chicago bar, five out of six lawyers worked exclusively for one category or the other (Laumann and Heinz 1979). One reason for this separation is demographic. Lawyers, like other professionals, have been leaving, or failing to settle in, small towns (Blaine 1976), where they served a heterogeneous clientele (Handler 1967; for a novelistic account of small-town practice, see Gardner 1972), in order to concentrate in the largest cities, where the market is segmented (Carlin 1962, 1966; Sikes et al. 1972). By contrast, potential individual clients have been moving away from lawyers—who are located in the center city, near the business district and courthouse—to the suburbs, where lawyers only now are beginning to follow them (Diamond 1981).

Corporations and wealthy individuals dominate this segmented market, consuming approximately half of all the time expended by lawyers (Laumann and Heinz 1979; Pashigian 1978). This dominance obviously is a concomitant of the rise of American capitalism—although the state may play a comparable role in state-capitalist societies (Friedman and Zile 1964; Barry and Berman 1968). It is the product of several convergent factors. First, the size and wealth of the consumer is related to both the quantity of services needed and the continuity of demand; the corporation rationalizes one sector of the market for legal services by aggregating the needs of all actors within the enterprise. Volume and continuity permit lawyers to achieve economies of scale, thereby enhancing their profits. Second, the larger and wealthier the consumers, the more sizable are the transactions in which they engage. The fees that can be charged also are proportionately higher, whether they are related to the value of the transaction—as in corporate finance, estates, and land transactions—or billed by the hour (Hoffman 1973, chap. 3; Royal

Commission on Legal Services 1979, vol. 1, pp. 269–76). Third, only certain categories of consumers need many of the services lawyers offer (Heinz and Laumann 1978). Wealthy individuals seek tax shelters (see, for example, Margolis 1972), large corporations require defense in protracted antitrust litigation—IBM has paid Cravath, Swaine and Moore as much as $10 million a year (Bernstein 1978, p. 106) in a case that began in 1969 and was abandoned by the government only in 1982. Finally, the wealth and status of the client directly correlate with the prestige of a law practice (Laumann and Heinz 1977).

Corporate Consumers Lawyers seek to control this desirable market in several ways. First, they specialize, not merely, like other professionals, in terms of subject matter—such as tax or patent law—but also, and even primarily, in terms of clients—such as labor unions, insurance companies, and antitrust plaintiffs (Heinz and Laumann 1978; Laumann and Heinz 1979). Although such specialization reduces competition, it simultaneously increases lawyers' dependence on a narrow clientele.

Second, lawyers seek to control the formation and preservation of the lawyer-client relationship. To anticipate a later point, they influence the ways in which individual clients choose lawyers by depriving the public of independent sources of information about the price and quality of legal services and by channeling clients through intermediaries in exchange for favors. By contrast, corporate clients are relatively knowledgeable about the small circle of large firms interested in serving them and are not easily influenced by lay intermediaries. But the large law firm, even more than the sole practitioner, is dependent on a continuous relationship with its corporate clients, both because each client represents a larger proportion of firm income and because large-firm practice entails an extremely high overhead (Hoffman 1973). Major law firms, therefore, take great pains to obtain and retain corporate clients. They hire and reward "rainmakers"—senior partners with close ties to corporate officials (Hoffman 1973; Nelson 1981, pp. 119–23)—a practice that is condemned as fee-splitting when engaged in by nonelite attorneys (ABA 1974, DR 2-107; ABA Commission 1980, Rule 1.6[e]; ABA 1981, Rule 1.5[d]). They encourage partners to accept positions on the boards of directors of clients (cf. Powell 1980), hire the relatives of corporate executives as associates, and place associates who are not made partners in the offices of corporate counsel or in smaller satellite firms that handle overflow business from the corporation (Smigel 1969; Hoffman 1973; Slovak 1980). Decisions to hire an associate and to promote the associate to partner are influenced strongly by the trust the candidate inspires in the firm—and thus will inspire in the client (Baird et al. 1977, pp. 30, 44; Nelson 1981, p. 115). Other mechanisms that also help to preserve the relationship are physical possession of the records of the corporation and accumulated expertise in its affairs, as well as simple proximity—corporation and law firm often are located in the same building (Hoffman 1973). More recently, firms even have established multistate practices in order to follow clients to new jurisdictions (Galanter 1982). As a result, law firms rarely lose major clients and usually do so only because of a change of personnel in client or firm or through a corporate merger (Hoffman 1973).

Law firms thus seek to control the market for corporate consumers by surrendering substantial control to the latter. The sources of lawyer subordination are several. Large though American firms may be compared with law practices in other countries (Royal

Commission on Legal Services 1979, vol. 2, pp. 456–61; Mendelsohn and Lippman 1979; Arthurs et al. 1971), the corporations they serve have hundreds of times their resources, personnel, and influence. Corporations generally spread their legal business among a number of firms, so as not to be overly dependent on any one. They also employ their own in-house lawyers, who serve two functions: they allocate and supervise the work of independent counsel; and, as the fees of outside counsel have grown to nearly twice the cost of in-house lawyering, they perform an increasing amount of the corporation's legal work themselves (Slovak 1979; Nelson 1981, pp. 130–31). By contrast, the ability of the law firm to reduce its dependence on particular clients is limited. It cannot turn down work for an existing client without fear of endangering that relationship; and it is inhibited in accepting new clients by conflict-of-interest rules (ABA 1981, Rules 1.7, 1.9). The cumulative result of these factors is an asymmetrical relationship, in which law firms have gained wealth, status, political influence, and security but at the cost of subordination to their corporate clients (Berle 1933; Stone 1934). This situation is illustrated by recent incidents of unethical behavior (for example, *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 1977; ABA 1981, pp. 124–40; Galanter 1982; cf. Nelson 1981, pp. 133–34).

Individual Consumers In many ways, the characteristics of individuals who are not wealthy and of small businesses, as clients of the lawyers who serve them, and of the relationship between the two are the obverse of the situation just described (Heinz and Laumann 1978; Laumann and Heinz 1979). Individual clients, in particular, represent a small, and possibly declining, share of the private sector; one study concluded that only 18 percent of lawyers' efforts are devoted to alleviating the legal problems of individuals (Laumann and Heinz 1979). Such business is not very profitable to lawyers for several reasons. Individuals rarely purchase legal services as an adjunct to capital investment (Johnson 1977); their transactions are relatively small and, therefore, cannot sustain high legal costs (Hunting and Neuwirth 1962; Trubek 1981); most important, they are one-shot affairs (Carlin 1962; Galanter 1974; Curran 1977, pp. 190–94). That individual consumers have remained unorganized is not accidental; the profession has systematically frustrated attempts to rationalize the market by prohibiting advertising (until recently), solicitation, and the use of lay intermediaries (ABA 1974, DR 2-101, 2-102, 2-103). Low and sporadic demand has two consequences. First, lawyers find it difficult to specialize and thereby enhance their market control. Instead, they constantly confront both competition from other occupations, such as banking and real estate—which are unrestrained by professional regulations and thus able to engage in the aggressive pursuit of business (Johnstone and Hopson 1967)—and from consumers who prefer to act for themselves (Ziegler and Hermann 1972; *Yale Law Journal* 1976; but see Tomasic 1978, pp. 22–25). Second, these lawyers must devote considerable energy to obtaining business (Carlin 1962, chap. 3).

Once the lawyer-client relationship is established, however, the lawyer, not the client, is dominant (Reed 1972; Rosenthal 1974; Hosticka 1979; cf. Cain 1979; Medcalf 1978; Danet et al. 1980). The client is expendable because he is unlikely to return. Individual clients have single problems, rather than ongoing needs for legal services; the average American who sees a lawyer at all does so only about twice in a lifetime and probably will take subsequent problems to different lawyers (Curran 1977, pp. 190–91; cf. Royal

Commission on Legal Services in Scotland 1980, vol. 2, pp. 60–63). It is true that the lawyer relies on former clients for future business, since personal referral is the most common means by which prospective clients find lawyers (Ladinsky 1976; Curran 1977, pp. 200–203; Royal Commission on Legal Services 1979, vol. 2, pp. 211–14). But this aspect does not confer significant influence on any individual client—partly because the client cannot evaluate the quality of service. Differences of education, income, social status, gender, and race between lawyer and client also contribute to the dominance of the former (see, for example, Warkov and Zelan 1965; Stevens 1973; Baird 1973; Boyer and Cramton 1974; ABA, Special Committee 1980, p. 26). Most clients consult lawyers involuntarily—in response to such crises as arrest, divorce, and injury—not in order to facilitate a transaction the client has initiated. Even the client who retains a lawyer to draft a will or negotiate the purchase or sale of a home generally enjoys little volition and experiences considerable tension. Whereas the corporate client controls the flow of information to the law firm, the individual client is totally dependent on the lawyer for information about the progress of the case—information the lawyer jealously guards (Rosenthal 1974; Steele and Nimmer 1976).

But if the lawyer has little loyalty toward his client, he is influenced strongly by those with whom he interacts continuously and who are in a position to grant significant favors: administrators (Rast 1978, p. 845; quoted in Macaulay 1979, p. 164); insurance-claims adjusters (Rosenthal 1974; Ross 1970); prosecutors (Blumberg 1967; *Law & Society Review* 1979; cf. Baldwin and McConville 1977); opposing counsel (O'Gorman 1963; *University of Pennsylvania Law Review* 1953); and such other courtroom regulars as clerks, judges, police, and bail bondsmen (Carlin 1962).

Producers of Legal Services

Control over the production of lawyers was largely achieved in the years following World War II. In 1974, only four of the 33,000 people admitted to the bar had received their training through study in a law office (Knauss 1976). Although a few states still admitted graduates of law schools unaccredited by the ABA, only California had a significant number of those schools (Blake 1979). As a consequence, there were fewer law students in 1960 than there had been thirty years earlier, though these were the years of the postwar boom, when corporate demand for legal services was expanding most rapidly. The resulting imbalance between supply and demand (Pashigian 1978) was visible in the starting salaries paid by law firms—which increased more than fivefold between 1965 and 1981—and the decline in discrimination in terms of class, ethnicity, and gender in law firm hiring (Young 1964; Smigel 1969, chap. 3; Hoffman 1973, chap. 8; Fishman and Kaufman 1975, pp. 149–64; Abel 1980, pp. 359–62). Not surprisingly, the response was a rapid rise in the enrollment in ABA-accredited law schools, from 43,695 in 1960 to 110,713 in 1974—more than 250 percent in 15 years (White 1975, p. 202). Yet even this was a controlled expansion of supply; three times as many people took the Law School Aptitude Test in 1973 as were admitted to law school; there were no unfilled seats at ABA schools that year (Ruud and White 1974, p. 344). And it was the base that grew, not the elite schools, which often received ten times as many applications as they had places (York and Hale 1973, pp. 22–25).

Other factors contributed to the attractiveness of law as a career. Many alternative

professions became overcrowded; engineering suffered as a result of the overresponse to Sputnik and fluctuations in demand; university teaching posts declined with the passing of the postwar demographic bulge. And law came to be seen as a significant agent for social change, first during the civil-rights movement (Casper 1972a; Council for Public Interest Law 1976, chap. 1) and then with the emergence of the OEO Legal Services Program and public-interest law (*Yale Law Journal* 1970; Johnson 1974; Handler et al. 1978a; Weisbrod et al. 1978; Erlanger 1978). Several commentators have argued that contemporary law students exhibit contradictory motives; many are uncommitted to the practice of law (since the attraction of law as a career is not its content but the fact that it is middle-class); many of those who are committed often harbor the (unconscious) belief that they can be agents for social change while enjoying wealth, power, and status (Nader 1970; Stevens 1973; Erlanger and Klegon 1978; Foster 1981).

Law student bodies have changed in composition as well as size. The virtual monopoly of ABA-accredited schools has meant that admission has grown more competitive even as the entering classes have expanded. Because all ABA-accredited schools now require a college degree for admission, there has been a national standardization of entrance criteria, which virtually are limited to performance in college and on the Law School Admission Test. In consequence, as law schools have abandoned explicit reliance on such ascribed characteristics as race, religion, national origin, and gender, the substitution of college grades and test scores has strengthened other forms of bias under cover of a meritocratic legitimation (Larson 1977), since these indices are highly correlated with socioeconomic status (Warkov and Zelan 1965). This bias is accentuated by the high, and rapidly rising, cost of law school education. Although elite law schools always have been prohibitively expensive for the working class, part-time education provided an alternative route for a majority of entrants to the profession prior to World War II. The great reduction in such opportunities (Kelso 1972; Ruud and White 1974, p. 345) has not been offset fully by the expansion of public university law schools, since the latter generally are full-time institutions. As a result, law students, and especially those at national schools, are from relatively, and increasingly, privileged backgrounds (Stevens 1973, pp. 572–73; Chappell 1980; Zemans and Rosenblum 1981, pp. 32–42; cf. Erlanger 1980).

Before World War II, the legal profession was almost exclusively the domain of white males (cf. Royal Commission on Legal Services 1979, vol. 1, chap. 35). This was, in part, the result of explicit discrimination. Many states would not admit women to the profession until the end of the nineteenth or the beginning of the twentieth century. Law schools also enforced sexist admission policies; Harvard excluded women entirely until 1950 (Auerbach 1974, p. 295; Seligman 1978a, p. 7). It was only during the war, when men were drafted, that a significant number of women attended law school—about 25 percent of the 6,422 law students in 1943–44 were women. But the proportion fell dramatically with the return of the veterans (Stevens 1971, p. 504); consequently, women constituted only 2.8 percent of the profession as late as 1971 (Grossblat and Sikes 1973).

Southern law schools also excluded black students—a policy that was not even challenged until after the war (*Sweatt* v. *Painter*, 1950)—and few blacks had the educational credentials or financial resources to attend northern schools. Historically, the American Bar Association was openly racist; it responded to the inadvertent admission of three

black attorneys in 1912 by requiring all applicants to identify their race and rejecting all blacks until the 1940s (Auerbach 1974, pp. 65–66). This racism was one stimulus for the founding of the National Lawyers Guild (Brown 1938) and the National Bar Association. At the beginning of the 1970s, black, Latino, Asian-American, and Native American lawyers constituted less than 1 percent of the profession (Ramsey 1980, pp. 377–78).

Major changes occurred after 1970 (see Abel 1980, pp. 359–62). Categorical exclusions have been eliminated. Women began attending law schools in larger numbers in the 1970s in one expression of the feminist movement (Epstein 1981). Some schools encouraged ethnic minorities to apply and designed admissions policies that took account both of the need for minority attorneys and of the centuries of political, economic, social, and educational discrimination minorities had suffered (Ramsey 1980). Yet, as recently as 1974, women constituted less than 20 percent of law school enrollments, and the rate of increase was diminishing (White 1975, p. 202; cf. Pipkin 1978). In 1978, ethnic minorities remained grossly underrepresented in law student bodies, compared with their proportions of the population; blacks were 4.3 percent and Latinos 1.7 percent (Ramsey 1980, p. 380; Ramey 1978). Furthermore, these figures stabilized and began to decline. If they are maintained for forty years (the time period necessary to replace the present generation of lawyers), women and minorities still will be underrepresented in the legal profession by about 50 percent.

But even such a modest improvement seems unlikely. Majority law students and alumni and state governments vocally have expressed their suspicions of and resentment toward affirmative-action programs. Faculties generally share these sentiments, although they usually frame their criticism in terms of lower academic preparation and performance, which reduces the likelihood that the student will pursue, or succeed in, a traditional career. The Supreme Court supported these views in *Regents of the University of California* v. *Bakke* (1978), ruling that professional schools must subordinate race to other criteria in admissions decisions. The combined effect of these other criteria—inevitably, college performance and aptitude test scores—together with the high and rising cost of law school, will both reduce the number of minority entrants and ensure that they are from more privileged backgrounds (cf. Zemans and Rosenblum 1981, pp. 32–42).

Not only do law schools have a monopoly over the selection of entrants to the profession; they also control a critical stage of the socialization process (see, generally, Barry and Connelly 1978). In exercising this control, they display a limited autonomy that conceals their fundamental subordination to the profession. The separation of law teachers and practitioners, introduced at Harvard a century ago, is virtually complete; for most faculty, teaching is a full-time, lifetime career, although teachers at less prestigious law schools are likely to practice and those at the elite to consult with, and move between, private practice, professional associations, government, and the judiciary (Fossum 1980a). Faculty members also control their own reproduction. The principal criterion for recruitment—success as a law student—affirms the value of what law teachers do. Yet that qualification generally requires confirmation by the state (a judicial clerkship or a job in the federal executive) or by corporate capitalism (several years as an associate in a law firm). Promotion to tenure and subsequent advancement turn largely on traditional scholarly criteria rather than on skill as a lawyer or in training future lawyers. Yet the hierarchic ranking of subject-matter specializations, headed by corporate and constitutional law, strongly reflects the principal clients the profession serves—

capital and state (Pipkin 1976, 1978). Finally, law school faculties, which had been exclusively male and white, now have hired small numbers of women (Fossum 1980b) and minorities. But professional dominance still is reflected in the range of tolerated political ideologies, which is narrower and more conservative than that found in most university social-science departments.

These tensions between academy and profession also affect the curriculum. Students who enter law school with an image of law as public service (Stevens 1973; Erlanger and Klegon 1978) are greeted with a set of required first-year courses that are at least consistent with such an image, if they also are relevant to later specialization (Zemans and Rosenblum 1981, pp. 144–50). By the second year, however, law students are increasingly subject to influences over which the school has little control—the job market (interviews for summer employment begin at the start of the second year) and the bar examination (almost all students take courses in every subject examined on the bar). As a result, 85 percent of the courses offered at law schools are bar-exam subjects (Seligman 1978b; cf. Bankowski and Mungham 1978). But this narrowing of the curriculum is portrayed as the reflection of market forces (student choice) and faculty autonomy (cf. Auerbach 1970 with Nader 1970) and not as a capitulation to either the profession or the state (but see Zemans and Rosenblum 1981, p. 11).

The conflict between academic autonomy and professional dominance can be seen in the long, and still unresolved, controversy over clinical education. Despite early and eloquent pleas for "lawyer schools" (Frank 1933, 1947), clinical education took root only in the 1960s. At first its growth was rapid—in 1976–77, 139 schools offered 494 programs in 57 fields of law (Gee 1977)—but its status remains tenuous. Traditional law teachers never have been comfortable with clinical education, which threatens their claim to unique mastery of a scientific discipline. Clinical law also tends to be more parochial than clinical medicine; because powerful clients will not entrust their legal problems to inexperienced law students (except those employed by their law firm), such students are limited to handling the legal problems of the poor and disadvantaged. Lawyers also are ambivalent about clinical education. Although they constantly berate law schools for failing to convey essential skills (Baird 1978; Benthall-Nietzel 1975; Zemans and Rosenblum 1981, pp. 34–144), the more elite the lawyers, the more they feel that they acquire these skills in practice (Zemans and Rosenblum 1981, pp. 150–55). Large law firms have strong reasons for retaining control over socialization after law school. Finally, because clinical education requires a low student-teacher ratio and therefore is very expensive, it has depended heavily on government support (Gee 1977). As law schools pursue their elusive academic status, as law firms continue to grow, as government curtails the legal services programs in which students are placed, and as student interest in poverty law declines, clinical education faces a gloomy future (Condlin 1981).

The form as well as the content of legal education reveals professional influence. In virtually all American law schools, the entire first year and much of the other two years are dominated by the "Socratic" dialogue—in which the teacher asks most of the questions and the student is *required* to answer—and the case method—in which analysis is focused principally on appellate cases (Stevens 1971; Gee and Jackson 1975). These pedagogic approaches share several salient characteristics. First, they stress the absolute subordination of student to teacher; the former is exposed as knowing nothing, while the

latter hints at omniscience without ever allowing this claim to be tested (Kennedy 1970; Savoy 1970; Stone 1971). This public demonstration of ignorance erodes the self-respect most students bring to law school and accustoms them to the subordinate status they will occupy for several years after graduation. Students simultaneously learn that the only way to gain the respect of their teachers—and, therefore, of their peers—is to accept the school's sole criterion of success and compete for a place in the hierarchy of grades (Turow 1977; Osborn 1979b). The case method permits a level of theoretical abstraction sufficient to differentiate the academy from the profession while still ensuring that the fundamental premises of the legal system are not questioned (Zemans and Rosenblum 1981, pp. 136, 185). Finally, students are required to argue either side of the case at the behest of the teacher. In this way, they become accustomed both to take moral direction from superiors and to value technical dexterity divorced from ethical commitment (Carrington and Conley 1977; Cramton 1978; Hedegard 1979; Katz and Denbaux 1976; Rathjen 1976; Riesman 1957; Scheingold 1974, chap. 10; Shaffer and Redmount 1976; Taylor 1975; see generally Barry and Connelly 1978, but see Erlanger and Klegon 1978; Kay 1978).

Yet the unchallenged dominion of law school is brief. No sooner have matriculates learned to think of themselves as law students (cf. Becker et al. 1961) then they must concern themselves with becoming lawyers. The elite national law schools promise most graduates secure, salaried positions; there is fierce competition for the grades that largely determine the hiring decisions of law firms and corporations (Zemans and Rosenblum 1981, pp. 108–10), but otherwise interest and effort slacken after the first year (Brickman 1978; Pipkin 1976; Stevens 1973). Few students in less prestigious schools can be as confident of employment, and some will have to set up individual practices; consequently, although disillusion with law school is high, energy devoted to schoolwork actually increases (Pipkin 1976). But if the profession penetrates the elite law school by way of career expectations, it influences nonelite law students more immediately. Whereas elite law schools discourage students from term-time work through explicit rules (ABA Special Committee 1980, pp. 34–35, n. 38), class schedules, extracurricular activities, or simple location outside a major metropolis, many students at nonelite law schools work half-time or more after their first year for reasons that combine financial need, training, and career (Zemans and Rosenblum 1981, pp. 44–47, 157). This experience significantly erodes both the educational and the moral influence of law school and simultaneously reduces pressure from both students and practitioners for more professionalized training or formal apprenticeship.

Entry to the Job Market The profession dominates law students most directly through the impact of the job market as mediated by the placement process. As one first-year student said, "We talk about justice before we come here; we get here and we talk about jobs" (quoted in Foster 1981, p. 243). Where the majority of law school graduates before World War II expected to become independent professionals, today most are anxious to begin their careers as the salaried employees of law firms, corporations, or government, and they expect to remain within similar institutions their entire working lives (Zemans and Rosenblum 1981, pp. 81–84). Large employers have progressively rationalized the labor market. Students rely less on personal contacts and imperfect information (Smigel 1969); instead, law school placement offices collect and exchange

hundreds of résumés from both students and potential employers. The placement process also begins earlier. At one time students looked for jobs only after they had passed the bar exam, or at most in their final term. Now the first half of the third year is virtually preoccupied with job seeking, second-year students are obsessed with summer jobs, and even first-year students are affected by employment anxiety. This process is dominated by those employers that hire a substantial cohort of new recruits every year, know their personnel needs far in advance, attract potential employees by offering summer jobs to students (whose productivity does not justify their pay), invest substantial resources in recruitment, and pay high salaries; in other words, large and medium firms and large corporations. And the law school has its own reasons for identifying a successful career with employment in law firms or corporations; such placements confirm the status of the school and produce the graduates who can make future financial contributions. It is not surprising that law students alter their conceptions of what skills and careers are desirable; abandoning criminal justice, poverty law, or active participation in social and political change, they gravitate toward law firm practice (Erlanger and Klegon 1978, pp. 22–26).

If the profession itself is the strongest influence on law schools and law students, the state is another significant factor. First, it is an employer whose importance has grown with the expansion of the regulatory apparatus, to the point where more than one lawyer in ten is a government employee, and more than one law graduate out of every five starts a career with the government (Sikes et al. 1972; Zemans and Rosenblum 1981, pp. 68–69; cf. Royal Commission on Legal Service 1979, vol. 2, pp. 46, 50–51). Because a judicial clerkship has become the most prestigious first job, the criteria for selection shape the behavior of law students; judges, in turn, select students for success and certify their clerks to subsequent employers (cf. Oakley and Thompson 1980).

Second, the state directly regulates legal education. In setting requirements for admission to the bar, the judiciary can and does specify the number of classroom hours a student must complete, the balance between classroom and clinical instruction, and even the particular courses that must be offered and taken (Zemans and Rosenblum 1981, p. 11). The judiciary also has castigated law schools for failing to instill advocacy skills and has threatened to impose additional requirements for litigators (Zemans and Rosenblum 1981, p. 9; Report of the Committee 1979). Sometimes the state even challenges the foundation of professional authority over legal education; for several years the U.S. Department of Education has been investigating the role of the ABA in accrediting law schools, and proprietary schools recently initiated a suit against the ABA to contest the association's blanket refusal to accredit them (Moskowitz 1977; U.S. Department of Health, Education and Welfare 1978; Fossum 1978; Stevens 1980, pp. 249–52). The state also is in a position to influence the norms by which law schools choose their faculty or student bodies or the ethnic or gender composition of each (*Regents of the University of California* v. *Bakke,* 1978).

The third source of state influence—finances—may be all the greater because it is largely invisible. Although legal education has traditionally demanded fewer institutional resources than other forms of professional or graduate training, and sometimes even generates a profit for the university (Stevens 1971; First 1976), this situation is changing under the combined influence of inflation and the growth of both clinical programs and faculty research (especially if the latter is empirical). In response, private institutions have raised tuition—increasing the dependence of their students on government loans—

and sought direct state support. Public institutions, in turn, may have to build a private endowment, increasing their subordination to graduates and thus to the profession.

Thus, control over the production of producers is the result of a complex interplay among law schools, the profession, and the state, illustrated by the changing roles of the bar examination and legal education. Although the bar exam usually is viewed as the paradigmatic licensing provision, it never really performed that function: the few examinations required before the 1890s were mere formalities, and their increasing stringency in the following decades did little more than parallel the growing importance of the law school and its rising admissions standards. For most entrants, acceptance by a law school has been tantamount to entry into the profession. In 1971, for instance, 72 percent of all examinees passed, 80 percent of those taking the bar for the first time did so, and the cumulative pass rate of those who persisted has been estimated at 90 percent (York and Hale 1973, pp. 6–7; cf. Royal Commission on Legal Services 1979, vol. 2, pp. 48–49, 53). Put another way, there is a strong correlation between scores on the Law School Admission Test (which, together with college grades, determines admission to law school), law school grades (which determine graduation), and the probability of passing the bar examination (Carlson and Werts 1976). There is further evidence that the bar examination is less central than law school. Proprietary (profit-making) bar review courses are completely unregulated, although law schools are heavily regulated and proprietary schools are denied accreditation. There are few restrictions on the number of times the bar examination may be taken, although law schools often expel students for academic failure (York and Hale 1973, p. 7). Bar examiners also have been supplanted by law schools as the arbiters of a suitable personality. Whereas character and fitness committees have either become rubber stamps (Association of the Bar 1978) or been prevented from imposing their standards (*Cord* v. *Gibb*, 1979), the criteria used to select students for law school (successful completion of sixteen years of formal education) and to determine who graduates from law school are more stringent and appear more universalistic.

Notwithstanding its diminished salience, the bar examination still exerts significant control over entry. First, it remains a major barrier for graduates of law schools not accredited by the ABA. In California—the only state with a significant number of such schools—the relative proportions of graduates of accredited and unaccredited law schools who passed the bar exam between 1974 and 1979 were 76 and 52 percent; for those who were repeating, the percentages were 90 and 73 (Blake 1979). Pass rates for minority applicants, who may be overrepresented in the unaccredited law schools, also are low (Blake 1980). But whereas law schools have been somewhat responsive to charges of cultural bias in the admissions and examination processes and to the need to compensate for prior discrimination (Ramsey 1980), bar examiners generally have rejected such criticisms (Commission to Study the Bar Examination 1975), and courts have upheld them against lawsuits charging discrimination (Antonides 1978).

Second, the bar examination inhibits the geographic mobility of lawyers, although these restrictions are being challenged and relaxed. Many jurisdictions denied noncitizens entry into the profession until the Supreme Court found this exclusion unconstitutional (*In re Griffiths*, 1973; see also Royal Commission on Legal Services 1979, vol. 1, pp. 495–96). Each state bar, however, continues to exclude the lawyers of other states, and the barriers against out-of-state lawyers are highest in those jurisdictions to which lawyers would most like to migrate—the Sun Belt, for instance (York and Hale 1973, p.

6, n. 26). Yet these controls are diminishing. The multistate bar examination, which most states have adopted in part, is one step toward a common qualification. The requirement of residence prior to the examination, which can impose a significant financial burden on a lawyer practicing in another state, is under attack (*Gordon* v. *Committee on Character and Fitness,* 1979). The rules governing partnerships among lawyers admitted in different states are being liberalized as large firms seek to engage in multistate practice for the convenience of their clients, whether conglomerates or wealthy retirees (Schwartz 1980; Galanter 1982; Becker 1978; cf. ABA 1974, DR 3-103[A], with ABA Commission 1981, pp. 175–78). Here again, as the bar examination becomes less significant as a regulatory device, the elite law schools assume a greater role—recruiting students from, and allocating them to, a national market (but see Zemans and Rosenblum 1981, pp. 47–52).

The profession has lost some control not only over who qualifies as a lawyer and how many do so but also over the practice of law by the unqualified. Every state has rules prohibiting the "unauthorized practice of law" by nonlawyers, and most state and local bar associations have watchdog committees to police infringements of these rules. Their efforts are loosely coordinated by the ABA, which periodically publishes *Unauthorized Practice News.* Yet challenges to the professional monopoly have proliferated in recent years. Businesses offer to help individuals conduct their own divorces, buy and sell real property, fight evictions, form corporations, draft and probate wills, and handle their own small-claims litigation (Abel 1980, pp. 379–82; *Yale Law Journal* 1976). And the state, which created the professional monopoly, now appears less sympathetic to its continuance. The Federal Trade Commission, which has been investigating all service occupations, views professional anticompetitive regulations with the greatest suspicion (*ABA Journal* 1977, 1978). Even the Chief Justice has questioned whether lawyers have a legitimate claim to their monopoly over "minor cases" (Burger 1976, p. 93).

These abridgments of professional control over the supply of legal services appear to be associated with a shift in the locus of regulation from the state to the federal government (cf. Schwartz 1980) and even to the international arena, where there is yet no political entity. This shift reflects the expanded scope of economic activity. Just as local bar associations proved inadequate to the task of regulation in the early nineteenth century, so state bar associations may be increasingly obsolete today. Perhaps this development is the reason why a recent president of the ABA listed "protection of the right of the profession to self-regulation" as one of his highest priorities (Sims 1978, p. 2) and why the ABA has been more active and more effective in the area of demand creation discussed below than have state and local groups. Yet there is reason to think that the efficacy of professional regulation inevitably declines as the scope of the market—and thus the locus of relevant political authority—shifts from locality to state to nation to region, since the political entity becomes more powerful—less subject to influence (cf. Scheiber 1980, pp. 696–707)—and the professional association more bureaucratized, differentiated, and less capable of representing the interests of its increasingly heterogeneous constituency (Orzack 1978, 1980). Some evidence may be found in the fact that only about one half the lawyers in the United States belong to the ABA, whereas two thirds of Chicago practitioners belong to the Chicago Bar Association (Heinz et al. 1976, pp. 769–70); of course, many lawyers belong to the integrated state bars in which membership is compulsory.

Structures of the Profession If professional control over the supply of lawyers, mediated by the state, has been attenuated, another form is emerging in its place—hierarchic (often bureaucratic) control over subordinates (usually salaried employees) within the unit of production. The law firm is the paradigm, partly because more than half those entering the profession now begin their careers as law firm associates (Zemans and Rosenblum 1981, p. 70). The firm first exercises control through the hiring process, which pervades and increasingly dominates the last two years of law school. Firms scrutinize prospective associates, not only during day-long interviews but also, in the course of summer and part-time employment, throughout one or two years. The flow of information is largely one way; firms deny applicants information about security of employment and the structure of remuneration within the firm but encourage students to feel that they are exercising meaningful career choices by stressing marginal differences of atmosphere (workload, social life, dress code, personalities) and starting salary.

The new associate begins an apprenticeship of five to ten years. There is considerable evidence that significant socialization occurs during this period. Law firms are reluctant to hire mature graduates in their 30s or 40s (who are presumably less malleable), preferring the callow 25-year-old, who has been in school for the previous nineteen years. Fundamental ethical views about professional work are developed during the early years of law practice, under the influence of peers and superiors, rather than in law school (Carlin 1966, chaps. 6, 8); and this socialization process is more intense the larger the firm (Zemans and Rosenblum 1981, pp. 173–87). Several factors combine to enhance the susceptibility of the associate. Because law school has not endowed the fledgling lawyer with practical skills (Zemans and Rosenblum 1981, pp. 135–40, 150–55), the new worker feels grossly incompetent and is dependent on senior associates and partners for the necessary training. Junior associates have virtually no control over their work. The amount is so overwhelming that they constantly feel inadequate, an experience aggravated by competition with other associates (Bazelon 1969, chap. 7; Mayer 1967, pp. 326–38; Hoffman 1973, chap. 8). They have little or no say over the content of the work; although associates can express preferences for particular departments (Nelson 1981, pp. 125–26), those who voice ethical objections to a client or to performing the services a client requests endanger their chances of partnership, or fear that they will do so. The associate simultaneously is denied significant responsibility; contact with clients is limited and mediated by superiors, who assign only sections of problems. But the new associate constantly is subjected to a one-way evaluation by those same superiors, who may never fully disclose the outcome.

Domination in the organization of work is paralleled by domination in the system of remuneration. Associates, as employees, have no control over what they are paid; raises and bonuses arrive as gifts from the partners—or fail to do so (Smigel 1969, p. 81; Hoffman 1973, p. 131). The structure of remuneration within the firm is hidden from associates. Most important, the enormous disparity between partner income and associate salary—often on the order of 5 to 1—restates the hierarchic relationship in the most powerful symbol available to capitalist society. Furthermore, partnership privilege is built on this inequality; partners' incomes are high because associates are paid only a fraction of what they earn for the firm—usually a third—while another third goes to the partners, the remainder being overhead (York and Hale 1973, p. 19; Hoffman 1973, p. 118; Nelson 1981, p. 126; Abel 1981d; but see Liebowitz and Tollison 1978). If associates feel

exploited, their only hope of redress is to become partners themselves and exploit others.

The last piece in this structure of control, and the one that holds it together, is the selection of some associates as partners. Although law firms differ, only a fraction of entering associates are made partners—often as few as one or two out of ten (Hoffman 1973, p. 129; Nelson 1981, p. 126). Intense competition among associates is induced by this high degree of selectivity combined with the magnitude of the reward—life-time security, extraordinary income, influence, status, and the domination of new subordinates within the firm (Osborn 1979a). But even those who fail in the struggle for partnership remain subject to the influence of the firm, which helps to place them in smaller, satellite firms, dependent on the parent firm for business, or in the office of legal counsel of the firm's corporate clients (Smigel 1969, pp. 80–90; Slovak 1979, 1980).

This structure of control is far more powerful than the bar examination. When superimposed on the factors that allocate students to primary and secondary school, college, and law school, the process of selecting associates produces an extraordinary homogeneity of class, race, and, until recently, religion and gender (Warkov and Zelan 1965; Smigel 1969, chaps. 3–5; Stevens 1973; Hoffman 1973, chap. 8; Fishman and Kaufman 1975, pp. 149–64; Zemans and Rosenblum 1981, chaps. 3, 5). Because the final stages of recruitment (initial hiring, intermediate promotions, and selection for partnership) are largely invisible and entirely private, they are almost totally unaccountable to public opinion or the courts—although recently there have been a number of lawsuits charging firms with sex and race discrimination (Galvin 1976; *ABA Journal* 1979, 65:897). Indeed, law firms willingly acknowledge that the capacity to inspire client confidence, sensitivity to client needs, and ability to get along with others in the firm are of the greatest importance when the firm chooses partners (Baird et al. 1977, pp. 30–33, 41; cf. Powell and Carlson 1978). The level of internal control attained through this lengthy and rigorous process of recruitment and socialization is revealed in the capacity of partners to divide partnership earnings, often quite unequally, without overt conflict and to handle the touchy matter of retirement without formal rules (Smigel 1969, chaps. 7–8; Hoffman 1973, chaps. 3–4).

The large law firm is not the only structure that exercises hierarchic control over the production of legal services. Indeed, the single largest unit in the United States is the office of house counsel of AT&T, with 863 lawyers (Schwartz 1980, p. 1275). Offices of house counsel, one of the fastest growing forms of legal practice, increased from 11,000 lawyers in 1951 to 50,000 in 1979 (Schwartz, 1980; Slovak 1979). But the trend may be most dramatic within private law firms. Whereas only 37 firms had more than 50 lawyers in 1959, there were 200 such firms 20 years later, 90 of them with over 100 lawyers; and the 20 largest firms, with a total of 4,681 lawyers, averaged 234 lawyers (Schwartz 1980, p. 1274; Galanter 1982). The proportion of sole practitioners dropped from almost two thirds of the bar 30 years ago to one third today (Schwartz 1980, p. 1274; cf. Sikes et al. 1972) and to 16 percent in a sample of Chicago practitioners (Zemans and Rosenblum 1981, p. 67). Most of the larger firms are also expanding geographically; 19 of the 20 largest had a mean of four branch offices; 15 of these had offices overseas (Galanter 1982). Firms are using more subordinated employees; permanent associates (lawyer employees who never become partners) are reappearing, the ratio of associates to partners in the 50 largest firms grew from 1:1 in 1975 to 1.6:1 in 1979, and the use of paraprofessionals is expanding (Galanter 1982; Brickman 1971; Statsky 1972; W. E. Green 1976;

Nelson 1981; Johnstone and Flood 1980). Finally, the development of office technology has resulted in a substantial increase in fixed capital (Muris and McChesney 1979).

Other structures consisting largely of employees organized hierarchically and bureaucratically have also expanded rapidly. These include legal clinics (Muris and McChesney 1979; Maron 1978), prepaid legal-service plans (Deitch and Weinstein 1976; Pfenningstorf and Kimball 1977), the Legal Services Corporation (Johnson 1974; Handler et al. 1978a; Legal Services Corporation 1975–80), prosecutors and public defenders (Hermann et al. 1977; Eisenstein 1978; Schwartz 1980, p. 1277), and regulatory agencies.

The explanations for and significance of these changes are complex. Economies of scale offer one reason for growth, but some productive units already are reaching, or have surpassed, the size beyond which further expansion produces diseconomies. Increases in the ratio of associates to partners, in the number of paraprofessionals, and in fixed capital all can enhance partners' profits (Siegfried 1976; Bower 1980; Illinois State Bar Association 1975, pp. 88–91). Specialization in response to the greater complexity of private and especially public law is a major factor (Laumann and Heinz 1977, 1979; Mindes 1980; Nelson 1981; Zemans and Rosenblum 1981, pp. 70–80). As clients grow and diversify, law firms must follow suit, especially if they are to satisfy the peak demands created by major litigation (Bernstein 1978). But growth also may have symbolic significance. A firm that is not growing as fast as others may be seen as declining (*American Lawyer*, June 1980), and such an impression can be self-fulfilling. In the absence of clear criteria of quality, size may be the most obvious surrogate (Nelson 1981; cf. Mungham and Thomas 1979).

Size also increases overhead, however, and consequently the dependence of the firm on its clients. A high and predictable volume of work becomes essential; only the larger corporations can pay the fees and furnish the volume; and the expertise necessary to handle such clients, as well as the personal contacts that assure such business, are valuable resources, not lightly squandered. Concentration naturally increases the barriers to entry by new firms. Finally, increased size mandates the progressive displacement of professional self-regulation by bureaucratic controls (Stinchcombe 1959), not so much among partners (Nelson 1981) as by superiors—executive committees, department heads—over inferiors—junior partners, associates, law clerks, and paraprofessionals.

Control over Production by Producers

If professionals control the market for their services mainly through control over the production *of* producers, a subsidiary means is control over production *by* producers (Larson 1977). The latter is more problematic for several reasons. It presupposes the former; it requires reciprocal self-sacrifice, rather than self-interested efforts to exclude competitors; and it is more difficult both to police, since competitive practices by licensed practitioners are less visible than the unauthorized practice of law, and to justify, since it is hard to explain why, in a capitalist society, professionals alone should not compete. Thus, whereas controls over the production *of* producers progressively were strengthened starting shortly after the Civil War, it was not until these were fairly secure—following World War I—that controls over production *by* producers began to be imposed.

Control of Information The profession has sought to control the information available to potential clients, who must choose among competing producers; indeed, it

often fosters the impression that all producers are equally qualified. The bar examination certifies minimum competence but does not rank those admitted; qualification is for life; and the profession has resisted mandatory continuing education (but see Zemans and Rosenblum 1981, pp. 160–61) and periodic examinations and has rejected responsibility for measuring quality (Carlson 1976; Rosenthal 1976; Steele and Nimmer 1976; Carroll and Gaston 1977; but see Parker 1974).

The lawyer-referral services established by bar associations recommend lawyers to the public at random, refusing to differentiate by quality (Christensen 1970, chap. 5; Berg 1979). Lawyers themselves have defeated and discouraged clients' accusations of incompetence by their conspiracy of silence in malpractice actions (Rothstein 1972; *Yale Law Journal* 1973; Mallen and Levit 1977; Vollmer 1978). A recent incident illustrates the professional attitude. Consumers Union sought to compile a directory of Virginia lawyers that would inform potential clients of qualifications, price, hours, language competency, and the like. But when the organization submitted the preliminary questionnaire to the Virginia State Bar Association, the latter ruled that any attorney responding to it would be subject to disciplinary action (*Consumers Union of United States* v. *American Bar Association,* 1975).

Yet, though the profession denies clients the means to make independent judgments, lawyers frequently are ranked by other lawyers. Law schools select applicants and grade students—and the law school attended and class standing are the two strongest predictors of career success; law firms hire associates—and there is substantial stability in both type and structure of practice throughout lawyers' careers (Zemans and Rosenblum 1981, pp. 81–87, 114). Elite lawyers assign their acquaintances to categories of competence and financial responsibility in law directories (*Steingold* v. *Martindale-Hubbell,* 1972). Generalists refer cases to specialists—for a fee (Carlin 1962, pp. 162–63; Rosenthal 1974; pp. 99–101). And bar associations increasingly are seeking control over the inescapable fact of specialization by certifying specialists and allowing only those certified to advertise their expertise (Zemans and Rosenblum 1981, p. 161; Zehnle 1975; *Virginia Law Review* 1975; Hochberg 1976).

A central arena for the struggle to control information about the price and quality of legal services has been advertising. Professional associations did not prohibit advertising until well into the present century. California, for instance, first promulgated such a rule in 1928 and permitted some forms of advertising even later (*Barton* v. *State Bar,* 1930). The functions of the ban appear to have been twofold—to enhance the image of lawyers as professionals, thereby advancing the project of collective mobility (Larson 1977, chap. 6), and to distribute consumers equally, or at least fairly broadly, among producers, thereby dampening competition. Yet only fifty years after it was imposed, the country-wide prohibition on advertising was lifted (*Bates* v. *State Bar of Arizona,* 1977; ABA Commission 1980, 1981; cf. Royal Commission on Legal Services 1979, vol. 1, chap. 27; Royal Commission on Legal Services in Scotland 1980, vol. 1, pp. 61–65; *Law Society Journal* [Australia], June 1980, pp. 309–10; ABA 1981, Rules 7.1–7.2).

Several factors contributed to this reversal. The primary legitimation of lawyers has been shifting from professionalism to public service. Although sole practitioners and small firms who had chafed under the ban (Carlin 1962, chap. 5) now opposed liberalization, there was strong pressure from the increasing numbers of younger lawyers (*ABA Journal* 1977)—and half the bar has practiced less than ten years, a third less than five

(Schwartz 1980, p. 1270). Finally, the Supreme Court declared the rule unconstitutional, over strong opposition from the organized profession. This opposition since has been displayed in grudging and incomplete compliance (Cox et al. 1979, chap. 3; Brosnahan and Andrews 1980).

But advertising is not the most important mechanism for informing clients about legal services, and most lawyers have eschewed the opportunities created by the new rules (Cox et al. 1979). Because consumers of personal services generally prefer to rely on the endorsement of someone they know (Ladinsky 1976; Lochner 1975; Curran 1977, pp. 200–203), a direct approach to a potential client, whether by the lawyer or by an intermediary, is more effective. Thus, the ban on solicitation was widely flouted (Carlin 1962), but for purposes of maintaining its image, the organized profession engaged in periodic, highly publicized crackdowns on "ambulance chasing" (Reichstein 1965). And lawyers made a sharp distinction between situations in which they themselves were the intermediaries—house counsel selecting outside counsel (Slovak 1980), law firm "rainmakers" and "finders" attracting corporate and wealthy individual clients (Hoffman 1973, chaps. 4–6; Nelson 1981), generalists referring cases and splitting fees with specialists (Carlin 1962, pp. 162–63; Rosenthal 1974, pp. 99–101)—and situations in which the intermediary was a relatively autonomous layperson who might even seek to control the professional (Carlin 1962, chap. 3). Pressures to relax the ban on solicitation again were resisted by the organized profession, but this time the Supreme Court overruled the bar only in part. It granted constitutional protection to lawyers who offered free services to unrepresented individuals seeking to assert political rights (*In re Primus*, 1978), but not to lawyers motivated by personal gain who solicited paying clients asserting nonconstitutional claims (*Ohralik* v. *Ohio State Bar Association*, 1978). The profession clearly intends to allow little more solicitation than is constitutionally mandated (cf. ABA Commission 1980, Rule 9.3, with ABA Commission 1981, Rule 713). The reasons for the factual distinction appear to be that the provision of legal services in the first instance enhances the reputation of the profession for public service while posing little threat of competition, whereas, in the second situation, solicitation might detract from the image of professionalism and simultaneously aggravate competition.

Control of Competition A similar pattern can be perceived in the controversy over prepaid group plans for legal services. These range along a continuum from wholly "open," in which members are entitled to retain *any* lawyer and be reimbursed for the costs, to wholly "closed," where members are restricted to the services of a single lawyer or law firm (Deitch and Weinstein 1976; Pfenningstorf and Kimball 1977). At both national and state levels, the organized bar sought to promote the former and restrict the latter through discriminatory regulations (ABA 1974, DR 2-102[D] [5]); these organizations were prevented from doing so only by the threat of prosecution by the Justice Department for antitrust violations (Deitch and Weinstein 1976, pp. 21–23). But though open-panel plans appear to leave untouched the existing distribution of business among participating lawyers, client preference for a personal recommendation actually tends to produce concentration in a few practitioners (Marks et al. 1974, pp. 67–70). Furthermore, virtually all the plans that have been established are closed (Deitch and Weinstein 1976, pp. 39–42).

All the practices just described seek to control production by authorized producers in

order to limit competition among lawyers. But, of course, the most effective means is price fixing. The organized profession began to set fees as soon as it achieved sufficient control over the production of producers, promulgating minimum schedules and threatening disciplinary action against lawyers who undercut prices. This practice went unchallenged for half a century, until the rise of consumerism stimulated lawsuits that successfully attacked those schedules as violations of the antitrust laws (*Goldfarb* v. *Virginia State Bar*, 1975). But that decision did not prevent lawyers from exchanging information about prices charged, which is what large law firms have been doing for years—subscribing to services offered by firms of accountants, which collect and distribute information on fees charged, hours billed, gross income, partnership shares, associate salaries, and other overhead items (Daniel J. Cantor 1980). This practice affords another instance of the shift from professional to bureaucratic methods of supply control. Yet these new forms of control probably are less effective than those they replaced. At the base of the profession there is competition from nonlawyers, who offer assistance in such matters as uncontested divorces and immigration, and from legal clinics, which cut costs through the economies of scale allowed by advertising, information-processing technology, and use of paraprofessionals (Muris and McChesney 1979). And large law firms have been losing business to in-house counsel, who cost corporations substantially less (Bernstein 1978; Schwartz 1980, pp. 1275–76; Nelson 1981).

A fundamental test of market control is price. Critics of the professions long have contended that control over production of and by producers of services must inflate the cost of those services and thereby reduce their availability (Reed 1921; Carroll and Gaston 1977; cf. Leffler 1978; Shepard 1978; Blair and Rubin 1980). There is considerable evidence to support this view (see, for example, Arnold 1972). It has been estimated that half the income differential between the professions and those occupations that control neither entry nor production is explained by restrictions on supply (Friedman and Kuznets 1945). Others have argued that, though licensing itself does not affect occupational income, difficulty of entry—whether measured by the length of training required (Pfeffer 1974) or the level of restraints on geographic mobility (Holen 1965)—does have such an effect. National time-series data on American lawyers from 1920 to the present show a decline in the ratio of real to equilibrium earnings of lawyers as the supply of lawyers expanded and a rise in that ratio after World War II as a result of the curtailment in supply caused by the Depression, the draft, and the increased stringency of supply controls (Pashigian 1978, pp. 64–67). Large disparities in the fees charged for standardized services by lawyers within the same community (Cox et al. 1979, chap. 5) strongly suggest the absence of vigorous price competition. Finally, inferences can be drawn from the consequences of introducing competition. Differences in the cost of prescription medicine and eye glasses between jurisdictions that allow and prohibit price advertising are striking (*Los Angeles Times*, May 25, 1978, pt. 1, p. 22; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 1976). Conveyancing in South and Western Australia—the two states in which lawyers do not have a professional monopoly—costs one third to one half of the price in the rest of Australia (Basten and Disney 1977, p. 13; Royal Commission on Legal Services 1979, vol. 2, pp. 154–58). And when legal clinics initiated vigorous price competition in the United States, they set fees at half the going rate charged by other lawyers for comparable services (Muris and McChesney 1979; Menkel-Meadow 1979).

Legitimation

As the characteristics, activities, and relationships of producers and consumers of lawyers' services have changed, so have the needs of the profession for legitimation and its means of satisfying them. Legitimation means nothing more arcane than the justification an actor offers for his actions or circumstances. What is felt to require explanation will vary, as will the audience to whom it is directed; the latter may include the actor himself, others similarly situated (in this case, other professionals), clients, and the general public. A number of tensions generate the need to legitimate. The very existence of a category of functional specialists creates tension between the dependence inherent in the division of labor and clients' desires for autonomy (Morris et al. 1973; Curran 1977, pp. 229–32; see, generally, May 1976). Individuals may be responding to this tension when they insist on representing themselves (Haug and Sussman 1969; Torens 1975; *Faretta* v. *California,* 1975; *Yale Law Journal* 1976; but see Tomasic 1978, pp. 22–25). Businesses are reacting to the same dynamic when they seek to keep lawyers out of transactions or to ensure that lawyers will be thoroughly subordinated (Macaulay 1963; Galanter 1982). The equivalent of this interindividual tension at the level of collectivities is the claim by professions that they are self-regulating and thus immune from control by the larger society. Bar associations have maintained that they are exempt from both the First Amendment and antitrust laws, and they even have sought to protect their members from certain criminal sanctions.

A different tension arises out of the conflict between partisanship and neutrality; lawyers vigorously advocate their clients' interests while insisting that lawyers must not be identified with those clients (Curtis 1951; Wasserstrom 1975; Fried 1976; Schwartz 1978; Simon 1978; Luban 1981). The claim to moral unaccountability is not readily accepted, since no other role in society enjoys such a privilege, and lawyer protestations that loyalty to client is moderated by loyalty to the legal system and to society often elicit skepticism and disbelief (*Nebraska Law Review* 1975; Fair and Moskowitz 1975; Waltz 1976). This dilemma is reproduced at the institutional level in the visible identification of the legal profession with clients drawn from a very limited segment of society—primarily corporations and wealthy individuals (Curran 1977, pp. 233–34).

Finally, lawyers cannot escape the tension between the prevailing ideology of egalitarianism and the reality of class and stratification. At the institutional level, the entire legal profession is seen to enjoy privileges of wealth, status, and power (Zemans and Rosenblum 1981, pp. 3–5). Yet from the perspective of the individual lawyer, there are vast differences within the profession among lawyers who practice in different settings, specialize in different subject matters, or serve different clienteles (Carlin 1966, chap. 2; Laumann and Heinz 1977, 1979; Zemans and Rosenblum 1981, chap. 4; Slovak 1980; Nelson 1981). Such intraprofessional stratification is in tension with the underlying assumption of professional equality expressed in the single uniform credential.

Justifications Several attributes of the legal profession appear to respond to these legitimation problems. The esoteric quality of legal practice and scholarship contributes to the image of law as science, thereby justifying the dependence of clients and the autonomy of the profession. The ideology of meritocracy—mediated by the university, the bar examination, and the job market for law school graduates—justifies both the

privileges of the profession as a whole and differential rewards within it. The conspicuous exertions of law students, bar examinees, associates, and even senior lawyers—the strong, often neurotic, intensity of the professional attachment to the work ethic—also serve to argue that lawyers' perquisites are well deserved (Riesman 1951; Bazelon 1969, chap. 7; Turow 1977; Osborn 1979a, 1979b). And indeed, as in all professions, effort (or at least endurance) is rewarded: earnings increase sharply with age (Langer 1978).

A third legitimation has been gaining ground in recent years—the ideology of the market (Abel 1981d). Pressed by the Supreme Court, the Justice Department, and the Federal Trade Commission, the organized profession grudgingly has relaxed restraints on advertising, solicitation, and prepaid legal plans and withdrawn its sanction from price fixing. This trend lends weight to the argument that the market explains the allocation of legal services—their quantity, quality, and price; justifies the moral unaccountability of the lawyer, who works for whoever pays him—an attitude most fully expressed in the "cab-rank" principle of English barristers (Royal Commission on Legal Services 1979, vol. 1, pp. 30–31); and, most important, would be distorted by any kind of external control, which could only detract from optimum efficiency. Yet, like earlier legitimations, this argument, too, is flawed. The market is far from perfect, and there are strong reasons why lawyers' services should not be allocated as though they were simply another commodity (see, for example, *Gideon* v. *Wainwright,* 1963).

Self-Regulation The two principal legitimations invoked by lawyers, however, are peculiar to the profession—self-regulation and altruism (cf. Fennell 1980). Self-regulation (Blair and Rubin 1980) allays the anxiety of the client who, in a crisis, must depend for vital services on a professional, often a stranger; it justifies the weakness, verging on total absence, of both market and external political controls; it moderates visible partisanship, individual and institutional, with an appearance of neutrality; and it suggests that professional privilege is a concomitant of superior moral worth. If it does not ultimately achieve these goals, it nevertheless contributes to them in a variety of complex ways (Abel 1981b). First, the formal codification of rules of professional conduct conveys the implicit message that whatever is not prohibited or discouraged is approved or at least condoned (cf. Erikson 1966). The decision to represent a client, for instance, is characterized as ethically unproblematic, since the rules offer no guidance. Second, because the rules speak only to the conduct of individual lawyers, they suggest that the ethical dilemmas of the profession are soluble provided the individual behaves properly; structural change is unnecessary. This focus on individual conformity leads readily to an emphasis on education as the means to internalize the rules and inspires periodic revitalization movements. Committees of the American Bar Association proposed revisions of the rules of professional ethics in 1928, 1933, 1937, 1954, and rewrote them in 1970 (ABA 1974, p. i); and yet the ABA once again is engaged in a "comprehensive rethinking of the ethical premises and problems of the profession of law" (ABA Commission 1981, p. i). The primary response to the recent major legitimation crisis, the Watergate scandal, was a requirement by the ABA that students at accredited law schools be instructed in the rules of ethics (ABA Standards for the Approval of Law Schools, § 302[a][iii], August 13, 1974) and the inclusion of ethical questions in state bar examinations. These exercises are largely symbolic. It was known before the reforms that ethical instruction has little effect on attitudes (Carlin 1966, pp. 143–46). Both students

and teachers view the courses as unimportant (Pipkin 1979). A number of elite law schools pay only lip service to the ABA requirement (Zemans and Rosenblum 1981, p. 169). And practitioners maintain that law school instruction in professional responsibility has little effect—though they, too, urge that it be continued! (Zemans and Rosenblum 1981, pp. 171–79).

Professional preoccupation with refining the rules and formal education rests on the assumption that the rules will be internalized and thus become self-enforcing. But the assumption is not justified in practice (Carlin 1966, chap. 3). The necessary corrective is an institutional mechanism for sanctioning deviance. As always, such a mechanism introduces the "gap" between the law of the books and the law in action (Abel 1973). One source of dissonance is control over the disciplinary process; there is something inherently suspect in the claim by an occupational category that its members will punish each other for infractions that all find tempting and many commit. *Quis custodiet ipsos custodes?* (Curran 1977, pp. 231–32). The profession responds to the consequent pressure for public accountability in several ways. The organized bar can divest itself of disciplinary responsibility while still ensuring that lawyers remain firmly in control (Powell 1976; Slovak 1981, pp. 170–74). Alternatively, it can coopt lay persons to serve on disciplinary bodies but always in such small numbers that they remain strongly deferential to the professional members (Steele and Nimmer 1976, pp. 923–24; Blake 1978; Arthurs 1981).

Another problem raised by enforcement is the dramatic disjunction between the content of ethical rules and the substance of client grievances—delay, discourtesy, neglect, unresponsiveness, and excessive fees (Marks and Cathcart 1974; Steele and Nimmer 1976, pp. 946–56; Curran 1977, pp. 224–31). This tension, together with the fact that the disciplinary process is wholly reactive, discourages clients from voicing all but an insignificant fraction of their complaints (Steele and Nimmer 1976, pp. 962–63; Royal Commission on Legal Services 1979, vol. 2, p. 252). Lawyers, who are more knowledgeable about both the content of ethical rules and the structure of disciplinary procedures even if they are not as well placed to observe some forms of misconduct, rarely report what they see or even express disapproval (Carlin 1966, chaps. 6, 9; Steele and Nimmer 1976, pp. 973–74).

The disciplinary process itself is extraordinarily lenient; at each successive stage most of the unresolved grievances are disposed of with little or no punishment. Only a trivial number of serious sanctions—lengthy suspension or disbarment—are ever imposed (Carlin 1966, chap. 9; ABA Special Committee 1970; Marks and Cathcart 1974; Steele and Nimmer 1976, pp. 978–99; Association of the Bar 1976; Tisher et al. 1977, chap. 5; cf. Royal Commission on Legal Services 1979, vol. 1, pp. 344–45, 348–49; New South Wales Law Reform Commission 1979, pp. 33–40; Royal Commission on Legal Services in Scotland 1980, vol. 1, chap. 18; Reiter 1978, pt. D).

Finally, self-regulation not only gives the profession a clean bill of health but also justifies intraprofessional stratification. The rules of professional conduct impose on the base of the profession a set of mores—about acquiring business, for instance—that only the elite can observe. At the same time, they permit a degree of loyalty to clients that may be justified at the base of the profession—in criminal defense, for instance—but is not obviously appropriate for elite practitioners lobbying legislatures or opposing regulatory agencies (Abel 1981b). Given this bias in the substance of the rules, an evenhanded

application exculpates the elite and stigmatizes the base (Carlin 1966, chap. 10; Shuchman 1968). Self-regulation thus advances a mythic picture of how lawyers should, and do, behave and what happens to them if they deviate. This picture is becoming ever more anachronistic as professional control is displaced by hierarchic organizations—the law firm, corporation, or state—having far greater influence over practitioners.

Altruism The last mode of legitimation—public service—is perhaps the most important because it simultaneously can be highly conspicuous while remaining susceptible to professional manipulation. By advertising its altruism, the profession claims that governmental control is unnecessary and that the free operation of market forces could be seriously detrimental to greater representation of the unrepresented. The partisanship of individual lawyers and of the profession as a whole is offset by visible charitable services. And the contribution of time helps to justify the privileges of the entire profession and the unique advantages of its elite.

Lawyers engage in public service through their professional associations and as individuals or firms. Professional associations (except, perhaps, those local groups with very homogeneous memberships) are dominated by elite practitioners, and their governing bodies are even more clearly differentiated in terms of the structure of practice, age, class, and ethnic origin (Halliday and Cappell 1979; Powell 1979; Auerbach 1974; Heinz et al. 1976; Carlin 1962, p. 203). Professional associations also are heavily dependent financially on contributions from the corporate clients of these elite lawyers (Halliday and Powell 1977). Nevertheless, they seek to appear to be more representative of the bar by involving prominent legal educators and scholars and, more recently, women and minority lawyers (Halliday and Powell 1977; Halliday and Cappell 1979).

Given this institutional structure, it is not surprising that professional associations engage in those forms of public service that have little explicit political content—education, rationalization of rules (especially those that are more technical and procedural), reorganization of bureaucracies (such as courts and police), review of judicial nominations, and redistribution of legal services (Halliday and Cappell 1979; Slovak 1981). Yet these activities have an indirect payoff. They imbue the professional association with an aura of selflessness that may help to disguise or distract attention from its self-interested pursuit of other goals, such as market control.

Individually, lawyers engage in two forms of public service. First, they are involved in politics—so involved that they dominate American political life (Melone 1980) and even the politics of other countries, such as Great Britain and Australia, where lawyers generally play a less central role (Podmore 1977, 1980a; Gower and Price 1957; Basten and Disney 1977). Law practice endows lawyers with relevant skills and allows them considerable control over their time. Political activity, in turn, confers visibility and status—thereby attracting new business—and offers new career opportunities. But it is the pro bono publico services that lawyers render without fee or for reduced fees that may be the most controversial manifestation of altruism, at least for the profession itself.

The type and quantity of these services naturally are influenced by the structure of the lawyer's practice. For elite lawyers, pro bono services have the advantage of helping to demonstrate their neutrality and to focus attention on their charitable activities—and away from the energies they devote to paying clients. Thus, it is noteworthy that elite lawyers have transferred some of their efforts from cultural, educational, and other

traditional charitable institutions (Smigel 1969, pp. 10–11; Mayer 1967, p. 338) to the environment, the indigent criminal, the tort victim, and the poor in general (*Harvard Law Review* 1970; Marks et al. 1972; Hoffman 1973, chap. 12; Handler et al. 1978a). The emphasis is on the big case, which exploits the skills and resources of the large law firm and simultaneously confirms its importance (see, for example, Stern 1976); only associates handle the routine problems of the unrepresented (Rosenthal et al. 1971; Ashman 1972). This reallocation of resources also made large-firm practice more attractive to the law graduates of the late 1960s and early 1970s (Simon et al. 1973). The nonelite lawyer operates in a very different environment; he is subject to more frequent requests for assistance whose satisfaction would cause him significant financial hardship, and he constantly must strive to secure more paying business. Consequently, he represents those supplicants who are likely to become paying clients in the future or are referred by intermediaries who also channel more remunerative matters; and he disposes of the problem with a minimum of effort (Lochner 1975).

The result is tokenism. Approximately one third of all lawyers do no pro bono work at all; those who do some handle an average of only three cases a year; 60 percent of those cases are disposed in less than ten hours each; and the bar as a whole donates an average of twenty-seven hours per year in charitable services (Maddi and Merrill 1971; Lochner 1975; Handler et al. 1978a, chap. 5). Nor are lawyers any more generous in direct monetary contributions (Rosenthal et al. 1971, p. 168). The differences in the environments and responses of elite and nonelite lawyers inevitably lead to tensions between them, best illustrated by the recent controversy over mandatory pro bono, which the former are advocating and the latter successfully resisting (Christensen 1981; Association of the Bar 1979; cf. ABA Commission 1980, Rule 8.1, with ABA Commission 1981, Rule 6.1; cf. Marks et al. 1972, chap. 14).

Thus, the legal profession draws upon dominant ideologies to give meaning to its structures and behavior and to resolve internal and external tensions. But it also strengthens those ideologies and contributes to the legitimation of basic social institutions.

First, it reinforces the apparent homology among the adversary system, the free market, and liberal pluralism, epitomized in Holmes's notion that the role of the courts is to preserve the "marketplace of ideas" (*Abrams* v. *United States*, 1919). Just as resources are said to be optimally allocated by the market and political decisions best made by electoral competition, so truth and justice are seen to be ensured by the clash of advocates. By conspicuously championing a few of the unrepresented, the legal profession makes this ideal appear more attainable (Abel 1979b). Second, lawyers depoliticize conflict by legalizing it (Poulantzas 1978, pp. 76–91), thereby detaching individual actors from large aggregates and suggesting that conflict can be resolved without structural change (Scheingold 1974; Abel 1981c, 1982; cf. Handler 1978b). Third, the legal profession exemplifies the meritocratic legitimation of stratification—even more persuasively now that women and minorities have been partly integrated. Fourth, the legal profession reinforces the belief that differences in technical skill compel and justify relations of dominance and subordination, such as those between lawyer and client (Mazor 1968; Wasserstrom 1975; Spiegel 1979; see generally Illich 1977). Indeed, the image of law as a "helping" profession is one of its greatest attractions to potential entrants (Foster 1981; cf. Edelman 1974). Finally, like other professionals, lawyers present one of the few

models of meaningful work under capitalism. Where others are cogs in the division of labor, the professional alone can see the whole (cf. Marx 1977, p. 482; Gouldner 1979; Berger and Mohr 1969). Where others experience work as drudgery and shirk it, the professional finds work rewarding, intrinsically and extrinsically, and glories in it (*Work in America* 1973, p. 16). It is not surprising that the activity of professionals—especially doctors and lawyers—is virtually the only work portrayed in fiction, television, or the movies, whether highbrow or lowbrow.

REDISTRIBUTING LEGAL SERVICES

The last two decades have witnessed the beginning of a transformation in the production of legal services that may be as momentous as the rise of the legal profession a century ago. This change, not limited to the United States, is just as marked in the United Kingdom (Abel 1981d; Royal Commission on Legal Services 1979; Royal Commission on Legal Services in Scotland 1980), Canada (Reid 1978), Australia (New South Wales Law Reform Commission 1981), the Netherlands (Schuyt et al. 1977; Griffiths 1977), and other European nations (Cappelletti et al. 1975; Storme and Casman 1978; Zemans 1979; Blankenburg 1980; Garth 1980; Nousiainen 1980) and Third World countries (International Legal Center 1974; Dias et al. 1981). It affects structures and relations of production, the identity of consumers, the role of intermediaries between the two, and the services performed. This transformation can be summarized as the growing importance of demand creation as a strategy of market control.

The need to redistribute legal services has been argued strongly and repeatedly for more than half a century, both in the United States (Smith 1919; Berle 1933; Stone 1934) and in Britain (Leat 1975; Alcock 1976). But until recently, the profession consistently has chosen to minimize the need and to make only the most grudging response (Royal Commission on Legal Services 1979, vol. 1, pp. 101–4). State subsidization of legal services for the poor was denounced as "socialist" in the 1950s (Storey 1951), and most American lawyers remained hostile to the idea as late as the 1970s (Stumpf 1975), although the ABA Board of Governors unanimously supported the founding of the Office of Equal Opportunity Legal Services Program in 1965 (Johnson 1974, p. 63). The situation in the 1980s could not be more different; when Ronald Reagan sought to abolish the Legal Services Corporation in the spring of 1981, virtually every bar association—national, state, and local—strongly opposed his recommendation (*Los Angeles Times*, March 7, 1981, pt. 1, p. 34; *New York Times*, March 11, 1981, pt. 1, p. 14).

Demand Creation

Several factors have converged to produce this explosion of interest in demand creation. First, control over supply, which gradually improved through the 1950s, significantly eroded thereafter. The number of students at ABA accredited law schools increased dramatically—and disproportionately at the base of the status hierarchy (York and Hale 1973, p. 22). Constraints on production by producers—rules concerning advertising, minimum fees, and unauthorized practice—also succumbed to external attack. Demand creation offers both an alternative and a supplement to the constriction of supply as a means of market control, even if it also emerges when supply control is not threatened (Griffiths 1977, p. 262).

Second, the legal profession's need to create demand coincided with new opportunities to do so. The rise of an organized workforce led by union officials interested in negotiating better fringe benefits constituted a category of potential clients who rarely had used lawyers in the past (Mayhew and Reiss 1969; Marks et al. 1974; Deitch and Weinstein 1976). The gradual growth of the welfare state and the emergence of the "new property" (Reich 1964) created myriad rights that lawyers can help to enforce (Leat 1975, p. 167; Schuyt et al. 1977; Royal Commission on Legal Services 1979, vol. 1, chap. 15). The enormous increase in the number of criminal prosecutions (Saari 1979), the progressive legalization of juvenile justice (*In re Gault,* 1967; Lemert 1976; Stapleton and Teitelbaum 1972; Rubinstein 1976; Anderson 1978), and the creation of a constitutional right to legal representation in most criminal cases (*Gideon* v. *Wainwright,* 1963; *Argersinger* v. *Hamlin,* 1972; *Scott* v. *Illinois,* 1979; see, generally, Hermann et al. 1977) have ensured a continuous and expanding demand for lawyers.

Third, demand creation is consistent with the general shift in advanced industrial economies from the production of goods to the production of services (Larson 1977, p. 250; Rothschild 1981). This transformation of productive activity is responsive to two problems. The first is resource scarcity and the resultant need for conservation; the production of services uses far fewer material resources than the production of goods. The other is underconsumption (Sherman 1979); the limits on the consumption of services are more flexible—few people will own more than one washing machine, but the passion for fast food appears insatiable (McKnight 1977). Finally, demand creation allows a more thoroughgoing form of market control, if one that may be more difficult to attain. It specifies not merely who may produce, but also what services will be consumed, by whom, and from whom.

Legal Need Demand creation is grounded on a reconceptualization of the value of lawyers' services. Studies of "legal need" have played an essential part in this process, comparable to the role performed by sociological jurisprudence in justifying, implementing, and criticizing the New Deal (Glennon 1979; cf. Schlegel 1979). Such studies have proliferated in the last decade, not merely in the United States (Levine and Preston 1970; Curran 1977, especially chap. 1) but also in England (Abel-Smith et al. 1973; Morris et al. 1973; Royal Commission on Legal Services 1979, vol. 2, chap. 8), Scotland (Royal Commission on Legal Services in Scotland 1980, vol. 2, chap. 4), France (Baraquin 1975; Valétas 1976), Germany (Tiemann and Blankenburg 1979), the Netherlands (Schuyt et al. 1977), Australia (Cass and Sackville 1975), and Canada (Colvin et al. 1978). Yet legal need is not a fact but a social construct. Scholars inevitably introduce political values when they assert that people have needs that lawyers can and should fulfill (Lewis 1973; Griffiths 1977, 1980; Marks 1976; Galanter 1976; Mayhew 1975). Whereas, previously, individual lawyers persuaded individual clients to accept proffered services (Rosenthal 1974; Cain 1979; Hosticka 1979), these newer studies allow the profession to act collectively to impute legal needs to entire categories of consumers (Illich 1977).

The studies have identified several barriers to the use of lawyers, which the profession has tried to eliminate or at least lower. The public sector has responded to the claim that lawyers are geographically inaccessible to potential clients (cf. Royal Commission on Legal Services 1979, vol. 1, pp. 46–48) by moving legal aid lawyers from their downtown

offices—which are convenient for lawyers who have to make frequent court appearances—to poor neighborhoods, where they have attracted a different clientele (*Harvard Law Review* 1967; Fisher and Ivie 1971). In the private sector, clinics have moved to the suburbs, often locating in chain stores and shopping centers (Diamond 1981); the Royal Commission on Legal Services (1979, vol. 1, pp. 181–82) even urged that the state subsidize loans to lawyers who locate in areas not presently served.

It also is claimed that potential clients are ignorant of the ways in which lawyers can be helpful (Royal Commission on Legal Services 1979, vol. 1, pp. 45–46). Advertising—especially institutional advertising by professional associations (Fennell 1982), often advocating "annual legal checkups"—has been one response (ABA Committee on Professional Ethics, Opinions 179, 205, 227, 307). Prepaid legal services plans are allowed to, and do, offer unsolicited advice to members. Nonprofit legal services offices were exempted from the prohibition on advertising long before the ban was struck down (ABA 1974, DR 2-102[D]). Potential clients also are thought to be deterred by fear of the unknown; there is evidence that once people use a lawyer, the probability of further recourse increases (Curran 1977, pp. 186–94; Marks et al. 1974, pp. 61–64). Pro bono services may help to overcome the initial apprehension and encourage clients to return with matters for which they will pay fees (Lochner 1975).

But the major barrier to the increased use of lawyers generally is thought to be cost (Royal Commission on Legal Services 1979, vol. 1, chaps. 10–16; but see Mayhew 1975). The response has been to transform legal services for the poor from an act of charity to a matter of right (Cappelletti et al. 1975). Yet, though this right has been firmly established in criminal defense, attempts to extend it to civil proceedings have been largely unsuccessful (*Meltzer* v. *C. Buck LeCraw & Co.*, 1971; *In re Smiley*, 1975; *Lassiter* v. *Department of Social Services*, 1981; cf. Royal Commission on Legal Services 1979, vol. 1, chaps. 12–15). Instead, the Legal Services Corporation has established a criterion of minimum access—two lawyers for every 10,000 poor people—and, as that goal has been approached, it has shifted its emphasis to the quality of the legal services furnished (Legal Services Corporation 1976–80; 1980, pp. 116–29; Bellow 1977; *Legal Services Corporation News*, October–November 1978; March–April 1979).

In the private sector, the barrier of cost has stimulated a number of responses. Among these are the exclusion from employee income for tax purposes of employer contributions to group legal service plans (Deitch and Weinstein 1976, pp. 29–31) and proposals to allow an income-tax deduction for personal legal expenses, similar to the present deductions for business legal expenses and personal medical expenses (Christensen 1970, pp. 71–73). Many lawyers offer free or below-cost initial consultations, which are now a commonplace in their advertising (cf. Royal Commission on Legal Services 1979, vol. 1, p. 134). Prepaid legal service plans dissociate payment and use. Finally, competition from legal clinics and from other occupations has led to substantial cost reductions.

Redistribution Mechanisms A brief inventory of mechanisms for redistributing legal services is an essential foundation for comparison and evaluation. They usefully can be categorized by means of two variables—the source of funding and the number of participating lawyers. Government, of course, accounts for the greatest redistribution, acting, for the most part, through employees in the executive branches of federal, state, and local government (Ford et al. 1952; Schrag 1971, 1972)—including prosecutors

(Eisenstein 1978) and public defenders (Silverstein 1965; Etheridge 1970; Hermann et al. 1977; Wice 1978)—and, more recently, legal services lawyers and paraprofessionals. The budget of the latter has grown from less than $5 million before the creation of the OEO Legal Services Program in 1965 (Johnson 1974, p. 39) to more than $300 million at the end of the Carter Administration, when it supported a staff of more than 5,000 lawyers (*Legal Services Corporation News,* July–August 1980). The Reagan Administration, however, seeking to abolish the Legal Services Corporation entirely, succeeded in cutting its 1982 budget by one third (*Poverty Law Today,* Summer 1981). But government also engages in redistribution by reimbursing private lawyers for services they render to the poor. Court-appointed counsel represent accused criminals (Hermann et al. 1977). More recently, experimental judicare programs have begun to pay private lawyers to provide civil legal assistance (Brakel 1974, 1979; Legal Services Corporation 1980).

A second major source of redistribution is charity. Many lawyers do no pro bono work, and those who perform any services tend to provide cursory representation to very small numbers of clients. This philanthropic activity, in which any member of the bar can participate, recently has been supplemented by the emergence of public-interest law firms. Although such firms have antecedents in the ACLU and the NAACP Legal Defense and Education Fund (Casper 1972a; Council for Public Interest Law 1976, chap. 1; Tushnet 1982), which have been in existence for decades, public-interest law experienced a major expansion in the 1970s, as the Ford Foundation and others made substantial investments. At their height in the mid-1970s, there were perhaps 75–100 public-interest law firms, employing more than 500 lawyers, with a total budget in excess of $30 million (Council for Public Interest Law 1976, chap. 2; Handler et al. 1978b). But foundation support began to dwindle toward the end of that decade (Ford Foundation and ABA Special Committee 1976), and other sources of funding remain elusive (*Alyeska Pipeline Service Co.* v. *Wilderness Society* 1975; Settle and Weisbrod 1978).

Finally, some forms of redistribution do not require subsidization by either government or charity, depending instead on lawyers' efforts to reduce the cost of their services and to reach new clienteles (Engel 1977). There are now more than 100 legal clinics, some with dozens of offices (Maron 1978; Bodine 1979). Several million clients also are enrolled in group legal service plans; one study estimated that this figure could reach 10 to 20 million in the 1980s (Deitch and Weinstein 1976, p. 6).

The New Clients In order to understand the significance of the shift in emphasis from supply control to demand creation, it is useful to pose many of the same questions addressed to earlier historical periods. The first concerns the new clients these services are designed to reach. Several characteristics distinguish them from the clienteles of traditional private-sector lawyers. Perhaps most important, they are almost exclusively individuals, whereas more than half the services of private lawyers are consumed by business associations (Laumann and Heinz 1979). The few exceptions—ethnic, religious, environmental, consumer, neighborhood, and other political groups represented by public-interest law firms (Weisbrod et al. 1978) and more rarely, by legal services offices (Handler et al. 1978a, chap. 3)—only serve to highlight the contrast. Furthermore, they are poorer, less educated, and more likely to belong to ethnic minorities and to be female than are the individual clients served by lawyers in traditional private practice (Fisher and Ivie 1971). This difference is more pronounced in legal services offices, however,

than in clinics or group plans, and each delivery system tends to reach the more privileged within the category of potential clients.

These characteristics of clients clearly affect the identities, work, and careers of the lawyers who serve them. Those lawyers are accorded little prestige within the profession. The status of lawyers is determined largely by the status of their clients; poor individuals and major corporations obviously represent polar extremes. The legal problems of the former are defined as unimportant when measured in terms of the monetary value at stake (Katz 1978). Lawyers' status also varies inversely with the degree of involvement in personal problems and with the level of altruism expressed (Laumann and Heinz 1977, p. 180). The mere fact that these lawyers are publicly subsidized often implies—to their clients as well as to others—that they are less well qualified than are lawyers whose services must be bought on the market (Casper 1972b; Morris et al. 1973, p. 311). The income of these lawyers is low (Langer 1978), either because costs must be kept down, as in clinics (Downey 1977b) and group plans, or because public-sector salaries always are relatively depressed. One study estimated that, in 1975, public-interest lawyers earned $9,000 less a year, and legal services lawyers $18,000 less, than they would have made in the private sector (Komesar and Weisbrod 1978); the gap undoubtedly has widened since. Finally, these lawyers carry very heavy caseloads. Legal services attorneys handle 400 to 800 cases a year, compared with 50 to 100 for lawyers in private practice (Handler et al. 1978a, p. 62; cf. Stephens 1980).

Yet, despite their low status and income and difficult working conditions, such jobs are highly coveted. Whereas, before 1965, lawyers who were less qualified or were excluded from other legal careers by race and sex discrimination gravitated toward legal aid offices (Katz 1976), by the 1970s legal services and public-interest lawyers had become fairly representative of the bar as a whole (Erlanger 1978; Handler et al. 1978a, chap. 7). Often, they were better qualified than their counterparts in private practice (Ford Foundation 1973; Johnson 1974, p. 179). Although most were not particularly dedicated to social and political change before working in the public sector, the experience appears to have a radicalizing effect (Erlanger 1978), instilling an ideological commitment (Finman 1971) that keeps lawyers in public-interest jobs when they leave their first position after a few years (Katz 1978; Erlanger 1977; Handler et al. 1978a, chap. 8).

The fact that clients are relatively poor individuals, with isolated problems involving small amounts of money, influences not only careers in law but also the relationship between lawyers and clients. For the majority of lawyers in the private sector who represent businesses or wealthy individuals, relationships with clients tend to endure and to provide a continuous flow of legal work. The acquisition of new clients remains important, but it, too, is performed by lawyers—"rainmakers" in law firms—often through their connections with the general counsel of potential client corporations. By contrast, the market composed of individual clients who are not wealthy is unrationalized, as was shown in the examination of sole practitioners, who rely heavily on lay intermediaries to channel both fee-generating and pro bono clients. Because the profession always has feared dominance by lay intermediaries, it has prohibited lawyers from paying for their services (ABA 1974, DR 2-103 [b]). But increasing reliance on a strategy of demand creation requires rationalization of the market for individual clients. Thus, large bureaucratic structures serve to aggregate and channel clients; this role is frequently performed by the laity or by lawyers who function more as bureaucrats or

entrepreneurs. Examples of such structures include legal services, public defenders, clinics, and group plans (Schwartz 1980). Indeed, the last often is the creation of trade unions (Hapgood 1977). The growing role of intermediaries does much to transform the legal profession from autonomy toward heteronomy (Johnson 1972, chap. 3; Larson 1977, chap. 11).

This tendency toward heteronomy is accentuated by the fact that not only are clients individuals with one-shot problems, but they also are poor and therefore usually require subsidization. The source of the subsidy can exercise significant influence over which clients are served and what services are provided. When lawyers themselves subsidize their clients by rendering pro bono services, they may choose those clients who are likely to generate future paying business; they may seek to please intermediaries who can refer such business (Lochner 1975); they may refuse to render services liable to offend paying clients (Ashman 1972); they may reject clients who are unsympathetic or deviant (Maddi and Merrill 1971); or they may choose to provide a bare minimum of assistance (Lochner 1975; Handler et al. 1978a, chap. 5). When the adversary will bear the cost through court-awarded fees, the lawyer may accept only cases offering a high probability of success (*University of Pennsylvania Law Review* 1974). When it is the employer who subsidizes, through contributions to a union-sponsored group legal services plan, all labor-management disputes may be excluded (Marks et al. 1974; Deitch and Weinstein 1976, pp. 24–25). A group that supports a public-interest law firm may withdraw its funding if the firm engages in activities of which it disapproves (Handler et al. 1978a, pp. 11–12); and foundations always protect their tax-exempt status by insisting that law firms they support follow IRS guidelines and abstain from most political activity (Council for Public Interest Law 1976, p. 65).

Finally and most important, when government itself is paymaster, its control is pervasive. Thus, court-appointed counsel may conduct a relatively perfunctory criminal defense in order to avoid angering the judges who appoint them (but see Hermann et al. 1977, pp. 35–36). Public defenders also may be less than vigorous (Blumberg 1967; Gilboy and Schmidt 1979) from similar considerations. Before 1965, legal aid offices often categorically refused to handle both divorces, of which they disapproved on moral grounds, and bankruptcies, which business donors to the community chest resented (Johnson 1974, p. 10). And a suspicious and often hostile Congress has imposed many substantial restraints on the Legal Services Corporation, prohibiting its attorneys from engaging, or encouraging others to engage, in pickets, boycotts, strikes, or public demonstrations; seeking to influence legislation, initiatives, referenda, or executive orders; engaging in voter registration; representing the "voluntary" poor; representing minors without the consent of their parents; engaging in community organization; offering legal advice with respect to desegregation, abortion, or selective service; filing class actions against government entities; representing aliens; and promoting, defending, or protecting homosexuality (Legal Services Corporation Act of 1974; Legal Services Corporation Act of 1977; *Poverty Law Today,* Summer 1981).

The Professional Dilemma

The shift in strategy from supply control to demand creation aggravates a perennial professional dilemma. Supply control does not directly affect the preexisting market share

of authorized producers; it simply precludes nonlawyers from offering those services and impedes entry into the profession. Demand creation, however, tends to result in the creation of demand for the services of particular lawyers, thereby intensifying competition and accelerating concentration. The legal profession as a whole strongly resists this tendency. Thus, it engaged in institutional advertising for years while prohibiting and inveighing against advertising by individual lawyers (ABA 1974, EC 2-2 and nn. 5–7; *ABA Journal* 1978, p. 1483). It continues to favor open-panel group legal service plans, which spread demand, over closed-panel plans, which concentrate it (Goodman 1979). Both the organized profession and lawyers in the lower strata have opposed the emergence and growth of legal clinics (Downey 1974, 1977a; Menkel-Meadow 1979). The base of the profession long fought the OEO Legal Services Program (Stumpf 1975), and when that battle was lost, it turned its energies toward promoting the concept of judicare (the law's equivalent of medicare). As a result, the Legal Services Corporation (1980) was mandated to study the relative merits of those two delivery systems among others and now is required to fund a program in every state, in which all members of the bar can participate (*Poverty Law Today,* Summer 1981).

Yet these efforts to inhibit competition, preserve the existing distribution of business, and allocate new business equally largely have failed. Generalized demand creation is ineffective; effective demand creation inevitably concentrates new business. Thus, institutional advertising has been abandoned, and only those lawyers who can invest heavily in individual advertising can profit from it (Cox et al. 1979; Muris and McChesney 1979). The vast majority of group legal service plans is closed—that is, clients are restricted to a single law firm (Deitch and Weinstein 1976, pp. 105–8)—and even those that are formally open channel clients to a relatively few lawyers (Marks et al. 1974, pp. 69–70). Lawyer referral services have begun to inform clients about lawyers' specialization and competence (Berg 1979), perhaps because they have been confronted with competition from private referral agencies (*ABA Journal* 1978, pp. 1481, 1483). Legal clinics have succeeded beyond anyone's expectations and now are organized into their own trade group, the American Legal Clinic Association. Even within judicare programs, many private lawyers turn down poverty clients (Brakel 1974, pp. 45–49; cf. Royal Commission on Legal Services 1979, vol. 1, pp. 520–21, 529). And judges display favoritism in appointing counsel in criminal and juvenile matters (Hermann et al. 1977, pp. 35–36). The tendency toward aggregation—whether attributable to bureaucratic convenience in the public sector or the desire to achieve economies of scale in the private sector—seems irresistible.

Mechanisms for creating demand also must be compared in terms of the services they render—subject matter, functions performed, and quality—and their cost. It should not be surprising that when cost is lowered—a major barrier to the use of lawyers—patterns of use remain largely unchanged; lawyers continue to offer, and new clients continue to request, the same services that lawyers previously had sold on the market (Mayhew 1975). Thus, traditional legal aid, both in the United States (Johnson 1974, chap. 1) and abroad (Cappelletti et al. 1975, pp. 33–58; Royal Commission on Legal Services 1979, vol. 1, chaps. 10–15), group legal services (Marks et al. 1974; Deitch and Weinstein 1976, pp. 42–45, 169–80), legal clinics (Muris and McChesney 1979; Menkel-Meadow 1979), judicare (Brakel 1974; Legal Services Corporation 1980, pp. 70–79), and pro bono services (Lochner 1975; Handler et al. 1978a, chap. 5), all represent clients in very

conventional subjects, principally divorce and other family matters (Legal Services Corporation 1980, pp. 75–78). The functions they perform also are unexceptional. Negotiation is more common than litigation; when lawyers litigate, they rarely appeal adverse judgments (cf. Rathjen 1978); clients are individuals rather than groups; and virtually no effort is devoted to law reform test cases or to impact litigation (Legal Services Corporation 1980, pp. 136–43; Katz 1976; Bellow 1977; but see Cartwright et al. 1980).

Legal services offices, public-interest law firms, and politically committed private firms present a sharp contrast in both respects, handling many more cases dealing with income maintenance, housing, consumer finance, worker health and safety, race and sex discrimination, regulation, and the environment; they also emphasize law reform litigation, legislative lobbying, investigative reporting, organization, and political action (Legal Services Corporation 1980, pp. 75–78, 136–43; Byles and Morris 1977; Handler et al. 1978a, chaps. 3–4 and pp. 112–23; Komesar and Weisbrod 1978; Weisbrod et al. 1978; Abel 1980, pp. 390–91).

Differences in quality and cost are more ambiguous. There is evidence that the several mechanisms for delivering conventional legal services do not vary greatly in quality, whether this criterion is measured objectively, assessed by a panel of experts, or evaluated by the subjective satisfaction of clients (Gutek 1978; Legal Services Corporation 1980, pp. 119–29; Muris and McChesney 1979; Brakel 1974, chap. 7; Etheridge 1970, 1973; Casper 1972b). Rather, the most significant qualitative difference may be that some systems deliver only conventional legal services, whereas others use unconventional means as well, attacking the client's total problem—which may include the legal "solution" (Bellow 1977). The same problem of comparability confuses the issue of relative cost. Several studies have concluded that the cost per case falls within the same general range for each delivery system (Brakel 1974, chap. 8; Legal Services Corporation 1980, pp. 90–104; but see Cole and Greenberger 1973). Yet, if some systems are performing additional services at similar prices, they actually are more cost effective. And the fact that lawyers make a substantial financial sacrifice in working for legal services, public-interest law firms, or politically committed private law firms is further evidence that their services are provided at lower cost.

Legitimation If the increasing emphasis on demand creation is largely a response to the imperative of market control, it also is part of the efforts of the profession to legitimate itself. All professionals are concerned about image—which, after all, is much of what differentiates them from other occupations. But lawyers seem unusually sensitive; both rank and file and leaders view public opinion as one of the most important problems, often the most important problem, facing the profession (*American Bar Association Journal* 1979, p. 40; Casey 1975; cf. Yankelovich et al. 1978; Sarat 1977). The redistribution of legal services clearly is an important means of legitimation, as witness the virtual unanimity with which lawyers and professional organizations supported the Legal Services Corporation against the attacks of the Reagan Administration. Yet it also introduces new problems for the profession, both external and internal.

The root of the external problem is the difficulty of justifying the redistribution. First, under capitalism, the public sector never has more than tenuous legitimacy (O'Connor 1973), as has been illustrated vividly by both the tax-cutting initiatives and the electoral and legislative victories of fiscal conservatives in the late 1970s and early 1980s. This

generic problem is exacerbated by public suspicions of and hostility toward lawyers, whose services are seen as unnecessary at best and probably mischievous (Bloomfield 1980; Curran 1977, pp. 228–29). Just as welfare recipients are stereotyped as chiselers enjoying undeserved luxury, so there is a widespread belief that legal services to the poor are overgenerous, while the legal needs of the middle class go unserved (Cheatham 1963; Christensen 1970; Champagne 1976).

One reason for this critical attitude may be that the poor need legal services in crises that can be read as indicating moral dereliction—divorce, bankruptcy, eviction, criminal charges—whereas the need for medical care, housing, and education is shared with other classes and does not suggest moral turpitude. Evidence of this attitude can be found in the exclusion of felony defense from most group plans (Deitch and Weinstein 1976, p. 45) and of all criminal defense from the jurisdiction of the Legal Services Corporation, as well as in the requirement that the Corporation and other legal assistance programs seek to recover their costs from the recipients (*Poverty Law Today*, Summer 1981).

A related problem is posed by the need to maintain the appearance of political neutrality. The response—a series of restrictions on the Legal Services Corporation, on public-interest law firms, on group plans, and on pro bono services—seriously inhibits what those programs can do for their clients (see Royal Commission on Legal Services 1979, vol. 1, chap. 8).

This situation, in turn, leads to a second dilemma. The redistribution of legal services is both inspired and justified by the liberal ideal of equal justice—making the adversary system work fairly by providing each combatant with a professional ally (Cramton 1975, p. 1342; Royal Commission on Legal Services 1979, vol. 1, p. 51). Yet that ideal cannot be realized under capitalism, and present efforts do not even constitute a serious attempt to do so (see generally Abel 1979b).

Public-sector expenditures on legal services are trivial compared to those in the private sector, which is dominated by corporate clients and by wealthy individuals. At their peaks, the Legal Services Corporation represented approximately 1 percent and public-interest law 0.1 percent of private-sector staff and budgets; and the first two categories are declining, while the last is expanding. Relative resources are dramatically illustrated in another area. In the government's antitrust suit against AT&T, settled in 1982, the Justice Department devoted $12 million to its case, while the company spent $293 million on its defense (*Los Angeles Times*, July 2, 1981, pt. 4, p. 2). Furthermore, subsidized legal services are almost entirely reactive. Lawyers respond to clients' problems after the fact and seek to settle claims, litigating only as a last resort (Katz 1978). Private-sector lawyers, by contrast, spend much of their time counseling clients to anticipate problems and to use the law proactively to pursue their goals. It is inconceivable that government could subsidize lawyers for these latter purposes or that poor individuals could mobilize the law in this fashion (Abel 1979b). Finally, subsidization, whether by the state, charity, or lawyers themselves, imposes substantial constraints on how aggressive and politically active lawyers can be, whereas private-sector lawyers are entirely free from such constraints (see, for example, Goulden 1972; Green 1975). There is evidence that the public is aware of these problems and continues to view both the legal system and the legal profession as biased, notwithstanding the recent highly visible efforts at redistribution (Curran 1977, pp. 227–34; Sarat 1977; cf. Podgorecki et al. 1973).

But if the profession has not been entirely persuasive, it nevertheless has framed the

terms of the debate over how equal justice might be attained. Implicit in any redistribution of legal services is the claim that some level of redistribution can achieve the ideal. Such a view is predicated on the beliefs that legal needs are experienced by individuals, not groups; that individuals need advocacy, not counseling; that the creation of rights is primary and enforcement secondary; and that procedural justice can and should be achieved without substantive (that is, social) justice. The focus on the redistribution of legal services distracts attention from the social, economic, and political structures that make redistribution necessary in the first place and that themselves would have to be radically transformed if redistribution were to achieve its proclaimed ends.

Increasing emphasis on demand creation through the redistribution of legal services also generates problems within the profession. First, it aggravates tension between the strata. Elite and base have different reasons for favoring redistribution. Elite lawyers are primarily concerned with legitimation, as shown by their preference for rendering pro bono services in the large, conspicuous case (Marks et al. 1972, chaps. 2–4; Ashman 1972); nonelite lawyers are moved more strongly by market considerations and see demand creation as alleviating the erosion of supply control (cf. Griffiths 1977, p. 268). This tension is visible in the controversies over mandatory pro bono (Association of the Bar 1979) and over advertising and solicitation (ABA Commission 1980, 1981). State subsidization of legal services also has divided the bar. Elite lawyers have enthusiastically supported its contribution to the ideal of equal justice; nonelite lawyers have feared competition, envied the status and security of salaried legal services lawyers, resented their youth and lifestyle, and become insecure about their own competence when confronted with aggressive adversaries, often for the first time (Champagne 1976, pp. 867–70; Stumpf 1975).

Reliance on demand creation introduces additional difficulties. It threatens supply control, which remains essential to the profession and a prerequisite for continuing demand creation. If lawyers create demand, especially by advertising, their professional distinctiveness is significantly diluted; and if they insist on the right of every citizen to legal representation, regardless of means, they no longer easily can reject the offer by nonlawyers to protect that right (Larson 1977, p. 39). Demand creation also intensifies competition within the profession, dividing advertisers from nonadvertisers, clinics and closed-panel group plans from sole practitioners and small firms. Despite professional efforts to establish mechanisms that allocate demand equally, concentration appears inevitable and progressively transforms a professional monopoly of small producers into an oligopoly of bureaucratized entrepreneurs. Finally, demand creation engenders more external regulation and a loss of professional autonomy. Advertising and solicitation are governed by detailed judicial standards; the acceptance of money from foundations subordinates lawyers to both their strictures and those of the IRS; the structure of group plans is determined by unions, employers, and government; and state subsidization is accompanied by pervasive control.

The cumulative impact of these changes hardly can be exaggerated. The profession is becoming bifurcated into two unequal branches—lawyers serving business and the wealthy and lawyers serving nonwealthy individuals—that have less and less in common (cf. Reed 1921; Berle 1933; Carlin 1966). The second group is confronted with rising competition from other occupations and from paraprofessionals. Although its members undoubtedly will seek to preserve professional dominance (Green 1976), they are likely

to lose substantial business. Lawyers serving individuals increasingly will be employees of large bureaucratic organizations; their work will be routinized; they will retain little autonomy; they will be stigmatized by the low status of their clients and the apparent triviality of the cases; there will be little scope for career advancement, except into the ranks of administration; pay will be low compared with that of lawyers serving business. It is likely that efforts at unionization, already common in the public sector (Kiersh 1979; *Los Angeles Lawyer* 1979; Zenor 1980; cf. Haug and Sussman 1971), will proliferate in response.

Thus, demand creation "solves" the problems of the legal profession only by creating others that appear even more intractable. In seeking to legitimate the redistribution of legal services, demand creation highlights the inescapably political nature of the work of those lawyers who respond to the demand thus stimulated—and by extension, the work of all lawyers. And in striving to strengthen market control, it threatens to deprive many lawyers of the professional status that is essential to such control.

CONCLUSION

Although often portrayed as a timeless phenomenon, the legal profession actually is of very recent origin. Its emergence is inextricably tied to the rise of capitalism and the expansion of the bourgeois state. Lawyers made themselves professionals by perfecting their control over the production of producers. Yet this form of market control—the foundation of the professional project—contains fundamental contradictions. The profession relies on the university to select entrants and to justify its exclusionary policies, but it thereby surrenders significant control over supply to the academy. It invokes a meritocratic ideology to explain the difficulty of entry and the method of allocating lawyers to professional roles and strata; but meritocracy will not persuade those who demand substantive equality, and it is particularly vulnerable to charges of bias concerning class, race, and gender. There appears to be a strong tendency for professions to push supply control too far, to the point where the extraordinary rewards of a professional career motivate aspirants to challenge, surmount, or circumvent the barriers to entry. And though control over the production of producers permits the profession to take the next step and seek to control production by producers, the latter is an internally divisive tactic and extremely difficult to justify publicly.

In recent years, the profession has sought to overcome these contradictions by turning to a second strategy of market control—demand creation. This strategy is permitted and encouraged by an ideological emphasis on individual rights and equality and by the rapid growth of the welfare state. But demand creation also has its costs and dilemmas. It renders lawyers dependent on the intermediaries who organize and channel individual clients and on the source of subsidization—the state or private philanthropy. The low status of clients and the "triviality" of their problems detracts from the respect to which lawyers are accustomed. Efforts to generate and to satisfy demand intensify competition within the profession and promote concentration. They also encourage other occupations—as well as potential clients—to seek to answer "legal needs," both because demand creation heightens awareness of those needs and because the requisite legal tasks are technically simple. Finally, just as there are limits to the control of supply, so there are inherent limits to the stimulation of demand. Individuals simply cannot be convinced

that they need significant amounts of legal services; private philanthropy is fickle; and the commitment of the state to subsidizing demand is uncertain but clearly finite.

In order to become and remain professionals, lawyers have had to create, control, and rationalize their markets—first, the market offered by capital (competitive capital, monopoly capital, and the interaction of both with the regulatory state) and, more recently, the market for individual clients, whether or not subsidized by the state. In the process, the production of legal services has been fundamentally restructured. In both the private and the public sectors, productive units have expanded enormously, largely by increasing the numbers of lawyers and paraprofessionals they employ. Externally, these new productive entities are less likely to submit to professional regulation; internally, they are forced to substitute hierarchic and bureaucratic controls for collegial relationships. As a result, the production of legal services is progressively incorporated into capitalist relations of production and begins to display incipient class struggle. But, as the market for legal services is rationalized, it also increasingly is segmented; lawyers who serve capital and those who represent individuals differ in functions, organization, income, status, relations to clients, technical knowledge, and, ultimately, even ideology. As the previously white male profession becomes integrated, it seems probable that differences of race and gender will be superimposed on these lines of segmentation. As a result, a "unified" profession will splinter into distinct groupings, whose interests and perceptions frequently are antagonistic and which, therefore, find it more and more difficult to take concerted action.

These changes in the characteristics of lawyers and clients and their relations to each other have required the profession to develop new legitimations. Lawyers traditionally have presented themselves as autonomous professionals—the basis of their claim that they are morally unaccountable for the actions they take on behalf of clients. But, in fact, lawyers have become increasingly dependent on limited categories of clients—even on individual clients—and consciously have fostered this dependency. Dependence on capital was an essential precondition for the growth of large law firms, the rapid elevation of lawyers' incomes and status, and ultimately for most forms of public service—in government, in professional associations, and in pro bono activities. Dependence on the state has become the prerequisite for the creation and satisfaction of individual demand. Each form of dependence undermines the pretense of professional autonomy; lawyers for capital are too deferential to their clients, and lawyers for individuals are too overbearing and insensitive, or too mindful of the priorities of their paymasters. In order to justify their insulation from market forces and from state control, lawyers also have asserted that they can be, must be, and actually are self-regulating. But self-regulation has become an arena for intraprofessional struggle, often waged by rival professional associations. And professional dependence on capital and state carries with it the threat of greater external regulation, either as an adjunct of state efforts to control capital or as a concomitant of lawyers' reliance on public funds to subsidize service to individuals. Finally, the shift in emphasis from supply restriction to demand creation as a mechanism of market control has been justified by the ideal of equal justice. But that ideal is inconsistent with the commodification of justice under capitalism.

For little more than a century, lawyers have enjoyed an unusual degree of immunity from capitalist relations of production. In the name of professionalism, they have achieved considerable insulation from market forces, dampening competition among

themselves and restricting external competition. They thereby have been enabled to take pride in the quality of their work without constantly seeking to maximize profits, and they have avoided the dehumanization associated with either performing wage labor or exploiting the labor of others—at least other lawyers. By successfully resisting state intervention, they have come close to realizing the laissez-faire ideal of liberalism. Yet these privileges are being drastically eroded. The lawyer of today (and perhaps even more of tomorrow) is an entrepreneur selling services in an increasingly competitive market, an employee whose labor is exploited and whose work is routinized and supervised, an employer exploiting subordinates. In each case, the lawyer increasingly is dependent upon state or capital for business and, therefore, increasingly subject to control by either or both. Although the ideal of professionalism undoubtedly will survive as an ever more anachronistic warrant of legitimacy, the profession as an economic, social, and political institution is moribund.

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9

PRIVATE GOVERNMENT

Stewart Macaulay
University of Wisconsin–Madison

Much of what we could call governing is done by groups that are not part of the institutions established by federal and state constitutions. If governing involves making rules, interpreting them, applying them to specific cases, and sanctioning violations, some of all of this is done by such different clusters of people as the Mafia, the National Collegiate Athletic Association, the American Arbitration Association, those who run large shopping centers, neighborhood associations, and even the regulars at Smokey's tavern. It may be necessary to draw a sharp line between public and private governments such as these in order to think about law, but in reality there is no such division. To the contrary, one finds instead interpenetration, overlapping jurisdictions, and opportunities

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for both harmony and conflict among public and private governments. Formal legal process typically plays a part only indirectly and as a last resort. We are likely to be seriously misled if we assume that there are sharp distinctions between public and private governments and between formal and informal processes. We must recognize that these concepts are only rough generalizations useful for emphasizing aspects of reality rather than accurate descriptions of things existing in the world.

These are not new observations. The concept of private government goes back at least to Ehrlich's theory (1913) of the "living law." However, despite this distinguished lineage, scholars often have failed to see the importance of private social control as it interacts with and affects the formal legal system. Fitzpatrick (1984) points out that even legal realism narrows its focus to formal legal process and doctrine.

> Academic legal knowledge is generated by applying a certain idea of law to the world. This approach cannot extend to social forms which do not find expression in terms of legal process or doctrine. The integrity of "law" is thus obliquely but potently affirmed in areas of scholarship that claim to be fundamentally skeptical of it. [p. 135]

At the same time, far too often, work in law and the behavioral sciences implicitly accepts the distinction between public and private spheres and assumes that one can study the roles played by law in a society by considering only the actors who play official parts. What is needed is a "private government perspective" which both recognizes private associations that affect government and also treats distinctions between public and private spheres as doubtful rather than as given. (Cf. Spitzer 1984.)

At the outset, I will try to give some shape to the amorphous term "private government." While any formal definition would be arbitrary, we need some idea about what we are and are not discussing. Once this is done, we can turn to specific topics in legal studies and consider possible contributions of a private government perspective which emphasizes private rule-making, interpretation, application, and sanctioning as well as the artificiality of drawing any hard line between public and private governing.

PRIVATE GOVERNMENTS AND THEIR RELATIONSHIPS WITH THE PUBLIC LEGAL SYSTEM

What Is a Private Government?

The term "private government" draws an analogy intended to highlight certain features of something that is not a public government. As we shall see, if we put aside for a moment our skepticism about the public/private distinction, we could call many actions of individuals and groups "government" (see Evan 1976, pp. 171–85). The test of any analogy is its usefulness as balanced against the risks of overlooking ways the things being compared differ. Probably those engaged in the social study of law should consider first those private governments that bear some close relationships to public ones.

When might we draw a plausible analogy between private social control and public government? It is easiest to label as a private government a formally defined organization which makes rules, interprets them in the context of specific cases, and imposes sanctions for their violation. The analogy might seem more apt if the organization attempted to mimic the public legal system. For example, at least in the past, "company towns" often

sought to govern by using the forms of legal rules, courts, and police—all controlled, however, by a business corporation rather than the citizens.

More typically, however, organizations attempt to take over only some of the functions of public government and mimic only part of the public legal system. Trade associations "legislate" rules of practice and suggest standard forms of agreement (see Leblebici and Salancik 1982); a number of groups "adjudicate" disputes by offering arbitration to their members; corporations establish their own private police to guard against (or engage in) industrial espionage. These groups may borrow some structures and symbols from the public government—for example, private police wear uniforms, badges, and guns; arbitrators may run their hearings by procedures approaching a trial; trade association rule-making may involve established procedures that suggest a legislature and often bring forth political tactics. Even a duel can be viewed as a kind of legal procedure with highly technical rules (cf. Schwartz, Baxter, and Ryan 1984).

Yet we can go beyond these fairly obvious analogies. Any group of people who more or less regularly interact tend to adopt rules, interpret them in light of specific situations, and sanction their violation (see Ford 1983; Schall 1983). If the group has some permanence, and if the actors within it tend to be the same people who value participation, we have what Moore (1978) calls a semi-autonomous social field. These social fields affect the operation of the legal system in many ways. For example, those involved in organized crime have rules that govern buying and selling of illegal goods and services as well as competitive practices and a range of sanctions to support them (see Reuter 1984; Adler and Adler 1983; cf. Cressey 1973). Many of these rules and sanctions serve to make enforcing the law against the group more difficult.

We could call even less formal and temporary relationships private governments if it served any purpose to do so. For example, people are linked in loosely coordinated social networks which may not be as structured, permanent, or valued as a social field (see Hammer 1980; Lee 1980; Nauta 1974). People learn norms and anticipate sanctioning for their violation appropriate to situations such as attending a dinner party with strangers or riding as a passenger on an airplane. We could talk of the legal system of the elevator. There are norms about looking at, talking to, and touching others in such temporary encounters (cf. Taylor and Brooks 1980; Baxter 1984). Sanctions include being ignored, ridiculed, and even threatened with physical violence. Probably these rules and sanctions contribute a great deal to our judgments about the safety of public places; it may be that our greatest demand for the physical embodiment of the criminal law—the uniformed police officer—comes when we see the private government of public places as inadequate. Black (1983) asserts that a "great deal of the conduct labeled and processed as a crime in modern societies . . . is intended as a punishment or other expression of disapproval, whether applied reflectively or impulsively, with coolness or in the heat of passion." He continues,

> most intentional homicide in modern society may be classified as social control, specifically as self-help, even if it is handled by legal officials as crime. From this standpoint, it is apparent that capital punishment is quite common in modern America . . . though it is nearly always a private rather than a public affair. [pp. 35–36]

However, at some point the analogy becomes strained and unsatisfying. There are widely accepted norms about when one should give relatives and friends birthday and

Christmas gifts, and there are sanctions for violating those norms. Nonetheless, most of us probably would be uneasy with the idea of the private government of a friendship or an "illegal" failure to give a Christmas gift (see Caplow 1982).

Another way to define a term is to ask how people have used it. The term "private government" has been used even where there was not a close approximation of public governmental procedures and structures. The most common use of "private government" has been as a rhetorical device in aid of arguing that large corporations ought to be accountable for their actions, somewhat as nations and states are held accountable. Employees, customers, suppliers, and those living in cities who are dependent upon corporate decisions, in this view, ought not be subject to arbitrary action by public or private government; the "citizens" of a corporation ought to have a right to free speech and the like. Whatever the merit of these positions, the argument focuses on amount of power and its impact rather than on the presence or absence of such things as judges in robes, doctrines speaking to the use of power, procedures, and the symbols of legal action.

A number of writers, drawing on anthropological tradition, see us living in a world of legal pluralism, subject to the jurisdictions of overlapping and partially conflicting legal systems (see, for example, Galanter 1981; Fitzpatrick 1984; Nader 1984). In this view, the legal system studied in law schools is but one of many. Here the concept of a legal system is expanded, often implicitly, to cover such things as the norms of the Jewish community living in an area, those of the neighborhood and tenant associations there, those of a particular apartment building and of a particular landlord-tenant relationship, as well as those found in the city's building code and the state laws governing landlord and tenant, property and contract as they are enforced. In this kind of analysis, a great deal of private rule-making and sanctioning is analogized to processes in the formal public legal system; again, usage seems not to demand a particularly close approximation to public government.

The major research on relatively institutionalized social fields is part of a yet unpublished project, "Legal Regulation and Self-Regulation in American Social Settings," by Marc Galanter, a law professor well known for his work in the field of dispute resolution. As part of his study, Galanter collected newspaper articles, accounts from the trade press, magazine stories, and reports of academic research dealing in a wide variety of contexts with what most of us would call governing. Galanter stresses that the relatively institutionalized social fields he has been studying show a much wider range of activities than simple dispute resolution (see, for example, *Harvard Law Review* 1949; Ellickson 1982).

One of the organizations studied by Galanter is the American Institute of Architects (AIA), which has drafted, and continues to revise, an elaborate set of terms and conditions for the construction of buildings. These rules have, effectively, become the law of this industry. While parties could negotiate contracts on some other basis, they seldom do so because it is much easier to use the well-understood and accepted AIA forms, perhaps amending them in one particular or another to cover special situations. For practical purposes, the AIA operates as the legislature in the area of building construction (Havighurst 1961, p. 97); its legislative activity features lobbying and logrolling by various interests, just as we would find at state capitals (Sweet 1978, 1983; cf. Johnstone and Hopson 1967, pp. 329–54). The relationship structured by the AIA standard form contracts is one in which the architect, who is the owner's representative for most purposes, is also the arbitrator of disputes about the meaning of the plans and the quality

of work performed. While such a mixed role neglects classical ideas about autonomy as a guarantee of impartiality, it allows a quick and inexpensive way to solve common problems that arise during construction (see Johnstone and Hopson 1967, pp. 315–28). Architects who abuse their role in one contract face problems in future transactions; builders have a number of ways to retaliate for unreasonable decisions; and an architect's reputation is likely to be known within the social field composed of those builders, architects, officials of financial institutions, and others who work together in a particular area. Many other trade associations enforce decisions and impose social control through their power over entry into a field and privileges members would dislike losing (see *Yale Law Journal* 1954). For example, in the international diamond trade, one must be accepted into the group in order to do business at all, and reputations must be carefully guarded in order to continue in the trade (*New York Times* 1984).

The legal pluralism approach shows that in American society the processes of rule-making, dispute avoidance, and resolution take place in a variety of settings apart from public governmental institutions. Even public government itself often participates in semi-autonomous social fields as it attends to its affairs—the Civil Aeronautics Board and the President of the United States interact with an association of airlines operated by private corporations and by national governments in setting international airline fares, for example (see Hannigan 1982; Cain 1983).

Many kinds of groups exercise governmental functions. Some are fairly structured entities which sometimes go to great lengths to mimic the procedures and symbols of public government, while others exhibit only a few of these features. What Galanter calls "mini-governments" vary widely in terms of the formality or informality of their operations, rules, and sanctions; their connection with one or more aspects of social life—some deal with a narrow part of the economy, others with living arrangements, with the family, or with multiple aspects—and their power over their members and their autonomy as against outsiders.

We could plausibly analogize many of these private legal systems to public government if it proved useful to do so. However, we are concerned with studies of the place of law in society and not with writing a dictionary. Thus, we should limit our analogizing to legal-like systems which are relevant to understanding the operations and functions of public government. What, then, are some of the relationships between the public government and these other governments? Which of these relationships seem worthy of attention in the social study of law?

The Relationships and Merging of Public and Private Governments

Often it is important to trace the relationships between public government and groups that carry out functions which are thought to be governmental or which deflect the impact of legal action. However, conceiving the problem this way assumes a distinct entity which we call public government and other distinct entities which operate in its shadow. As we shall see, a private government perspective requires that we both see the amount and nature of private governing and recognize at the same time that public and private governments are interpenetrated rather than distinct entities. First, I will consider some of the relationships, and then I will discuss how distinctions between what is public and what is private are questionable.

There are a number of relationships between public and private governments. Social fields govern in areas where we might expect public government to exercise control. Sills (1968) notes that

> [it] is difficult to overstate . . . the part played by voluntary associations in the actual business of governing the United States, in the sense of making decisions on policy and of providing services to citizens. . . . In large cities, voluntary associations seem to serve largely as important pressure groups; in medium-sized cities they virtually run the municipal government. . . . In small towns the decision-making role is filled by families and cliques, leaving to voluntary associations such service tasks as raising funds for the library, decorating the plaza, and maintaining the cemeteries. [p. 375]

Professional groups, for example, practice "self-regulation" in order to ward off public regulation. At times this is done totally apart from public government. At other times, however, a profession or an occupational group "captures" a public agency and exercises self-regulation in the guise of public regulation. Many state statutes, for example, facilitate self-government by organized occupational groups. Often members of state boards that license occupations or professions must be members of these groups.

Large corporations may assume functions usually thought of as governmental when they want control and little accountability. Many organizations have their own private police forces which offer everything from crowd control to protection of executives in foreign countries (see Livingstone 1981). O'Toole (1978) reports that

> General Motors has a force of 4200 plant guards, which makes its corporate police force larger than the municipal police departments of all but five American cities. And the Ford Motor Company has twenty-four ex-FBI agents on its payroll to counter threats ranging from dishonest employees to industrial spies. The business world seems to believe that law enforcement is too important a matter to be left to the police. [p. 42]

(See also Ghezzi 1983; Kakalik and Wildhorn 1977; Shearing and Stenning 1983; Stenning and Shearing 1979.) Spitzer and Scull (1977) note that private police can seek to deter or gain restitution rather than gather evidence for criminal trials, and they can use more sophisticated, scientifically advanced, technical equipment than most law enforcement agencies could afford or would be allowed to use under rules specifying constitutionally acceptable evidence.

Large corporations often handle theft, embezzlement, and appropriation of trade secrets by employees by what has been called the "second criminal law system" (Cole 1978). Employees suspected of criminal activity are demoted or fired, and sometimes they are forced to make restitution. Procedures and standards of evidence differ sharply from those found in the public criminal law system in its formal operations; the mere appearance of wrongdoing may be enough to cost an employee his or her job or prompt a transfer to a less desirable position; the employer does not worry about proof beyond a reasonable doubt or the hearsay rule. Indeed, in this process the "facts" may never be established. The employer may have only strong suspicions. The employee may admit nothing or the employee may never be confronted with a charge of wrongdoing and may never be sure why he or she was transferred, demoted, or fired.

In the 1970s, failure to prosecute white-collar crime became a political issue in the

United States. However, few who took stands against soft treatment for such criminals recognized the existence and operation of the second criminal justice system. It may be that both "defendants" and "prosecutors" in this system are better off than had cases been tried before courts. Employees accept this resolution of the situation in exchange for a promise not to initiate prosecution in the public criminal process or to make public their wrongdoing. The corporation, by using the second criminal justice system, may avoid damage to its reputation since a public prosecution might bring into question the adequacy of its supervision of its employees, and an accused employee might make countercharges of wrongdoing directed at other corporate officers. On the other hand, the second criminal justice system has costs as well as benefits. Those wrongly suspected may have no opportunity to establish their innocence. Those rightfully suspected may be free to move elsewhere and embezzle or steal company secrets again, unless the story is passed on by a gossip network.

Unionized employees who appear in a grievance procedure before a labor arbitrator could, perhaps, be said to participate in a third criminal justice system. Arbitrators may consider past alleged misconduct such as pilferage on the job, illegally obtained evidence, and information gained by wiretapping (see Fleming 1961, 1962), none of which could be used in a public criminal proceeding on the question of guilt or innocence. Again, this means that some of the values entailed in the public criminal justice system will not be implemented in this private proceeding.

Public government can attempt to facilitate the growth and operation of particular social fields in order to serve some public end. For example, during the Carter Administration, many saw the legal system as failing to cope with disputes within the family; in neighborhoods, workplaces, and retail markets; and in the landlord-tenant relationship. Accordingly, in the 1970s, a number of neighborhood justice centers were established with support from the Law Enforcement Assistance Administration of the Department of Justice and from some private foundations. Members of a community were to bring their disputes before trained mediators for help in resolving them. Evaluation studies indicate that the programs had only modest success (see, for example, Felstiner and Williams 1978, 1979; Snyder 1978; Tomasic and Feeley 1982). Generally, people did not voluntarily bring cases to these centers. Many of the cases handled came to the centers when prosecutors, clerks of court, or judges diverted criminal charges to mediation. For example, a husband might be charged with beating his wife. When faced with the choice of a neighborhood justice center or a criminal trial, both husband and wife often preferred the less formal setting. However, when there was no outside coercive force pushing everyone inside the doors, those with power to settle scores on their own terms had little reason to play. Landlords, creditors, and retailers, for example, tended to be satisfied with existing structures for the exercise of their power.

Often where delegalized dispute settlement has been successful in the United States, it has been tied to groups viewed as culturally distinct from mainstream American society and subject to discrimination because of bias. Chinese-American, Native-American, and Jewish groups all have mediation systems. It is difficult to leave these communities without paying a high price in lost relationships. Thus, the groups are able to induce their members to participate and accept decisions. In short, one cannot create a community by creating a court. Public government can foster existing social fields and institutions, but if new ones are to be created, there must be incentives to participate in them.

Relationships between public and private governments also may involve partial or total conflict, more or less openly recognized. At one extreme stands the crusading prosecutor heading a strike force attempting to battle organized crime or the British government seeking to control the "Provisional Wing of the Irish Republican Army" (see Burton 1976). Colonial powers long imposed a version of the common law or a civil code on top of "native law." While, in theory, there were principles to coordinate the two systems, often the reality was legal pluralism and competition. In many countries today there are internal colonies wherein national and indigenous governments exist in a variable relationship of conflict and cooperation.

Religious groups, too, may have practices that violate the law of the state, with varying outcomes. The state tried to stamp out polygamy among the Mormons, but special exemptions to formal laws have been carved out to relieve the Amish from the requirements of compulsory education. Sometimes the official law is stated as applicable to everyone, but it is not enforced against members of particular religious groups or is enforced only in response to a complaint from an outsider with power.

Another mixed relationship can be seen between public government and trade associations. While self-regulation by professionals long has been accepted as offering certain values (see Barber 1978), those championing the interests of consumers complain that self-regulation often discourages competition by erecting barriers to entry and fixing prices for services. During the 1970s, various units of the United States government challenged a number of trade associations in the name of competition. One such challenge won lawyers the right to advertise, although the risk of losing professional reputation keeps many from engaging in this kind of competition for clients (see Macaulay 1985).

In addition to these areas of conflict, there are others in which private organizations act counter to official policy (see Biersteker 1980). When American labor unions refuse to unload ships carrying cargo from Communist countries, it makes it difficult for the State Department to implement a policy of increasing trade with eastern European nations in order to lessen the dependence of those nations on the Soviet Union (see Bilder 1970; Friedmann 1957; Miller 1960). This kind of conflict occurs also in less recognizable forms. For example, in the late 1960s, when official United States policy imposed a boycott on Cuba, the Ford Foundation sent a number of Third World scholars and government officials to visit Havana. The foundation could do "privately" what the United States government did not wish to do publicly. However, such action may have furthered United States interests (see Arnove 1977), and so the conflict may have been more apparent than real.

Another kind of conflict between public and private governments may be prompted when members of an organization turn to the legal system seeking to change the balance of power which works to their disadvantage. On the one hand, there are battles before courts and legislatures for rules which, it is hoped, will benefit the less powerful. On the other hand, rules are not self-implementing, and often a battle to vindicate any rights gained is waged before courts and administrative agencies. For example, a faction of a religious group may seek to oust those in control; courts have been asked to arbitrate conflicting versions of the true faith in disputes about control of church property.

While it is important for many purposes to chart relationships between public and private governments, this schematic statement of the task can be misleading. Implicit in

the idea of "relationships" between public and private sectors is the idea that they are separate and distinct. Sometimes this is the case, but often it is not. The American legal system has relatively open borders even in its formal description: jurors drawn from the community act as triers of fact; judges and prosecutors often are elected; critically important roles are played by lawyers who typically are thought of as private professionals serving as officers of the courts (see Schmidhauser 1979). The rules of law themselves often are justified as the will of the people or as the product of a pluralistic bargaining process.

"Backstage" one finds even greater penetration of the public sector by the private. "Power elite" theories seek to establish links between private centers of economic power and governmental officeholders and activities (see, for example, Mills 1956; Dye 1978; Hopkins 1978; Kerbo and Della Fave 1983; Milward and Francisco 1983; Useem 1983). Effectiveness of reform legislation often turns on the existence of face-to-face sanctions in a social field that encompasses both governmental officials and private leaders of various kinds. (Cf. the work of Lindblom 1977; see Tilman 1983 on reactions to Lindblom's work.) The effective boundaries of social fields are unsettled and often are the focus of struggle and change (Weyrauch 1969, 1971). Some people are leading actors in a social field, while others are bit players. Yet this relationship can change gradually or rapidly.

Semi-autonomous social fields are likely to be found at the margins of public government itself. For example, American courts are faced with many cases involving personal injuries caused by automobiles. Litigation has grown since the early days of motoring, and there has been the parallel development of insurance to cover liability. This has prompted the growth of professional insurance adjusters who determine what the company is willing to offer in settlement, plaintiffs' lawyers who work for contingent fees and bargain or litigate to increase the amount paid, specialized insurance defense lawyers who come forward when litigation threatens, and experts of many kinds who sell their opinions about the condition of products and patients. All of these actors find themselves in a continuing relationship mediated by judges and clerks of court, governed by a loose system of rules and sanctions (see Ross 1970), and so they are "repeat players," interested in the impact of what they do in today's case on next year's transactions (Galanter 1974). As a result, the vast majority of cases are settled out of court by these specialists, whose moves are governed both by rules enforced through powerful though informal sanctions and by explicit or tacit threats to file a complaint and litigate in court.

Within the criminal justice system, a similar field involves those who regularly prosecute and defend criminal cases. Assistant prosecuting attorneys and defense counsel play leading roles. Other important actors include trial judges, clerks of court, police officers and officials of the department, the public defender's office, and even newspaper reporters and editors (see Carter 1974; Pritchard 1985). In a corrupt city, one might also include the leaders of organized crime and key political officials (see Block and Thomas 1984). Any of these people can look forward to sanctions from some of the others if they make work in the social field more difficult. All find their tasks easier to carry out if they can count on cooperation and favors from the others. Mileski (1971) comments:

> One attorney . . . noted that whenever he obtained an "unreasonable" acquittal, the prosecutor penalized him by not calling his cases until the end of the day's session. This "penalty" would last about a week after the disapproved disposition. Not only the lawyer but also his client, then, must sometimes sit all day in court

> for reasons irrelevant to the substance of the cases at hand. Ordinarily, clients with attorneys have their cases scheduled for very early or very late in the day's session. The court thus allows the attorneys to salvage most of each day for out-of-court matters. Defendants without attorneys are told the day, but not the time, of their court appearances. This favor may add to the court's leverage in coaxing attorneys toward routine cooperation. [p. 489]

Generally, those who interact repeatedly over time will find themselves in a semi-autonomous social field with rules and sanctions which reflect some balance of the long-term interests of all the actors in that field. Often this balance is not totally congruent with the official definition of roles (see Mechanic 1962). Many studies have shown that agencies charged with enforcing a law may try to mediate, educate, or persuade the targets of the regulation to comply with some part of the law or with its spirit, rather than going to court to seek sanctions for violations. Wherever this kind of "soft" law enforcement exists, there is reason to look for a social field with rules and sanctions of its own that apply both to the targets of regulation and to the regulators.

Anyone familiar with the social study of law will see the relevance of many of these examples of nongovernmental governing to concerns in the field. This review of the relationships between the legal system and various kinds of organizations and social fields which are formally outside the boundaries of government suggests that we must be concerned not only with private associations which mimic the structures and symbols of public government but also with those social fields closely related to the legal system which affect its operations. Ultimately, however, judgments about what the label "private government" requires turn on the usefulness of the analogy. This calls for the consideration of several problems in the field, asking what would be gained by a focus on various kinds of associations that do some of the work of the formal legal system or affect its operations.

PRIVATE GOVERNMENT AND TOPICS IN THE SOCIAL STUDY OF LAW

A private government perspective could improve work in a number of areas of law and the behavioral sciences. I will consider three major examples: (a) private government and the limits of effective legal action; (b) social fields, the legal system, and stability and change in society; and (c) the autonomy and accountability of private associations.

Private Government and the Limits of Effective Legal Action

At least since Pound's essay in 1917, "the limits of effective legal action" has been a classic problem, but one lacking classic answers. Much of the writing assumes a state issuing commands to individuals who, acting alone, choose to comply or evade in view of the benefits of crime and the costs of punishment considered in light of the risks of being caught. However, Moore (1978, p. 58) suggests that the limited success and unintended and unwanted side effects of innovative social legislation can be explained partly because "new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence. Legislation is often passed with the intention of altering the going social arrangements in specified ways. The social arrangements are often effectively stronger than the new laws."

Developing this suggestion, I shall consider the functions of informal, relatively unstructured social networks, more permanent social fields, and then structured private governments of some complexity. Finally, I will examine implementation of regulations calling for affirmative action to hire and tenure women in universities as an example showing how structure and social fields involving both regulators and regulated interact to blunt the impact of laws seen as of questionable legitimacy by many of those affected.

The Impact of Increasing Degrees of Structure Relatively unstructured *informal networks* can serve as gatekeepers, rationing access both to illegal goods and services and to government services and benefits. In both instances, such networks affect the impact of law. Those who sell illegal goods and services seldom can operate at a fixed address with a sign over the door inviting the public to trade nor can they advertise in the newspapers or in the Yellow Pages. Loosely structured social networks of people channel customers to those who can supply what is wanted, filter out unwanted individuals such as police officers pretending to be customers, and serve to insulate most levels of criminal organization from detection and punishment. For example, a visitor to a city can ask a hotel employee, a cab driver, or a bartender for aid in finding prohibited drugs, gambling, or a prostitute. If the visitor has selected the right person, he or she will be sent to one or more people guarding access to the illegal goods or services. Those experienced in finding illegal items will be able to read hints, body language, and situations to minimize difficulty in making links with suppliers. Each person in the network usually can screen out unwanted customers and possible police officers. Those participants at street level are easiest to find, but they know only what they need to know in order to minimize the risks to others in the criminal network. There is a system of rewards and punishments to hold the system together. Those who channel wanted customers can make money; those who tell police too much can be injured or killed.

Such networks sometimes can be used by law enforcement officials, with more or less success, as leverage points for applying the law against major entrepreneurs as well as the street-level sales force. Officers posing as potential customers buy the illegal goods or services and arrest those involved. Prosecutors then sometimes are able to trade a favorable plea bargain for information or testimony against those higher up in the chain of distribution. This works, of course, only when the value of the plea bargain outweighs the danger of retaliation from those who control the criminal network.

Similar networks can ration access to government services. Elected public officials at all levels do "casework" for their constituents (see Lineberry and Watson 1980; Abney and Lauth 1982). Sometimes this involves sending people to the right official with the necessary information. In a close case, at least, it is easier for an administrator to say yes than to reject a claim and explain the denial to a mayor, a representative, or a senator. Union shop stewards, religious leaders, and community leaders also perform such brokerage roles, sending people to the right place and exerting what influence they have on the decision that is made. Friends at school, at the workplace, or at the playground or laundry also can offer more or less accurate information on how to cope with government systems—where to go, whom to see, and what to say to gain access (see Nelson 1980). (Cf. the situation in the Soviet Union. See Simis 1982; Di Franceisco and Gitelman 1984.)

This rationing of access to public services often has impact on the effectiveness of reform law. Those who lack information and endorsements may be at a disadvantage:

they fail to ask for services to which they are entitled or their claims may get lost in bureaucratic procedures, prompting them to give up. Moreover, there is reason to expect that the well-connected who can use endorsements from various kinds of leaders to affect administrative decisions will come from some groups in the society rather than others. Some officials are bribed to produce favorable decisions, but bribery costs money. Some will have more opportunity than others to influence action this way (see Deysine 1980). Thus, laws that purport to apply equally to those entitled to their benefits will serve some and not others. Furthermore, some benefits are granted only if certain conditions are met; this is done to influence behavior. Insofar as lawmakers attempt to regulate in this manner, they will be only partially effective to the extent that gatekeepers channel services to some people and keep them from others. Those left out will have little incentive to modify their behavior in the desired direction.

Finally, those who serve as brokers of information and access may tell their clients how to comply with the form and not the substance of the law or how to hide the fact that they are not entitled to licenses or benefits. Here, too, brokerage systems may influence the impact of law. For example, a particular office of a state motor vehicle department may have an informal policy of failing teenage males unless they pass three "rule-of-thumb" tests which the inspectors think demonstrate respect for traffic laws. A group of friends at school may tell X, who is reckless and has great contempt for traffic laws, about these tests. X carefully complies and passes the three tests when he seeks his driver's license. X may pass and be licensed, but his recklessness and contempt may even be encouraged since he has beaten the system.

Lawyers sometimes serve the same function, telling clients how to comply in form but not in substance. Even if few lawyers show clients how to avoid having crimes detected, there is at least anecdotal evidence that many clients think lawyers will provide such service. Lawyers, then, may be hired to serve as substitutes for the gatekeepers involved in informal social networks, offering information about the operation of government agencies and, in some cases, influence over the content of decisions (see *Vanderbilt Law Review* 1984).

The kind of *social field* discussed by Moore as "often effectively stronger than the new laws" usually is more structured and permanent than the informal networks considered so far. Social fields can serve most of the functions of informal networks but their structure and permanence allow them additional means of warding off the influence of legal commands. There are a number of examples of social fields playing this part: Moore's own work considers an elite in an African nation attempting to implement a socialist program in the face of resistance from village and tribal units. In our country the closest analogy to the situation described by Moore might be a religious group that withdraws from ordinary society in order to continue a religious practice deemed illegal by state or federal law. Governments and religious groups have battled, with mixed results, over sending children to secular schools, polygamy, and the use of drugs in ceremonies.

Social fields need not be as structured, permanent, or distinct as a settled community to succeed in warding off regulation by the state. For example, those who work together or who are regulars at a bar may deal in stolen goods. Employees of a lumber yard may offer good bargains on stolen building materials to the group (see Henry 1981). Those who work in restaurants may help each other minimize their income tax burden by devising and sharing strategies for reporting as little income as possible on tax returns. It

might look suspicious for a waitress to report no tips, but she may welcome help in determining how little she can report safely. Those who identify themselves as professional criminals may form a fairly structured network to aid their activities. One of the functions of a prison is that of a center for developing and reinforcing criminal networks. For example, safecrackers can share techniques and information about good places to rob, and those in the business are identified so that they may be contacted when ex-inmates resume their criminal careers and need help.

Social fields serve to undercut the impact of law in a variety of ways. A group can delegitimate compliance and make violation seem ordinary and acceptable. Those who would comply or even suggest doing so may be the subject of ridicule, ostracism, or even violence. In such a case, if membership in the group is valued, one has to consider risking loss of his or her position before complying openly. Alternatively, evasion can be legitimated in a number of ways. The definition of a situation can be transformed so that members can deny that they are violating a legal norm. For example, those who take goods from their employer can argue that it is not really stealing but a customary right and part of their compensation (see Tersine and Russell 1981). Or if members of the group have to acknowledge they are violating the law, violation can be rationalized, and this rationalization can be repeated so that it becomes part of the common sense of the field. For example, those who work in restaurants and receive tips justify not reporting all of them on their tax return because of all of the loopholes in the tax system benefiting the rich, the general unfairness of the tax system, or the senseless way in which governments spend money.

Members of the group also can teach techniques of evasion which minimize the risk of detection. Those interested in stealing by subverting the computers that control so much of modern business can share the latest techniques and ways to counter safeguards against tampering. If members of a social field regularly meet for legitimate purposes, this serves to cover their discussions of plans for breaking the law. For example, parents who attend the same church may plan on how to initiate prayers in their local school despite rulings of the Supreme Court. If they are all tied to the community, those who might object and try to blow the whistle could be subject to many powerful sanctions. Their children might be subject to ridicule and ostracism, their businesses might be boycotted, or their homes vandalized. In a small city, no one might be free to object to prayers in the local schools.

Moore's position stresses the power of social fields to resist unwanted regulation. Nonetheless, one wonders how far these groups can ward off the larger society when those who hold power are offended by or fear the social field. The Federal Bureau of Investigation had great success in undermining the Communist party during the 1950s; it had less success in similar attempts against groups in the civil rights and antiwar movements of the 1960s and 1970s. The Brazilian and Uruguayan governments seem to have defeated urban guerrilla movements which were well organized private governments seeking to overthrow public authority, but the British government has not been able to overcome the Provisional Wing of the Irish Republican Army. It seems unlikely that an adequate explanation of these differences can be found in the structures or processes of the revolutionary groups in the various countries—indeed, the processes and structures of most contemporary revolutionary groups draw on a common literature, including, importantly, the writings of the Brazilian Carlos Marighela (1971). At least part of the explanation for the different degrees of success in repressing guerrilla movements might involve the

unwillingness of the British to use all of the tactics that the military regimes found acceptable. Probably public governments can overcome most, if not all, social fields if it is worth the price. However, undercover work attempting to infiltrate the group, harassment, and manipulation of public opinion to turn the group into a pariah require skill and money. They also cost valued privacy and freedom of association. More repressive measures carry a higher price.

Social fields also may act in ways apparently serving to implement the operation of the legal process. Groups can support those seeking to enforce their rights under existing laws or to change the rules. A group may supply money and access to lawyers and others who know how to litigate, negotiate, and lobby. It also may serve as an audience, applauding appropriate behavior. If, as often is the case, lawmaking and law enforcement must be triggered by complaints, a group can provide not only resources but a shield against retaliation. In fact, one who speaks out may find it hard to back down and settle or drop the matter if the group defines this as selling out. Of course, all these valuable functions will be supplied only for a price. Groups will not support those they oppose, they will not campaign for legal action against their interests, and they may focus retaliation against the one seeking legal action that offends other members. As a result, individuals may be given powerful incentives to transform their desires and translate them into a vocabulary approved by whatever groups are available. In this way, for example, labor unions can limit the effectiveness of laws designed to give rights to individual union members against union leaders; an American Association of University Professors chapter on a campus can help insulate the administration from challenges by faculty members denied tenure or contract renewal and frustrate laws designed to affect such decisions.

When we turn from informal networks and social fields to what we more comfortably can call *private governments*—formally structured complex organizations such as business corporations, universities, and major charitable foundations—we find still additional barriers to effective legal action. Organizational structure and process itself is an important variable in attempts to control behavior, as a number of writers are beginning to recognize. I will begin by viewing the deviance of business corporations from a private government perspective, generalize this analysis by applying it to universities, and then attempt to show that complex organizations such as corporations and universities cannot always be viewed as something distinct from public government. Social fields often cut across organizational boundaries with important consequences for the impact of law.

Corporations are subject to a wide variety of direct legal controls in all Western societies. However, in the past few decades many have become concerned about the limited effectiveness of rules designed to protect the market, the environment, consumers, or the political system. Apparently, business organizations have a good deal of power to deflect what reformers think is or ought to be the law.

Public government also attempts to induce large organizations to implement certain policies less directly. An enforcement agency may pursue a policy of "soft" law enforcement, seeking to persuade large organizations to comply with agency directives. The threat of legal action may serve as part of the agencies' negotiating power, but this threat is often limited by obvious difficulties in applying sanctions. Also, if an agency can succeed in getting a large business corporation to agree to change practices, it, in effect, gains the use of the private organization's internal communication and sanction system to change the way things are done in local offices and places of business throughout the

country. Governments also deal with private organizations by using contracts. By using the benefits of holding a government contract as an incentive, an agency can often gain agreement to carry out social policies more or less related to the transaction. For example, federal contractors must pay certain minimum wages and offer their workers certain conditions of employment. Despite these techniques, however, reformers worry that corporate deviance or mere token compliance is unacceptably high (*New York Times* 1985).

Several authors have stressed the effects of structure and process in studies seeking to understand unlawful organizational behavior and to fashion innovative and more effective sanctions. Coffee (1981) and Vaughan (1982, 1983) draw on sociological theories about the functioning of organizations, while Braithwaite (1982), Fisse (1981), and Fisse and Braithwaite (1984) base their analyses on an empirical research project in which over 200 senior executives of 50 transnational corporations, as well as many government officials, have been interviewed. I will first describe this group of studies, and then I will offer some additional considerations.

Vaughan argues that the environment in which organizations operate and their own processes generate incentives for individuals working within them to engage in deviant activity. Following Merton (1957a, 1957b), she argues that the goal of organizational success is so highly valued that the importance of attaining it outweighs concern about the means used. Businesses seek economic success measured in ways such as market share or the price of the corporate stock. Great efforts have been made in modern business corporations to create decentralized structures and sophisticated accounting systems so that those responsible for profit and loss can be rewarded or punished. At the same time, normative support for succeeding only through legal means has been progressively lessened.

For example, the definition of deviance usually is doubtful. Reforms will not be perceived as sensible and right if they make it harder for managers to gain rewards and avoid punishments within the organization. While reformers may see programs that minimize environmental pollution as highly beneficial, a manager may see only that they increase the costs of operation making it harder to reach the target for return on investment. Also, since it is costly and difficult to prosecute a large corporation quite able to defend itself, government agencies frequently resort to negotiations and informal proceedings. Those who violate the law are seldom sanctioned severely, and, as a result, only a few examples of wrongdoing are publicized. The fact that deals are made may suggest that the subject is not an important issue of right and wrong. Coffee points out that a sanction severe enough to outweigh the benefits of violation would have to be so great as to threaten the existence of the corporation. As a result, sanctions tend to be mere tokens; they are more like fines for overtime parking than punishment for truly wrongful behavior. Since government so often cannot enforce the law, managers evade and achieve success. Thus, illegal action becomes accepted within an organization as just the way things are done. Managers who attempted to comply with the law would face a serious handicap when compared with those who cut corners to get results.

Vaughan recognizes that her structural incentive argument fails to explain the behavior of all corporate actors. Many, if not most, business people do not violate the law. Others violate it but are not aware they are doing so because they do not know the rule or they misunderstand what it commands. She cites with approval Coffee's explanation for

illegal behavior which rests on an interaction between psychological and structural factors. Coffee notes that modern corporations tend to be multidivisional and decentralized. Top management allocates funds to managers of profitable divisions and disciplines those who fail to meet targeted goals for return on investment. Thus, the manager responsible for operational decisions is increasingly separated by organizational structure, language, goals, and experience from the financial managers who plan for the future and decide on rewards and punishments. Coffee argues that this means that "the locus of corporate crime is predominantly at the lower to middle management level" (p. 397). He explains that

> [t]he middle manager is acutely aware that he can be easily replaced; he knows that if he cannot achieve a quick fix, another manager is in the wings, eager to assume operational control over a division. The results of such a structure are predictable: When pressure is intensified, illegal or irresponsible means become attractive to a desperate middle manager who has no recourse against a stern but myopic notion of accountability that looks only to the bottom line of the income statement. [p. 398]

Vaughan recognizes that incentives to violate laws are not a sufficient explanation for corporate crime; there must be opportunities for unlawful conduct as well. In large complex organizations unlawful behavior may be both encouraged and hidden from insiders at other levels as well as from outsiders. Officials of subunits are likely to defend their domain whatever the claims of other units or outsiders. Control over subunits largely rests on accounting systems which disclose the consequences of various practices but obscure other things. In Coffee's terms, this allows senior managers to "piously express shock at their subordinates' actions while still demanding strict 'accountability' on the part of such managers for short-term operating results" (p. 410).

The analysis in these articles could be carried further. Vaughan notes that corporate managers may have ties outside the corporation that provide incentives to comply with the law or not to get caught violating it. She says that "[a]lternative skills, alternative sources of income, and alternative validating social roles reduce financial and social dependence on the firm. Consequently, external rewards and punishments may reduce the organization's ability to mobilize individual efforts in its behalf, despite processes that produce a normative environment supporting unlawful conduct" (p. 1392). Obviously, corporate managers, like the rest of us, have acquired complex attitudes about following rules from family, neighborhood groups, schools, mass media, and experience. On the one hand, there are general messages indicating that we should obey the law. On the other hand, we often learn in school, and particularly from competitive athletics, that we may cheat for a good cause. From newspapers and television we learn that respected figures break rules in all kinds of social games. Corporate life can be seen as a game where winning is the only goal.

At the same time, social fields and organizations such as business corporations may reward compliance with the law. In at least some corporations there are ways to avoid the kinds of pressures described by Vaughan and Coffee. For example, one may be able to use members of the legal staff as a way to support compliance rather than violation. Lawyers can be blamed for increasing costs by fashioning procedures in response to new regulations, and a manager may be able to bring his or her department's activities to the

attention of the general counsel's office so that he or she will appear to be forced to comply. The legal staff may welcome a chance to symbolize respect for the law since the techniques of compliance are within its domain, and the need to respond to regulation enhances its power within the organization. A manager may be able to dress an ethical stance in prudential garb: complying with the law can be justified in terms of the negative consequences of the likely bad publicity if the firm was caught violating a regulation.

This is not to say that Vaughan and Coffee are wrong in stressing the pressures to evade the law, but more emphasis on possible offsetting pressures supporting compliance would seem warranted. We know little about when the balance falls one way or the other. Furthermore, corporations that have suffered serious blows to their reputations as the result of publicity surrounding getting caught violating the law may modify their incentive systems to ease the pressures for deviance—at least temporarily. Of course, as Coffee stresses, while the formal message from a corporate president's office may call for compliance, the real message communicated may be, rather, "don't get caught."

Coffee's argument that the locus of corporate crime is middle management seems only partially true. Undoubtedly, in many cases the pressures he describes are real. Nonetheless, some kinds of corporate crime must involve the participation of top management. For example, decisions to sponsor a military coup to overthrow the government of a nation which has threatened corporate interests, to bribe high governmental officials, to continue participation in international cartels during wartime with corporations based in enemy nations, and the like are not usually within the power of middle management to make or implement. Certain multinational corporations, moreover, interact with governments, pursuing what could be viewed as their own foreign policies. Lowenthal (1978) observes that

> [in] a curious sense, it is much easier for the [United States] government to manage its relations with the Soviet Union or China than with Chile or Peru. Latin American and Caribbean countries are very strongly influenced by decisions taken by Exxon, the American Smelting and Refining Co. (ASARCO), United Brands, Citibank, Manufacturers' Hanover Trust, or Chase Manhattan, to name just a few examples. And some of the main problems in inter-American relations—especially access to capital and technology—are issues over which the U.S. government has considerably less influence than non-governmental actors. [p. 122]

For example, during the Carter Administration, it was United States foreign policy, reinforced by legislation, not to supply arms to nations that repressed the human rights of their citizens. However, American corporations could evade government policy by channeling sales through their foreign subsidiaries. It seems likely that the decisions to make such sales were made at the upper levels of management.

A Case Study: Affirmative Action for Women in Universities Finally, the discussion in these articles draws a rather sharp distinction between public and private spheres and fails to cover social fields that include both the regulators and regulated. We will turn to an extended example—affirmative action for women at universities—to stress that the structure of a large private government and the existence of social networks cutting across formal boundaries can work together to blunt the effectiveness of regulation. In other words, we will use a private government perspective to analyze the limited

impact of a legal reform. We will stress both the relationships between public and private spheres and the interpenetrations of the two areas. The example also will make clear that much of the analysis in the articles just considered is not limited to business corporations but applies to other complex organizations as well.

Women have faced barriers to becoming and remaining university professors throughout the history of higher education in this country because of conscious policy or circumstance (Bernard 1964). By 1972, there were three bodies of law designed to eliminate discrimination against women and members of minority groups by large academic institutions. First, Title VII of the Civil Rights Act of 1964 was extended to universities and colleges, allowing academic women who saw themselves as victims of discrimination in hiring, promotion, or tenure to sue for court orders directing that they be granted the position to which they were entitled, damages, or both. Groups of women also could form a class and sue on behalf of themselves and others, seeking judgments placing a university under judicial supervision to ensure the abolition of discrimination. While there were some notable victories, courts have been hesitant to substitute their judgment for those of professionals about the quality of teaching and scholarship. Second, under the Equal Pay Act academic institutions may not pay different salaries to men and women with substantially equal qualifications who occupy substantially equal positions.

Finally, under Executive Order 11375 universities which receive large federal contracts must submit a plan to take affirmative action to overcome the effects of past discrimination against women (see, generally, Prager 1982). Employers must analyze their work force and the pool of qualified potential employees and establish goals so that the composition of a work force eventually will reflect the percentages of women in the pool. This is not a quota system nor a requirement that women less qualified than available men be hired. Rather, the federal contractor must show some progress as a result of good faith efforts in meeting goals when required reports are made.

Generally, this regulation of academic hiring received mixed reviews from the regulated. University professors and administrators did not object to the Equal Pay Act, and few had difficulty with the idea that a woman who had suffered discrimination ought to have a remedy. However, most of them expected almost no valid claims because they believed that universities, with but few exceptions, hire, promote, and grant tenure on the basis of merit. Some were concerned with the potential burden of defending a discrimination claim even when it lacked merit. Most senior professors and administrators saw affirmative action as unsuited to a university.

In the 1970s, women's organizations, along with minority and handicapped groups, sued the federal agencies charged with enforcing the requirement of affirmative action and negotiated promises that the law would be enforced. Nonetheless after more than a decade, members of these organizations remain dissatisfied with the amount of compliance with affirmative action laws by universities while federal grants and contracts continue to flow to them (see, for example, Abramson 1977; Hornig 1980; McKenna and Denmark 1975; Page 1978; Vladeck and Young 1978).

A sketch of the process involved in attempts at enforcement over a decade at a major campus of a state university—called State University at Fillmore for purposes of this study—will illustrate the complex and multileveled interactions when a private government is reluctant to carry out the demands of public government (see J. Macaulay 1980). In 1970, after complaints of nonenforcement of the law were made by national women's

groups, representatives of the Office of Civil Rights (OCR) of the Department of Health, Education and Welfare visited State University at Fillmore. They told university administrators that they saw a pattern of underutilization of women and of salary discrimination. The 1970 campus affirmative action plan was found to be inadequate, and campus officials signed an agreement to produce an acceptable one, update it annually, and submit the plan and the reports to OCR. The OCR staff announced that it planned a follow-up visit to the campus in January 1971.

The president of State University then issued a directive to all campuses in the system, including the one at Fillmore, to appoint an affirmative action officer (AAO) and a Committee on the Status of Women. This was done at Fillmore, and the AAO and the committee gained a measure of power from the threat to federal contracts and grants posed by the OCR visit and planned return. Salaries were investigated, and a number of extreme cases of discrimination were uncovered. Deans and department chairpersons were told to grant raises to remedy these inequities. A number of women were discovered teaching a major course load without permanent positions and at low pay. Many of these women were promoted to tenure track positions or given tenure in recognition of their long service and the unfairness of their past treatment by the university. A utilization analysis was done, and it revealed a pattern of underrepresentation of women in the majority of departments at the campus.

Once these steps were taken, however, a pattern developed which was to be repeated throughout the decade. The AAO would work on an affirmative action plan and write reports with data on the hiring, promotion, and tenuring of women. Field personnel of the various federal agencies which successively were given enforcement responsibility over universities would write or visit the campus. Members of a social field composed of women with some connection to the university who were dissatisfied with progress on affirmative action would meet with the federal personnel and point out defects in the plan and statistics. The field personnel would recommend that the Fillmore campus be required to take certain steps or have contracts and grants disapproved. But then the threatening clouds would blow away and officials in Washington would pronounce the Fillmore campus still approved to receive contracts and grants although it never produced the kind of plan or data which would seem to be required in order to comply with the letter or purposes of the law.

Moreover, although the number of women hired increased, the proportion of those with permanent tenured positions rose very little. Women's promotion chances remained low, and departments that never employed women in proportion to their availability continued always to fall short of their goals. One year a state civil rights agency found probable cause to believe that a university department had discriminated against a woman when it refused to grant her tenure; another year a state commission on women found the university's efforts in affirmative action to be inadequate. Women, and members of minority groups, continued to point to figures showing that the university was falling far short of its announced goals. Still the university kept saying that it was fully complying with all laws and regulations, and federal agencies took no action against it.

Four explanations stand out for the success of State University at Fillmore in warding off the impact of these laws: affirmative action lacked legitimacy; the structure and process of the university diffused responsibility and made it hard to find reliable data; social networks that included both regulators and the regulated had the power to deflect

enforcement; and the consequences of cutting off contracts and grants to a great research university were unacceptable. They will be examined in turn.

Affirmative action for women at universities progressively lost legitimacy in the eyes of those with the power to make decisions. The academic community can be viewed as a loosely coordinated social field, and its culture operated to undercut the legitimacy of this program. Affirmative action was sharply attacked in a number of books and articles written by professors (see, for example, Lester 1974; Posner 1979; Sowell 1976). This literature tended to paint an idealized picture of university life, glorifying an unselfish pursuit of truth, devotion to students, and decision based on merit—the academy was pictured as something like a religious community, fundamentally different from factories and business offices where affirmative action might make some sense. Affirmative action regulations were labeled "reverse discrimination," as the title of one book put it (Glazer 1975). Whatever the merits of the arguments presented, these books and articles helped professors and administrators justify evading or minimally complying with the letter of the law (cf. Lipset 1982).

In addition to questionable legitimacy in the eyes of those making hiring, promotion, and tenure decisions, government officials charged with enforcing affirmative action regulations faced problems of structure and process. Most prestigious universities have a complex structure characterized by a tension between the powers of those who administer and those who teach and do research. Formally, usually a university is run by a governing board which delegates power to a chief executive officer. This administrator, in turn, appoints deans to administer various subunits. Within these divisions, there are departments charged with teaching and research in their own area. In theory, deans and chairpersons administer while the faculty makes policy within boundaries set by statutes or a charter and the decisions of the governing board. In practice, however, professors are "street level bureaucrats" (cf. Prottas 1978; Carter 1974) who operate relatively autonomously with little direct supervision. The faculty claims, and often has, power to decide who is to be hired, promoted, and given tenure. Those higher up the chain of command have veto power, but custom demands that it be used only sparingly. Obviously, there is great opportunity for negotiation and politics within the formal decision-making process.

Just as Vaughan and Coffee suggest, this decentralization of power had important consequences for the enforcement of affirmative action requirements. It was hard to detect violations and noncompliance as long as those in the departments making the hiring and tenuring decisions knew enough not to post signs saying "no women need apply" and to make gestures such as advertising positions and interviewing at least a few women along with the men being considered in the usual course of recruiting.

Government officials exerted pressure for affirmative action at higher administrative levels. Professors usually learn about affirmative action regulations not by reading the law but from directives coming down from above. Those who wrote the directives at Fillmore tended to simplify and pass on interpretations which would not upset traditional practices very much. Professors also learned about the rules from atrocity stories passed along by deans and chairpersons that told of the costs and burdens of red tape and bureaucratic procedures. These stories may well have undercut any impulse to make significant changes in departmental recruiting and decision-making.

Since most important hiring and tenure decisions take place in the departments, administrators were able to close their eyes to evasion as long as they could find some

apparent or symbolic compliance. The day-to-day burden of dealing with affirmative action usually is placed on an assistant to the university head. Such assistants have had relatively little power unless the president or chancellor wanted to push for compliance. Assistants who want to keep their jobs are likely to negotiate for gestures and proceed cautiously (see Liss 1977). They have little incentive, from the standpoint of their careers, to make available information that might embarrass the university. Rather, all the incentives are to interpret the data as showing progress in hiring women. (Cf. Weiss and Gruber 1984.) If this proved difficult, assistants could at least make a case for good faith effort to comply in the face of adverse economic conditions, budget constraints, and less hiring and tenuring.

In addition to the questionable legitimacy of affirmative action and structural characteristics of the university, there is also a social field comprising those who are supposed to enforce these laws and those university professors and administrators who are the targets of regulation. For example, State University at Fillmore had acquired a reputation as a leader in affirmative action for women because of its early efforts to correct clear-cut examples of discrimination. As a result, in 1974 its AAO became a consultant to the Department of Health, Education and Welfare. Her role was reflected in a memorandum written in February of that year. She reported that she was "spending almost half of every week in Washington, D.C., trying to win a modification or deletion" of rules such as those requiring the compilation of data about employees. Without these data complete statistical analyses for evidence of underutilization of or discrimination against women could never be done. Moreover, she described her plan to go only so far in complying with the letter of the affirmative action regulations as to be able to comply fully within ninety days if and when the federal government ever insisted that the Fillmore campus meet them; her constant contact with officials in Washington apparently enabled her to judge when it would be necessary to begin to compile a precise plan and detailed and accurate statistics.

The AAO was a member of the faculty of a department at Fillmore, an officer of the campus administration, and a consultant to the federal government's enforcement agency. Her role crossed formal organizational boundaries. The consequences for the impact of the law were shown by events in November and December of 1974. In November, an assistant to the president of State University wrote HEW's director of the Higher Education Division, asking how the affirmative action plans of various campuses of State University should be submitted for approval by HEW. The director and the AAO of the Fillmore campus were well acquainted as a result of all the consulting and lobbying in Washington. On December 3, the director telephoned the AAO at home in the evening after working hours. The AAO's memorandum concerning the conversation states:

> [The director] indicated to me that the agency did not wish to engage in general institution-wide compliance reviews while the standards and procedures . . . [then in effect] are still extant. She further indicated that to the best of her knowledge and belief no major university could be today found in compliance if . . . [these] standards are applied. Consequently, she stated she believed that an on-site review at this time, as required by Revised Order 14 for approval of an affirmative action plan, would find many or all . . . system schools out of compliance, without regard to any excellence or lack of it in real progress in affirmative action. She expressed the further belief that the target of such reviews

> would automatically become the . . . [State University at Fillmore] . . . and that we were very likely therefore to go to fund cut-off.
>
> She indicated that she felt such compliance reviews in the present circumstances would be very destructive, supportive neither of affirmative action nor of educational goals. But, she noted, in view of the currently pending suit in which NOW, WEAL and others have charged HEW with nonenforcement, she was not at liberty to instruct . . . [the assistant to the President of the University] . . . in writing not to submit the plans.
>
> In view of all these circumstances she asked me if I could insure that the plans were not submitted.

The AAO's solution to this problem was to "draft a tentative letter" for the HEW director to send to the assistant to the president "indicating that the plans *could* be submitted but that the agency maintained a reviewing schedule to which, absent some pressing necessity, it preferred to adhere." The letter was written, the Fillmore campus plan was not submitted, and this threat to the flow of federal money passed.

This was not the only instance of informal contacts designed to blunt compliance with the letter of the regulations. Whenever the threat looked serious, administrators of the Fillmore campus and influential professors were able to go over the head of the field investigators and the regional offices and take their case to top officials in Washington. Those at the top of the chain of command in the agencies charged with enforcing affirmative action regulations are part of the higher education social field. Whatever formal organization charts might indicate, these cabinet officers, top level administrators, and their staffs often were former university professors, foundation executives, or others who held graduate degrees and were sympathetic to the traditions of higher education and who were often linked by friendship or long association with officials in national educational associations if not directly with those who ran the Fillmore campus. These federal officials were not "captured" by the university administrators; they just understood one another and shared similar attitudes and values. Often, during the 1970s, those ultimately responsible were former academics temporarily serving as cabinet officers or administrators. As the Fillmore campus chancellor's lawyer told a group of law students, when a contract or grant was held up because of questions about affirmative action at this campus, administrators, professors, and representatives of higher education organizations in Washington "have been able to find the people who are ultimately responsible for whatever the regional office is off on and help to get them back on the track."

Finally, we have to look to the consequences of enforcing the affirmative action regulations to the letter. If the federal government had cut off all grants and contracts to State University at Fillmore, it would have crippled a major research and teaching center. Both public and private universities are dependent on federal funds. Moreover, if administrators and professors at Fillmore had been forced to comply with the federal regulations as they were written, traditional hiring practices would have been overturned and many members of the faculty would have been antagonized. Yet this price did not have to be paid because affirmative action for women did not have great public support, and those who ran State University at Fillmore had friends with important positions in the legislative and executive branches of the federal government. In short, it was far easier to have symbolic but unenforced regulations than to pay the price for implementing them.

Social Fields, the Legal System, and Stability and Change in Society

Those writing broad social theories often see a need to account for law and legal institutions. One interested in the social study of law frequently finds these accounts unsatisfying because the theorist posits a formal picture of law. When one adds private governments, social fields, and networks to a sociological view of law, much found in these broader social theories seems inadequate if not wrong. Of course, turning from normative claims or theoretical statements about the functions of legal systems to a description of law in operation makes neat theories messy and complex, but oversimplification seldom is a virtue.

While this is not the place to describe and distinguish the variety of existing social theories and their accounts of the role of law, I will consider elements common to many of them and then discuss how concern with private governments, social fields, and networks might add to or question these theories. I am not offering a worked-out picture of society that accounts for the parts played by law and the legal system, but rather examples that suggest some of the things that any theory must deal with if it is to be useful to those concerned with the place of law.

The Roles Played by Law in Various Social Theories Before one can question the treatment of law in a social theory, it is necessary to sketch the way in which it deals with it. Here I will describe briefly and generally the account of law in structural-functional, conflict, and Marxist-derived theories. In the next section, I will consider how elements in these theories might be questioned if a broader view of the place of law were taken.

Many social theorists have offered what are called *structural-functional theories.* Here the focus is on social structure—the more or less enduring patterns of the ways people interact. Social phenomena are seen as interdependent as in a biological system. Action taken in one social unit affects the functioning of others. For example, economic and legal systems affect each other: an impoverished society cannot afford complex legal institutions, but modern industrialized nations have developed legal institutions where police, judges, lawyers, and regulatory agencies importantly affect the way business is conducted.

In most social theories, a major problem is the explanation of social order and the operation and continuation of societies. Most structural-functionalists see law as an important factor in such an explanation (see, for example, Bredemeier 1962; Grace and Wilkinson 1978; Koch 1980; Lamo de Espinosa 1980; Mishra 1982; Parsons 1962; Wilkinson 1981). They draw pictures of a relatively harmonious and stable society with the legal system playing a key role at its margin. People have expectations about the behavior of others and how others expect them to behave. Thus, one can rely on what others will do and pattern one's own conduct in order to fit in. People learn how to act in particular situations, and the norms governing social behavior become part of their psychological make-up. Most obligations are fulfilled naturally, and external sanctions play only a secondary, and often indirect, role. While there is much normative regulation, law is only an objective and visible part of a pyramid of habits, customs, norms, rules, and law.

Compliance with social norms may be enforced by sanctions inherent in reciprocal relationships, which exist in great numbers in any society. One has friends, interacts in groups for recreation, and repeatedly engages in business dealings with the same people.

One who complies with the expectations of others in these relationships will continue to receive whatever benefits are involved, which may range from love or esteem to profitable business opportunities. One who disappoints the expectations of those in continuing relationships risks being subject to a range of sanctions: one's partners may frown, use sarcasm or ridicule, discontinue the relationship, or retaliate by using violence. (Cf. Griffiths' 1984 comments on gossip systems.) Only in extreme situations will one's partners call the police or file a lawsuit.

Those disputes that occur despite internalized norms and relational sanctions will be the product of ambiguity in the application of generally held values to particular situations. This creates a need for arbiters who can impose, or threaten to impose, sanctions so that their decisions about the proper interpretation of the norms will be carried out. In this way, legal activity serves the function of social integration by aiding the coordination or unification of various parts of the society.

Adjudication clarifies values in light of changing situations. In most instances, the decision of a court or arbiter will be accepted and does not have to be imposed. However, the legal system must be related to the state so that its monopoly of the legitimate use of force ensures that legal norms override any inconsistent social norms. In a few rare cases, a display of force may be needed to assert the priority of legal norms over all others by sanctioning those deviants who are not contained by other means of social control. Sanctions can be imposed only when permitted by the rule of law: one may be arrested, tried, convicted, and imprisoned for robbery only when the elements of the crime are present. If sanctions could be imposed apart from the rules, they would lose some or all of their normative force.

Some particularly important social values will be institutionalized as special legal agencies are created to protect them (Mayhew 1968). Certain kinds of equality are at least symbolized when a government creates an Equal Employment Opportunities Commission; certain patterns of coping with labor disputes are institutionalized by the creation of a National Labor Relations Board. These agencies must then have access to the people who violate the norms being protected. This means that those aggrieved must have incentives to participate in bringing problems to them.

When important disputes do come to the legal system as complaints, causes of action, or pleas for services, the system can then serve other functions which also carry out social integration. Disputes signal policy-makers and the interpreters of norms that there is need for an adjustment so that similar disputes or claims do not arise in the future.

Many theorists also see actual decisions as serving to legitimate society, the legal system, and the particular judgment in a case in a number of ways. The norms selected for application are seen as appropriate, and their application is consistent with the expectations of those observing the legal process. The legal system itself may have enough prestige so that members of the public will see any norms applied or interpreted by it as just, simply because they are crystallized in legal doctrine. Acceptance flows from at least two sources. First, the legal system is viewed as autonomous and not dependent on other centers of power. It can make and enforce its decisions impartially. Second, legal officials are selected in ways that most members of the society see as appropriate—they are experts who are selected in recognition of their skill, they have long practical experience, they are elected by the people, or they are appointed by those who symbolize the society. Finally, legal action promotes legitimacy because the legal system is perceived as having

enough effectiveness to implement the norms it serves; it is more than idle rhetoric and pious preaching in the face of reality.

Conflict theories attack structural-functionalism, but, generally, this perspective tends to criticize ideas about the functions of law in society rather than offer a complete theory of its own (see, for example, Chambliss and Seidman 1971; Chambliss 1973, 1979; Quinney 1975). Conflict theorists see society not as harmonious and stable but held together by the use or threats of force. Law legitimates police violence and other uses of power to undercut attacks on the system. The reality of law is a police officer with a club or a SWAT team with automatic weapons attacking any group that threatens the stability of the existing order. Law supports the structures of property and exploitation. Under a system of division of labor, people are not self-sufficient, and they need cash to buy their needs. This means that they must have jobs and keep them. However, one's claim to a job under the law is always questionable. Those who challenge their employers risk being fired and gaining a reputation as troublemakers so that substitute employment will be difficult to find. These threats, rather than a general normative consensus, dampen open dissent and explain the persistence of societies in which few of the people share most of the benefits.

Conflict theorists turn structural-functionalism on its head. Instead of normative consensus, they say there is a great deal of dissensus and cynical knowledge. Instead of seeing the society, its legal system, and particular decisions as legitimate, they see cheating, manipulation, or simple resignation as the ways to cope with an unjust system which cannot be confronted directly. People at the bottom of the distribution of wealth and status do not accept their place as part of the natural order of things or as their just reward for lack of effort or skill. They see people at the top of the society as having gained their position illegitimately or as descendants of such people. Business executives cheat on their taxes, bribe American and foreign government officials, and foist shoddy products on the public. Elaborate rationalizations are fabricated by those at all levels for violating official norms.

Conflict theory tells us that, contrary to the claim of the structural-functionalists, the legal system and particular decisions seldom yield legitimacy. People do not see law as salient to their lives; at best, it is a background factor with limited impact. While the daily operation of law possibly might reflect common sense, people hear only about extraordinary cases. The acquittal of the man who attempted to assassinate President Reagan did not create legitimacy for either the criminal justice system or the insanity defense (see Hans and Slater 1983). Indeed, those decisions which are publicized are likely to provoke anger and dissensus. One need mention only the opinions of the Supreme Court concerning school prayers, abortion, and racial integration of the public schools as examples. People suspect that legal decisions often turn on wealth and connections rather than on apolitical, rational norms applied by an autonomous body of experts. Awareness of institutions such as plea bargaining and the settlement of personal injury cases would seem to reinforce such a view. Legal procedures do not reassure most people that the game is fair. Rather, they appear to be ploys in a game benefiting the economic interests of the legal profession and those who can pay the best lawyers to play for their side.

Austin Turk (1976) points out that, even when it is not corrupt, the legal system may promote conflict rather than social integration. Control of the system, for example, is a

prize about which groups can fight—the power to appoint judges and administrators is one of the things gained by winning elections. Moreover, the chance to mobilize whatever power courts possess can be an incentive to abandon acceptance of the status quo. *Brown* v. *Board of Education* (the school desegregation case) was one of many factors provoking the civil rights movement and conflict in an effort to change traditional ways in the South (see Harding 1975). The chance of victories before courts and legislatures may undercut compromise, generating more conflict rather than stabilizing the society.

Marxist-derived theories show a different view of the functions of the law in postcapitalist societies. (For reviews of this literature, see Greenberg and Anderson 1981; Jessop 1980.) Most of these theorists, rather like the structural-functionalists, see society as composed of a number of subsystems and structures. While in a Marxist-inspired theory, the economic system and class relations will be central, the state and law are seen as necessary or useful in attempting to cope with contradictions, inconsistencies, and imperfections in the interest of the dominant class. Koch (1980, p. 6), in an essay highly critical of Marxist-derived theories, finds that they typically see the state and law fulfilling functions such as "the guarantee of legal relations, especially the relations of private property, the provision of general material conditions for production activity (the 'infrastructure'), the regulation of the conflict between wage-labour and capital and the defence and expansion of total national capital on the capitalist world market."

Many of these theorists see traditional bourgeois law as undercutting the possibility of effective class struggle, as working toward the acceptance of exploitation through mystification. In liberal states, individuals are formally equal before the law and are bearers of rights. Balbus (1977), in an often-cited article, argues that capitalist legal systems make people into citizens, abstracted from their personality and actual social situation. In this way they can be made to appear equal, despite all the real differences in status and power between the dominant and dominated classes. This militates against the formation of class consciousness. "[T]he 'community' produced by the legal form contributes decisively to the reproduction of the very capitalist mode of production which makes genuine community impossible" (p. 580).

Related theories see law as part of the battle for common sense (see Femia 1983). Except in times of stress, all classes accept a world view in which the existing order is seen as natural and proper. However, this view advances the interests of only the dominant class. Traditional intellectuals rationalize concepts of social order as the material basis of the dominant class's power change. Law and legal intellectuals are but part of this larger picture. For example, as economic crisis during the depression of the 1930s began to prompt greater governmental regulation of the economy, economists and law professors in sympathy with the New Deal fashioned a rationalization for action which previously had been thought unconstitutional. Simplified versions of the new ideology were passed along and ultimately became part of the vocabulary of both major American political parties. When economic conditions changed and New Deal regulation inconvenienced business, another generation of economists and law professors appeared ready to champion efficiency, free markets, and other symbols of a capitalist world view.

Adding Private Governments, Social Fields, and Networks to Social Theory

None of these theoretical pictures adequately incorporates the roles played by private governments, social fields, and networks and their complex relationships with the formal

legal system. In particular settings some writers recognize that theories must be expanded to cover individuals acting in groups (cf. Zimring 1981; Gottlieb 1983; Nader 1984). However, this has been the exception rather than the rule. I will consider a number of instances where the theories seem to assume a state or legal system on one side confronting an isolated individual on the other. I will note where social groups have been added to the analysis. Finally, I will suggest what might be added to these theories if a broader perspective were used consistently.

"Legal" Functions Are Played by Private Systems. At the outset, recall that the state and the legal systems often face competition from private governments which perform some or almost all of their functions. In talking about the effectiveness of law, I noted that corporations may be able to socialize employees to internalize norms different from those of the larger society, and they may be able to sanction noncompliance with corporate norms. If the public law calls for measures to protect the environment, but the cost of these measures threatens the economic health of the corporation, officials must cope with this conflicting set of signals. On the one hand, these officials can comply with the law but seek to influence elections so that new legislators, governors, and presidents will change the rules or enforcement practices. On the other hand, they can try to evade the command of the law, and often do so with great skill.

Other forms of competition with public government were noted earlier. Private governments such as corporations, churches, and labor unions can pursue their own foreign policies, in concert with or in opposition to official policy (see, for example, Kowalewski and Leitko 1983; Teulings 1982). Nations may form alliances with large multinational corporations or such corporations may seek to overthrow governments. Churches may battle nations about human rights, seeking to affect what is called world public opinion. Labor unions may boycott goods from certain nations. Private governments often take over what we think of as state functions. Corporations often provide their own police when the public police seem inadequate to serve their interests, and I have already noted how white-collar crime is often handled privately. Trade associations often make rules governing members, devise standard forms to facilitate making contracts, and arbitrate or mediate disputes.

In short, a social theory cannot assume that public government has a monopoly on those functions the theory assigns to "the legal system" (see Greenberg 1976). Of course, a theorist can escape this problem by expanding the term "legal system" to include whatever agency, public or private, performs what the theorist wishes to call legal functions. However, such a move glosses over whether it makes a difference if a particular function is performed publicly or privately. It seems likely that the more private and decentralized the structures for performing a social function with broad impact, the greater the problems of coordination and integration.

Channeling and Filtering Matters In and Out of the Legal System. Not all problems, disputes, claims, and the like existing in society come before legal officials, and many of those that do are not handled in ways that these theorists assume. Thus, functions assigned to the legal system by many of these theories become questionable. Here I will consider the consequences for these theories of two aspects of social fields and networks: the filtering and channeling done by gatekeepers to the legal system and the coping with recurrent legal problems that takes place on the margins of law.

There has been extensive study of dispute processing during the past decade. Relying

on some of this work, Luhmann (1981) expands structural-functional theory to show that whether or how the legal system will play an integrative role is uncertain. He offers a theory of "thematization thresholds" as a barrier to transforming problems into legal questions. While law can stabilize people's expectations in interaction as these theories assume, for this to happen legal norms must be made into the theme of discussion between the parties—concrete situations must be "thematized" as legal questions: a buyer's dissatisfaction with the quality of a new car, for example, could be discussed with the dealer in terms of warranty and the remedy limitation in their form contract rather than in terms of other kinds of norms. However, in many situations there are good reasons to avoid invoking legal norms. By openly confronting another with the question of whether she is acting legally, one shatters the comfortable consensus that is normally assumed in a social relationship. Legal themes introduce the possibility of disagreement about interpretation of norms or the history of the situation and tend to force discussion into a dichotomy of right and wrong. Assertion of legal right is an attempt at coercion, and it may be a challenge to fight to defend one's honor. Interaction is moved from the domain of family life, a continuing economic relationship involving trust, and the like. In these domains what is given up now is likely to be rewarded by benefits that come later. It is difficult to threaten divorce and still keep a marriage alive; it is hard to contest issues in a divorce proceeding and continue to interact afterward.

Whether or not one will cross this thematization threshold is determined, Luhmann says, in large part by the prospects of social support in case conflict should arise. Turning to law usually means withdrawing from the relationship in question, and often one needs support to replace the benefits of the situation rejected. A legal discussion may initiate a chain of events with an unpredictable outcome, and the more uncertain the future, the more support is needed.

FitzGerald, Hickman, and Dickins (1980) see members of relevant social fields and networks serving not only as supporters but also as audiences, reality-testers, and defusers when disputes arise. For example, the group at the bar separates likely combatants; networks of friends and relatives repair defective products so the buyer does not have to confront a seller and demand a remedy; the women watching over small children at a playground work out potential neighborhood disputes. People in social fields can suppress disputes by making fun of one who voices a complaint or by reacting in such a way as to communicate that an asserted claim of right shows weakness and a lack of self-reliance (see Engel 1984). Baumgartner (1985) suggests that middle-class people may be less willing to use the legal system than those lower on the social scale. The threat of disapproval by one's peers may serve a gatekeeping function. At times those in a social field can act as champions or mediators, offering ways to communicate with the other party in the dispute, suggesting solutions, or adding their own power to press for resolution (see Eisenstadt and Roniger 1980). Significant others, on the other hand, can pour gasoline on the fire and raise consciousness—one can be told to fight and how to do it. Such an audience, moreover, may make it difficult to back down and compromise or withdraw without a loss of face.

Who plays these roles? Members of social fields or networks centered in the workplace or neighborhood may be called on. Ethnic or religious communities may be invoked when members do not view themselves as autonomous. However, Ladinsky and Susmilch (1983) find that in consumer disputes people tend not to contact third parties but to act

alone. It may be that people have a repertoire of disputing techniques in certain areas but not others (see Sharp 1980). It may be that Americans, at least, face a complex of norms about "not airing dirty linen in public" and "what will the neighbors think."

Rather than ignoring a problem, acting alone, or consulting acquaintances, some Americans go, or are sent, to lawyers. Social fields and networks may still play a part in dealing with the dispute. Usually, the client is buying access to the social field in which the lawyer acts. The lawyer has contacts and can get things done; the lawyer can act as mediator or go-between; the lawyer can suppress a dispute, encourage the client to fight, or attempt to work out a settlement (see Macaulay 1979).

Most social theories ignore the activities of lawyers and officials and deal with law in its most formal aspect. Law tends to be seen as adjudication or a supreme court giving meaning to guarantees of equal protection. Yet adjudication and the interpretation of norms are only part of a larger process involving negotiation, bargaining, and the assertion of power. Probably the key finding of nearly three decades of the social study of law is that a descriptive model of the legal process in the criminal area involves plea bargaining with trials and appeals operating at the margin as factors to consider during negotiations. On the civil side, insurance adjusters meet injured victims or their lawyers and work out settlements in which the chance of trials and appeals affects what is offered and accepted. This kind of patterned dispute processing frequently is carried on by private governments, social fields, and networks where there are identifiable roles, rules, and sanctions. In some bargaining arenas recurrent problems are dealt with by a relatively fixed cast of characters. For example, those who prosecute and defend criminal cases play defined roles but so do police officers, social workers, and others who are regularly involved. In these arenas the problems of individuals tend to be channeled into limited repertoires of solutions which have been developed by specialists who are influenced as much by their own goals and those of the institution as by the needs of disputants. In such arenas facts are not established beyond a reasonable doubt and rights are not vindicated. Rather, rights and facts are only factors in reaching a deal in which the interests and power of all participants will be reflected.

Even when we find adjudication in its more formal dress, we cannot assume that particular decisions solve the problems and define the rights once and for all (cf. Lindgren 1983). A particular appellate opinion may be but a battle in a larger war. For example, retail gasoline dealers battled the large oil companies for about forty years, seeking to enlarge and redefine their rights. The relationships were structured by lawyers for the large companies so that the dealers would have few, if any, rights. Individual dealers first sued, offering novel legal theories backed by atrocity stories to justify a change in the balance of power. Generally they lost. Eventually their trade associations mobilized and directed resources into a long battle. They also sought relief from administrative agencies. While they often failed to gain a change in the rules, they did gain the services of agency staffs as coercive mediators. Finally, the organized dealers turned to both state and federal legislatures. Here they won what appeared to be major victories. Under some of the statutes that were passed dealers could not be canceled except for cause; under others a requirement of good faith was imposed. However, the war was not over. The large oil companies went to court seeking interpretations of the statutes and challenging them on constitutional grounds.

During the whole course of this legal warfare, the oil companies used their economic

power to shape relationships with their dealers. The chance that dealers might win rights from courts and legislatures may have affected the companies' actions, but neither this chance nor the rights ultimately won put dealers in control. The cases and statutes were battles in a war rather than authoritative interpretations of ambiguities in values. Social theories that neglect the impact of legal decisions on bargaining position or fail to see that bargaining power rests on far more than legal rights explain almost nothing.

These social theories tend to identify law's role with conflict. However, much of law in any social system is facilitative. Do we drive on the right-hand or the left-hand side of the street? Can people act in groups with limited liability? Is there a way to notify others about my claims to your property? Can my less tangible claims serve as security for loans? Can we drink the water and milk and eat the lettuce with reasonable assurance that we will not be ill tomorrow? Will there be roads and bridges, and will the snow be cleared from them so we can transport our products to market? Will the conditions exist for a workable system of insurance? Will there be schools, hospitals, libraries, and parks? Private governments, social fields, and networks all draw upon these facilitative resources provided by the public legal system, and often legal regulation provides a focus for the formation or continuation of a relatively private group. In short, social theories must deal with interactions between and interpenetrations of public and private units.

Legitimacy and Mystification as Mediated by Social Groups. Social fields and networks also qualify in other ways some of the social theories we have considered. For example, both structural-functional and Marxist-derived theories tend to assume that societies are held together, at least in part, by a consensus about values. Of course, in one theory the writer talks of legitimacy while in the other the consensus is the product of false consciousness. Law is supposed to serve social integration by *clarifying* values so that disputes will be avoided and expectations realized. However, it is possible that *ambiguity* in the interpretation of generally accepted social norms and inconsistency in their application may in fact aid in holding societies together (Mills 1983). As Galanter (1979, p. 17) points out, modern society is "a world of loosely overlapping partial or fragmentary communities." Americans, at least, tend to be spatially and ideologically segregated. Certain ethnic and religious groups maintain a separate identity, more or less willingly. Those who live in upper-income suburbs see themselves as distinct from factory workers, who distinguish themselves from the poor who inhabit inner cities. People also form distinct but partial communities based on lifestyle. One way all of these communities can coexist in relative harmony is by the overestimation of consensus on values as well as by a fair amount of physical and cultural isolation.

Sometimes members of a society share allegiances to values at a high level of abstraction, but differ about interpretations. Sometimes our values may have contradictory implications so that people are free to draw their own conclusions without renouncing the value. For example, all Americans might agree that they favor equality, free speech, and constitutional government. However, members of one group may stress equality of opportunity while those belonging to another group advocate affirmative action to offset past discrimination. Some will tolerate freedom for the thought they hate while others distinguish free speech from treason or from pornography that incites violence against women. Some stress the rights of the accused while others remind us of the rights of victims and potential victims.

When matters can be left ambiguous, the members of each social field can support the

general norm and be comforted by an interpretation favoring their interests or point of view. As the conflict theorists remind us, an authoritative interpretation through the process of adjudication and appeal may only provoke anger and division rather than integration. Sometimes some of the strain may be reduced by discretionary enforcement. In theory, an authoritative interpretation by a court of last resort settles matters. In practice, those who must enforce the law may hesitate to force groups whose members feel intensely about the matter to comply with a law that affronts them (see Macaulay and Macaulay 1978). Moreover, normative ambiguity allows regulators and the regulated to evade the authoritative interpretation and rationalize their action in terms of fundamental values. They do not have to see themselves as outlaws. Those advocating the official interpretation may be dismayed by what they see as hypocrisy, but those responsible may be unwilling to pay the price of coercing a sizable minority into compliance (cf. Hagen, Silva, and Simpson 1977).

Some writers have turned to social fields to explain deviance. If, following structural-functional theories, one sees social order as resting on internalized norms, perhaps reinforced by sanctions based in reciprocal relationships, how then can crime be explained? Many have found the explanation in deviant subcultures which promote norms counter to the official ones. For example, one can point to adolescent gangs in large cities where one proves courage and gains status by a willingness to engage in violent conduct and to risk arrest. For these people, law provides an official norm to violate, and the police and the rest of the criminal justice system provide the opportunity to display skill in evading, manipulating, or coping with the demands of authority.

There are a number of distinct subcultural theories. Some writers see younger people as surrounded by those who transmit conventional social norms and others who transmit procriminal norms. The ratio of these associations determines whether younger people learn one or the other pattern (Sutherland and Cressey 1978). Other writers stress social learning in interactions with those who can reinforce or punish and offer models of conventional or criminal behavior (see, for example, Burgess and Akers 1966; Akers 1977). Many theorists emphasize more material factors, such as accepting conventional goals of success and material rewards but rejecting conventional limitations on the means of attaining such ends. When people find their access to legitimate opportunities blocked by discrimination or class barriers, they are likely to discover illegitimate opportunities (see, for example, Cloward and Ohlin 1960; Cohen 1955). Instead of gaining a Cadillac by business success in conventional terms, one becomes, for example, a narcotics dealer.

Other scholars have objected to these explanations for deviance as oversimplified. On the one hand, while gangs of poor youths do exist, there is a political dimension to emphasizing deviant subcultures. These theories stress threats to the social order from the poor and invite segregation and various types of social control measures, ranging from crackdowns on gang activity to being drafted into the armed forces. The theories tend to overlook crime committed by members of the middle and upper classes who, presumably, are part of the dominant majority culture. Many of their crimes are committed secretly and not as a group activity—one seldom embezzles, for example, as a way to show off one's courage to other corporate officers or one's associates at the country club.

On the other hand, available empirical evidence does not support the existence of delinquent subcultures standing apart from the main body of society. Delinquents and criminals say they do not approve of their own illegal conduct, such subcultures as one

can find do not contain a coherent set of inverse values, and delinquents tend to affirm much of conventional morality (Elliot and Voss 1974; Kornhauser 1978; Regoli and Poole 1978). Some suggest that it may be more profitable to abandon subcultural explanations and turn to theories stressing weakness of social control and increasing opportunity to commit crimes in modern society (see, for example, Cohen and Felson 1979).

Nonetheless, any complete theory of criminal behavior must note that social fields may facilitate if not cause some kinds of violations of the law (see Ekland-Olson 1982). Even if they do not constitute true rival cultures to mainstream society, those who use cocaine often are part of a social field which can help rationalize violating the law. One may be motivated to steal for any number of reasons which may or may not include exposure to a deviant subculture. However, if one who steals is part of a gang of those who also steal, he or she may be provided with a vocabulary with which to derogate the victim and justify the act. Moreover, those who use illegal drugs or crack safes also can pass along information on how to gain access to drugs or offset the latest countermeasures of safe manufacturers. Beginners may learn from professionals techniques of minimizing the chances of arrest, conviction, or a harsh sentence. Group communications may serve to magnify both the amount and success of criminal activity on the part of those who were insiders. In other words, the advantages of considering social fields when theorizing still exist even when the role played by groups fails to provide a complete explanation for behavior.

Many of the social theories we considered see law as playing a part in establishing legitimacy, symbolic satisfactions, or a false consciousness through mystification. These ideas are plausible and undoubtedly contain more than a little truth, but they are unclear about how the process of communication and persuasion is supposed to take place. There is reason to think that any messages broadcast by the legal system are mediated through social fields and networks which may transform and distort them. Moreover, any complete theory must deal with the countermessages which rivals of the state and the public legal system attempt to transmit with varying effect. It is useful to distinguish, and discuss separately, two versions of the impact of law on attitudes which seem to be implicit in these social theories: law and things legal are said to legitimate or mystify the nature of the legal system and liberal society in the eyes of *citizens in general.* Whatever the merits of that assertion, law and things legal may have an impact on the perceptions of *those who seek to enter the legal arena* and must play by its rules.

Many theorists have posited that legality serves to legitimate liberal societies, or some part of their processes, but they are unclear about how this occurs. The public is supposed to have faith because of the relative autonomy of legal officials, formal procedures, and the rule of law. For example, some drew the lesson from the Watergate scandal that "the system works," because the Supreme Court held that President Nixon was bound by the law and could not hide behind a vague "executive privilege."

There are several difficulties with these claims. Schools teach the conventional view of the legal system and mass media communicate a great deal about certain features of it, but people still know little about the legal process in operation and what they know is often distorted (Albrecht and Green 1977; Casey 1976; Cortese 1966; Hearst Corp. 1983; *Michigan Law Review* 1973; National Center for State Courts 1978; Williams and Hall 1972). Perhaps it is enough to sense in some vague and imprecise way that a good legal system is out there. Indeed, there is evidence that those who have the least contact with the American legal system are the most satisfied with it (National Center for State Courts

1978). Nonetheless, vague and distorted pictures of lawyers, judges, police, and administrators would not seem enough to foster a reliable faith or sense of legitimacy. We might suspect that dissonance between the normative claims of American law and an introduction to the realities of plea bargaining, personal injury settlement, and bureaucratic routine would disenchant those who had to confront reality.

Moreover, social fields and networks are not defenseless against messages sent by the legal system. The *Dred Scott* decision, overturning the Missouri Compromise and denying standing to former slaves who had fled to the North, did not change the view of abolitionists about the morality of slavery. The decisions of the Supreme Court of the past few decades dealing with desegregation, school prayers, abortion, and contraception have not legitimated the positions taken by the Court in the eyes of many citizens. Instead, in such instances law has provoked counterreactions and has served as the focus for rallying opposition. Fundamentalist religious leaders and conservative politicians have formed an uneasy alliance to decry the loss of morality symbolized by these decisions. A loose social network has arisen around these issues (Watts 1983). Such groups have targeted elected officials whom they saw as holding the wrong views on one or more of these issues and swung elections against them. Members of the Congress who respond to such views have sought to overturn or undercut many of these Supreme Court decisions with varying success, through withdrawing jurisdiction of the Supreme Court over school prayers, cutting off federal funds to states which provide abortions to welfare recipients, and influencing judicial and administrative appointments. Perhaps in the long run the Supreme Court decisions that prompted all this conflict will become the conventional wisdom of most citizens. However, at least in the short run, instead of enhancing legitimacy they have provoked some measure of conflict and disintegration.

If we recognize that few people in any society ever read legal opinions, legislative committee reports, or statutes in the full original text, we should be prompted to turn to another social field important in the process of promoting legitimacy or provoking outrage—the mass media. Messages about legal action are conveyed to the public by journalists, television reporters, script writers, and novelists. Perhaps some of these people are influenced by law professors and others who can claim expert standing to comment on legal action in light of conventional theories of law. These communicators, however, tend to be at least skeptical if not cynical about the normative claims of legal actors because they see too much of what goes on backstage. Their task, moreover, is to capture public attention and so they are attracted to what is provocative rather than the typical. Accounts of the legal system operating by the book which might reassure readers or viewers seldom are front-page news. On the other hand, for many reasons, news tends to be muckraking rather than revolutionary; bad people rather than the system tend to be blamed.

The chains through which messages about the legal system pass undoubtedly are complex, distorting, and not well understood. Moreover, while it is fairly easy to study what is sent out by the mass media, films, or novels, it is much harder to learn just what different kinds of people receive from such messages. Individuals may reinterpret a report of a distinguished law professor's views about a Supreme Court decision to suit their own world view, and perhaps this is more likely to happen when they are part of a social network with a stake in another view. Some honor civil libertarians but others call them friends of criminals and enemies of the nation. Supreme Court opinions may be seen as

upholding basic values or as idealistic but unrealistic. The rule that a defendant is presumed innocent until proved guilty, for example, is seen by members of many groups as an unwarranted attack on the competence of the police.

Perhaps, over time, subtle messages which are repeated on news broadcasts and entertainment programs affect attitudes despite the conservative efforts of fundamentalist churches, organized interest groups, or the regulars at the tavern. However, we must remember the great skill members of many groups possess to reinterpret or reject ideas that offend them. In short, it is clear that if a social theory tells us that law affects attitudes and no more, the theory is, at best, incomplete. To be meaningful, the theory also must describe in a plausible fashion the process by which those whose attitudes are reinforced or changed learn about legal action and what they make of what they learn.

Similar objections can be raised to Marxist-derived theories of law that talk of false consciousness and mystification. Hunt's statement (1976) is typical:

> Legal norms . . . have the role of moulding and inducing acceptance of the power differentials that are encapsulated within them. . . . The concept of citizenship, formal equality of participation in the public affairs of society, is transposed in the field of law through the "rule of law" and associated concepts. Thus the assertion of the legitimacy of law is a celebration of social unity facilitated by the formal universalism of its symbolic content. [pp. 40–41]

The criteria for judging such assertions are a matter of dispute. On the one hand, some Marxist theorists would deny that their writing can be judged by non-Marxist social science. If correct theory tells a scholar that bourgeois law mystifies and helps produce false consciousness, all that is necessary is to find examples. "Data are important in terms of how well they describe the 'actualization of the objective role' played by events and concepts, and they are irrelevant otherwise" (Marenin 1981, p. 10). On the other hand, analyses such as that by Balbus (1977) in the *Law & Society Review*, apparently rest on observation of capitalist legal systems. Therefore, it seems appropriate to ask how much such theories would be altered if the roles played by social fields and networks were considered. As will be seen, such a move both challenges and supports parts of Marxist-derived analyses.

Balbus says that citizenship is a "substitute gratification which compensates for the misery of reality," and the "absence of communal relationships within . . . everyday existence" (p. 580). Without a good deal of qualification, it seems implausible that abstract citizenship is a substitute for community in the minds of many people in capitalist society. Citizenship has meaning only through those partial communities that exist in such nations. One usually votes as part of an undifferentiated mass, and, except in the rare case of an extremely close election, it would not matter if one stayed home and neglected to participate. However, one discusses politics with the regulars at the tavern, the lunch group at the office, neighbors, and the like, and it is here in these partial communities that one's views, vote, and being a citizen gain meaning. At least in the past, some have felt obligations of citizenship called for volunteering to join the armed forces. During World Wars I and II, this won approval from one's social network. One's family members shared in the display of citizenship by putting a banner with a blue star in the window of their home, an act designed to gain approval from an audience of those whose opinions mattered. Finally, we can point out that those for whom reality is the

most miserable are least likely to vote and most likely to view political activity with cynicism.

Theorists of the left often see capitalist society as characterized by what they see as a lack of "genuine" community. However, people acting in social fields and networks often feel some sense of community, and, at times, the legal system provides a focus for that sense. For example, a study of older black and white women who had incomes below the government's definition of poverty found that

> Black women made greater use of alternative medical systems, had larger networks of family and friends, participated at greater rates in institutional support systems, and rated themselves higher with respect to health and happiness than did White women. These differences were attributed to the closely cooperative life styles of Black women. These patterns of mutual support were thought to be a highly sophisticated cultural adaptation to historic and economic circumstances. [Curran 1978, p. 39]

The legal system was a focus for cooperative activity within these networks of black women; they had to help each other cope with systems providing government benefits, and, particularly because of their membership in churches, they were organized to do so. We can debate whether this was a *genuine* community, but it is clear that while one should not romanticize their situation, picturing these women as alienated and isolated would be a distortion of their strength. Moreover, it seems unlikely that the lack of a cooperative lifestyle of the older white women studied by Curran is a result of their status as abstract citizens with rights, or their false consciousness about the nature of society and its legal system. At the least, to be convincing Marxist-derived theories must trace the linkages between an ideological picture of legal persons developed by theorists and such matters as the apparent alienation of these older white women.

Another theme related to law as mystification concerns the impact of capitalist ideology on family relationships. The "bourgeois family of liberal capitalism," it has been said, "was privatized and offered a refuge, an emotional haven, from the cold harshness and impersonal competition of the outside reality" (Hearn 1980, p. 131). However, the family in postcapitalist society is losing "its capacity to provide its members with a private space" and is turning into an association which focuses "more on output than on warmth and shared concern." Perhaps theorists such as Balbus have this in mind when they tell us that "the 'community' produced by the legal form contributes *decisively* to the reproduction of the very capitalist mode of production which makes genuine community impossible" (p. 580).

Whatever the problems of the modern family, it is unclear how legal ideology affects the sense of community in family-living arrangements. Furthermore, other social networks—the fellows at the club or tavern, the members of the bowling league, or the women who gather regularly to talk and drink coffee—also may offer some refuge from "the cold harshness and impersonal competition of the outside reality" (see Bissonette 1977; Genovese 1980; Schoenberg 1980). Such social fields and networks often carry some norms of altruism and community, whatever their success in implementing them.

There is little evidence, nor even much of a plausible theory, connecting the attitudes and values of the worker standing with his friends at the bar in a tavern with the logic of the legal system at the doctrinal level. Indeed, there is evidence that people think it

wrong to invoke the law within one's social fields. One keeps one's word, for example, rather than finding loopholes in the language of contracts with family and friends (see Engel 1984). Moreover, any theory of mystification by legal concepts must take into account many workers' sophistication and cynical knowledge about power and privilege in their society (see Stack 1978).

People in social fields regularly help each other cope with legal norms. They help each other comply. However, they may legitimate evasions of the law and teach each other how to evade successfully, often redefining legal norms to their own advantage. Port workers, for example, accept the idea that one should not steal, but they do not see taking damaged cargo as stealing (Hoekema 1975). Networks of employees often take, as of right, reasonable amounts of supplies from their employer, viewing this as just part of their compensation. Breaking what are deemed as foolish laws can become a game: even as loosely structured a group as Japanese commuters share their schemes to cheat the national railways by riding without paying the full fare (Noguchi 1979). In short, "[s]ocial relations in capitalism often deceive in appearance, but their observers are not always deceived because 'they have minds of their own,' minds which sometimes accurately reflect contradictory class interests" (Sumner 1979, p. 265).

Another problem with assertions about the legal system's contributions to legitimacy or mystification is that legality may more effectively shape attitudes and conduct of members of some groups than among others. It has been argued that "it is typically the case that subordinate classes do *not* believe (share, accept) the dominant ideology which has far more significance for the integration and control of the dominant class itself." This is true because "the apparatuses of transmission of belief are not very efficient in reaching the subordinate classes" (Abercrombie and Turner 1978, pp. 153, 159). Similarly, Ray (1978, p. 155) asserts that "it is not entirely clear that the market and the economic subsystem perform legitimation functions for the *whole* of liberal capitalist society, rather, this is restricted to the bourgeois class, which must convince *itself* that it no longer rules—hence its development of universal ethics and natural law."

Some support for this idea can be found in a study of the Massachusetts Commission Against Discrimination, which found that compromises and settlements involving small amounts of money were much more common than vindications of rights. Working-class complainants tended to be satisfied with what they received because they did not expect to gain much from a legal agency. In contrast, middle-class complainants, who had the highest percentage of favorable outcomes, tended to be the least satisfied because they thought they had rights and expected the system to vindicate them. "For many, a major cost of filing is the discovery that the legal system does not operate the way it is supposed to" (Crowe 1978, p. 234; cf. Baumgartner 1985). This was not news to the poor and working-class complainants; their social networks and experiences carry that message loudly and clearly.

Of course, it is not clear that even all of the most privileged groups in society believe in the rule of law, the autonomy of the legal system, and the like. Those who seek to capture regulatory agencies, influence the course of legislation, and affect appointments to judicial and administrative posts by making campaign contributions, bribes, and similar exercises of influence seem unlikely to be innocent believers in official rhetoric. Perhaps the few at the top and the many at the bottom, then, share cynical knowledge about how things are done.

Having said all this, it is still possible that legal forms do contribute something to legitimacy or mystification. People often act as if they did believe in the power of law. Legal symbols and rhetoric are appropriated selectively by those in social fields on many occasions to rationalize action. Members of these social fields may also attempt to introduce legal ideas as a limitation on the power of those who dominate the field. For example, private police look like the public police—they wear uniforms with badges, carry guns, and use what we think of as police equipment. Given the multiple and overlapping police forces in the United States, it is easy to confuse private with public officers. Private arbitration panels often meet in courtrooms or other public places which have the architecture of authority, and at least some of their discourse uses the language of legal rights. Employees of private universities and business corporations have increasingly claimed that administration and management must give reasons for decisions, and in American culture such justifications tend to have legal or constitutional overtones. Those who want to curb the power of those in charge often speak of due process and free speech; those who hold power often talk of property and contract rights. Private groups often select leaders and take positions by holding elections. One does not have to sit through too many meetings of governing boards of private organizations to gain a healthy respect for the mystificatory power of Robert's Rules of Order in the hands of a master at the game.

Law also can be a cultural resource, selectively drawn upon to aid in the operation of social fields. Santos (1977) studied a squatter settlement in Rio de Janeiro which he called Pasargada. Under Brazilian law, the entire settlement was illegal because it was built without authorization on land belonging to the government. Yet, the settlers of Pasargada held what they saw as property interests in their houses. They established a private government—the Residents' Association—to deal with disputes and to create a structure under which their homes could be leased, bought, and sold. The Residents' Association borrowed and adapted Brazilian legal concepts and procedures to carry out these transactions. Much of the procedure carried out the evidentiary, channeling, and cautionary functions of legal formality (see Fuller 1941). To effect a transfer, the parties came before the *Presidente* of the Residents' Association. He questioned them to determine whether they understood the transaction, much as a notary does in many civil-law systems. A typed contract or lease was produced which was a powerful formality in a community where typewritten documents are not an everyday matter and literacy cannot be assumed. The signed or marked leases and conveyances were filed at the office of the Residents' Association, and filing itself was an important ceremony, giving the transaction legitimacy much as the recording of a legal document might in public legal systems.

Such legal ritual probably lessened conflict by offering symbols of the transfer of property and increasing the awareness of the parties about the nature of their transaction. It also probably served to assert the authority of the Residents' Association and to clothe it with some legitimacy. Squatter law must be appropriate since it is "just like" the law used by the rich in those parts of Brazil where the streets are paved (which the residents of Pasargada called "the law of the asphalt"). It also was hoped that the legal concepts and procedures used would help defend the autonomy of the settlement against the Brazilian government. Transfers purported to deal only with interests in the houses and made no claim to the land on which they stood. The Residents' Association mediated disputes between residents. Santos observes that "[b]y providing Pasargadians with peaceful means

of dispute prevention and settlement Pasargada law neutralizes potential violence, enhances the possibility of orderly life, and thus instills a respect for law and order that may carry out when Pasargadians go into town and interact with official society" (p. 90). This, too, may have protected the settlement. There was always a risk that public authority would send in bulldozers and destroy the settlement, but there was hope that the more self-contained and trouble-free the settlement, the less likely it would be to attract the unwanted attention of governmental authorities.

Santos shows that the legitimating or mystifying power of legal form and rhetoric is a weapon which can be appropriated by both the dominant and the dominated under certain conditions. Of course, groups with wealth can make better use of this weapon and use it in more situations. Moreover, the success of the Residents' Association in Pasargada probably turned on many factors in addition to its adaptation of the forms and vocabulary of Brazilian law. If the land on which the settlement was built was needed for a project which the Brazilian government saw as critically important for the development of the country, we can wonder whether legality would stop the bulldozers.

Whatever the impact of the ideological structure of liberal legal systems on general public opinion, those who use these systems for their own purposes, or who find that they must cope with them, face the necessity of transforming their position into the language of tort, contract, property, due process, free speech, or the like. To what extent, if at all, do such transformations mystify those who want to or must use the legal system?

Groups seeking some degree of social change, or the alteration of the balance of power within a social field or network, seldom are thwarted in seeking favorable readings of basic norms because of the law's emphasis on formal equality, individual rights, and fair procedures. Many of the theorists appear to know little of the reality of modern legal doctrine. Often they credit it with far too much coherence. There are counterprinciples that call for protection of people because of the disadvantaged position of their group. Even where the legal process requires claims to be stated in terms of legal rights, groups can be mobilized around what, in form, is stated as an individual claim. On its face, *Brown* v. *Board of Education* (the school desegregation case) appeared to be a dispute between Linda Brown and the school system in Topeka, Kansas. It is safe to say that few were misled and failed to see that any decision would speak broadly to the position of blacks in American society.

However, Trubek (1980–81) points out that the law itself is one of the filters that determine what disputes will emerge and what forms conflicts will take. He suggests that the entire behavioral system relating to processing particular types of disputes—including the relevant legal doctrine—"not only transforms the various individual conflicts: in so doing it 'transforms,' so to speak, a raw conflict of interest into a social process with limited possibilities. The disputes that do emerge are those in which basic economic relationships are not challenged: all other possibilities are filtered out" (p. 743). For example, I have mentioned the long-term struggle between retail gasoline dealers and the major oil companies about the nature of their relationship. The arguments of the dealers' lawyers were framed in terms consistent with one strain of classical notions of property and contract. One could imagine claims for much broader protections for the dealers which their lawyers would have been foolish to assert in an American court—for example, the dealers might benefit if a court were to appoint a receiver to supervise the relationships between, say, Mobil Oil and all its dealers; few lawyers would ask for anything so broad for fear of prejudicing their chance of getting anything at all.

One might view this kind of transformation and judgment about what kinds of claims are likely to sell before American judges as mystification. On the other hand, it is possible that no one involved in the gasoline dealers' battles was fooled in the slightest. Everyone may have accurately appraised the amount of power dealers could bring to bear and decided that a slight extension of contract and property ideas was the most that could be hoped for at the moment in question. Either way, Trubek's point holds—American judges and legislators are unlikely to redistribute wealth and power other than incrementally. Few with any experience in the system would expect them to. Indeed, many who have never considered the matter, if asked, might prefer a legal system whose output was incremental to revolutionary change. Those who are, or would be, suspicious of revolutionary change might be wrong, but they are not necessarily mystified.

If we focus on legislation rather than adjudication, we can find an area in which some mystification may take place as Marxist-derived theories suggest. The rhetoric heard in the legislative process is similar to that heard before the courts, but it is not the same. Those claiming to represent farmers, organized labor, small businesses, consumers, the unemployed, and the like typically try to relate the claims of their groups to the interests of the nation as a whole. They claim the need for regulation to alter the balance of power in certain relationships in the society. The lawmaking process usually involves a degree of pluralistic bargaining among certain interests. Seldom will claims be made in the name of the working class in a Marxist sense; seldom will legislation be passed which purports to redistribute wealth more than marginally. More often groups win legislation creating rights for individuals who, for example, have been the victims of discrimination or bad faith.

However, such legislative victories may be more symbolic than real. If rights are to be more than words in a statute book, lawyers usually are needed to represent those who think they have been wronged. Sometimes statutes give complainants a reasonable chance of winning a considerable amount of money, but more often these new rights can be protected only by injunctions that courts hesitate to grant, the damages that can be proved are likely to be low, and establishing a cause of action requires difficult and costly legal research and expert testimony.

It is difficult to mobilize groups to raise funds necessary to bring successful cases to vindicate individual rights. After the statute is passed, sympathetic groups may turn their attention elsewhere or just fade away, believing that the war is won. Private lawyers may donate services, but the supply of those able and willing to do this is low. Given these problems, a reform law may at best create a weak bargaining entitlement, setting the stage for negotiation rather than vindication. It would be fair to say that members of groups that win the passage of statutes creating individual rights without providing an adequate means of vindication have been mystified into thinking they had won a war when they had only won an initial battle. Of course, the failure of a particular statute to affect behavior can be the focus for another legislative battle, but fashions in reform change and it may be difficult to argue for the creation of an administrative agency when deregulation is the cause of the moment or for government-paid legal services when those programs displease powerful interests.

When we consider various social theories and their accounts of the roles played by the legal system, and then add private governments, social fields, and networks, we see that whether law plays the parts assigned is unproved. Many social theorists seem to have accepted the view of the centrality of law championed by legal scholars, but an expanded

perspective shows that in many, or most, instances law and the legal system may be irrelevant or appear briefly in a walk-on part. While, on occasion, law may be in the spotlight center stage, the task is to account for when law and legal actors play major parts and when these roles are played by others.

Of course, it is possible—but difficult to establish—that legal norms and legal practices play an important background role so that social interaction would be very different if they were not present. People act on the basis of many tacit assumptions about the present and future and things legal may be one of the factors providing the reassurance necessary for social interaction. We assume, in most instances, that we are safe walking the streets during the day, that criminals will be arrested, and that contracts will be performed. When we lose this faith, as in time of civil war or a repressive takeover by a military government, our behavior changes. It would be difficult to show the part played by law in our tacit assumptions as compared with customs, experiences, and the like. Yet it seems plausible that it is there. Moreover, legal norms and procedures are a potential resource which always might be mobilized by one group or another, and the chance that this could happen may affect official behavior, perhaps in subtle ways. Police, mayors, governors, regulatory agency personnel, and legislators know that if they affront the beliefs and interests of groups of people, they might mobilize and retaliate by voting the rascals out or by bringing a suit in the courts.

If law fails to play the roles it is assigned in various social theories, there may be costs unless its parts are well played by other associations and groups. Luhmann (1981) sees the filtering done by social fields and networks as potentially harmful.

> As a conflict-regulating system that is always belatedly set in motion, i.e. only when called upon, the legal system very seldom takes the initiative. . . . Excessive inhibition of the thematization of law may, therefore, lead to a kind of drying up of the legal system, and so leave the regulation of conflict to other mechanisms—e.g. morality, ignorance, class structure, or the use of force outside the law—whose social structural compatibility may be problematic. [p. 247]

Luhmann, thus, seems to believe that there is a function best performed by the public legal system. If disputes, claims, and the like are the basis for the perception of problems by legal institutions, the filtering and channeling done by social fields and networks are likely to offer a distorted view to lawmakers. Cases before agencies and the courts and bills being lobbied before legislatures are a biased sample of problems in the society (cf. Galanter 1983, p. 70).

If we were to look closely at the roles played by private governments, social fields, and networks, we might see an important problem of legitimacy, undeveloped in the theories we have considered. Hurst (1960, pp. 518–19) tells us that throughout American legal history, "we sought to make all secular power responsible to power outside itself, for ends which it alone did not define." Unger (1976) sees the recognition of the power of private associations as bringing into question the legitimacy of the liberal state. He asserts that

> the increasing recognition of the power these organizations exercise, in a quasi-public manner, over the lives of their members makes it even harder to maintain the distinction between state action and private conduct. Finally, the social law of institutions is a law compounded of state-authored rules and of privately sponsored regulations or practices; its two elements are less and less capable of

> being separated. All these movements, which tend to destroy the public character of law, carry forward a process that begins in the failure of liberal society to keep its promise of concentrating all significant power in government. [pp. 201–2]

The parts played in society by private governments, social fields, and networks are far more diverse and complex than the roles envisioned in the social theories discussed. Individuals are subject to a web of norms and sanctions, only some of which are imposed by the state. If, in Hurst's words, "secular power [is not] responsible to power outside itself, for ends which it alone did not define," we can expect those subject to the jurisdiction of such private governments and more structured social fields to challenge their autonomy. Moreover, some response from public government may be needed to preserve its own legitimacy. I will now turn to such questions.

The Autonomy and Accountability of Private Associations

In the United States, relationships between government and various kinds of associations are complex and uncertain. While much of our earlier disquiet about regulation has been overcome, private associations ranging from the family to multinational corporations still have large claims to autonomy. Advocates of greater accountability tend to find the threat to individual liberty, efficiency, or other values coming from powerful private associations as well as the state. Tocqueville (1835) saw equality in the new democracies leading to control by the bureaucratic state. However, he thought that voluntary associations would serve to restrain the power of the state and, indeed, the power of other associations. Durkheim (1950), on the other hand, saw individual liberty as threatened both by private associations and by the state. Liberty required the balancing of both the power of secondary groups which surround the individual on all sides and that of the nation-state so that "collective particularism" is held in check. "And it is out of this conflict of social forces that individual liberties are born" (p. 63).

There is a sprawling normative and descriptive literature about regulation (see Tomasic 1984). It deals with such things as its justification in terms of market failure, capture of regulatory agencies by those supposedly regulated, the new regulation gained by the reforms in the 1960s and 1970s, and the deregulation movement of the 1970s and 1980s. In order to make the discussion in this section more manageable, I will narrow my focus to attempts by individuals or groups *within* a private association to gain action by the legal system to affect the balance of power inside the group. I will take as an example the claims of employees and those who hold franchises against employers and franchisors. The area is important and provides good examples, and much of what is said would apply also to factional struggles in churches, political parties, athletic organizations, and similar associations.

Much of this discussion also will be relevant to the adequacy of structural-functionalist conflict, and Marxist-derived theories considered in the last section. However, in addition I have had an opportunity to consider neo-evolutionary theory in the sociology of law. Teubner (1983, 1984a, 1984b), in a synthesis of several theoretical works, sees legal systems in Western societies moving from what Weber called a formally rational style to a substantively rational one with the rise of the welfare state. However, recent crises may prompt what Teubner calls "reflexive rationality," as the public legal system more and

more seeks to gain substantive goals by working through private associations. However, when we look at concrete examples of the process about which Teubner writes, we will see that reflexive rationality may produce consequences that some would challenge.

First, I will sketch the claims for autonomy and for accountability of private associations and will consider their applications to the employment relationship. Second, I will consider Teubner's synthesis of a number of major evolutionary theories and his description of reflexive rationality. Finally, I will consider challenges to the corporatism implicit in reflexive rationality.

Accountability and Autonomy in the Employment Relationship When we look at the legal response to claims by members of groups against those in control, usually we find plausible theories calling for accountability being matched against norms justifying autonomy from outside authority. This may reflect, to a large degree, the decay of older views which drew a sharp line between public and private spheres of life. Public action was seen as constrained by the rule of law; private interaction within groups was simply a matter of free contract and choice. By the 1980s, if not long before, the purity of such distinctions had been lost. To use Unger's words (1976, p. 193), in postliberal society there is only a "general approximation of state and society, of public and private sphere."

The original theory, which still has a good deal of rhetorical power, saw public governments as holding a monopoly on the legitimate use of force. However, this power to constrain liberty had to be limited. Public officials thus acted only under the rule of law. Citizens were protected from governmental action by a Bill of Rights. Government control rested on elections, and power was constrained by checks and balances, federalism, or both. Private activity, including a right of association, was left free of restraint, subject only to the boundaries set by the law of property, contract, tort, crimes and similar legal categories. Counterbalancing associations offset the power of any particular group. One dissatisfied with a particular club, church, or business organization could go elsewhere, and this threat of exit and competition supplied all the regulation needed. Indeed, an important part of American history involves accounts of groups breaking away from religious organizations and forming new sects to pursue the true faith. This threat of exit constrains leaders to temper their actions.

Of course, the limitations of the rule of law, separation of powers, and federalism on public government and the freedom from state regulation enjoyed by private associations probably always have been less effective than claimed. Government officials probably have acted first and hoped to rationalize what was done later; discretion has long been a major part of our legal system. Private associations have always had to cope with some regulatory elements inherent in contract, property, tort, and criminal law. Nonetheless, one who would rationalize discretion of public officials or regulation of private associations has had the burden of persuasion.

Economic crises and social struggles have prompted the growth of the modern welfare state, which increasingly has attempted to regulate private associations. Instead of a sharp line between public and private purposes, governments promise to take whatever measures are needed to promote the success of the economy, to guarantee equality, and to deal with foreign threats of one kind or another. Instead of applying formal rules through classic procedures, modern governments increasingly rely on those who claim expert

status and exercise discretion in the pursuit of these substantive goals. Also, instead of regulating conduct, government officials often bargain with various interests. Government may attempt to affect social conditions by trying to influence the action of the private sector in many ways, ranging from controlling the supply of money to setting terms for government contracting. At the same time, private associations have grown in power and significance and assume what are seen as public functions (see Nachmias and Greer 1982). Business corporations may wield critical influence over the future of employees, customers, suppliers, and the communities or regions in which they operate. Those dependent on them cannot exit easily. If a stable or expanding economy is seen as a public function, the operations of these large business organizations seem to many to be more than mere private action. Moreover, many corporations develop and supply transportation, communication, and weaponry viewed as essential to the national interest. When bad judgments, accidents, or world economic conditions threaten large organizations engaged in such important functions, it has been seen as a matter for public concern and government action.

Kennedy (1982) sees six stages in the decline of the public/private distinction. First, there are hard cases with large stakes—we manipulate the distinction and analyze it. Second, intermediate terms develop—we recognize that some situations are neither one thing nor another but share the characteristics of each. Third, the distinction collapses—we realize that however one tries to apply it, one ends up in a situation of hopeless contradiction. Property and contract, for example, can be viewed as examples of delegated state power since they are supported by cops and courts. Fourth, rather than abolish the distinction, we see matters along a continuum from polar cases of public and private action. Institutions in the middle seem to need rules which are a mixture of those appropriate to public and private modes. One balances factors that cut one way or another. Fifth, we see that questions about where an instance fits on the continuum involve manipulation of balanced pro/con policy arguments that come in matched pairs. Finally, at times the ends of the continuum may seem closer together than either end does to the middle. Kennedy calls this "loopification." Parents act more like judges, legislators, and police than officials of very large corporations; yet the family and legal officials would seem to be at opposite poles of the public/private continuum. When this stage is reached, it is hard to take seriously the distinction between what is public and what is private as a justification for treating one situation differently from another.

We can see something of the process Kennedy describes in the attacks on the claim of what, traditionally, were seen as private associations to autonomy from regulation. While some earlier works questioned this autonomy (see, for example, Hale 1920), attention was focused on the issue by Berle and Means (1932), who argued that there had been a separation of ownership from control of the large publicly held business corporation. The majority of shareholders lacked information and ability to mobilize their voting rights in all but extreme situations. Corporate executives, thus, were free to govern in the light of their own interests, subject only to whatever discipline might be found in the various markets in which the corporation dealt. Since corporate democracy was but an empty form and competitive pressures but an uncertain check, public regulation and control were justified.

Then during the early 1950s, a number of writers saw large business corporations as "private governments," exercising powers similar to those of states unchecked by the

market, the rule of law, or the Bill of Rights (see, for example, Friedmann 1957; Hansloe 1961; Schwartz 1960; Wirtz 1952). Eells (1962, p. 278) observed that "private government is no imaginary construct of academic minds, but is now widely accepted wherever men come to grips with the facts of political life. The corporation of the future is certain to be assessed not only as an element in the economy but also as a contributor—or as a deterrent—to freedom and order." Berle (1952, p. 942) found an emerging principle holding that the "corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself."

While separation of ownership from control and private government theories can be challenged on a number of grounds, both became part of the American political and legal culture. (For a modern version of the argument, see Ewing 1977.) One finds traces of each one in many battles before courts and legislatures about the autonomy or accountability of private associations. As Hanslowe (1961, p. 104) notes, during the 1940s and 1950s, "in labor relations, at least, quasi-governmental powers . . . [were] . . . being circumscribed by . . . quasi-constitutional restraints." These kinds of arguments seem to fall somewhere in the middle of Kennedy's six stages. Private government, for example, is an analogy. General motors is both like and unlike the state of Wisconsin. As a result, a matched set of predictable arguments fall into place—one calls for GM employees to be protected by guarantees of due process and free speech while the other argument stresses that, unlike a true government, GM's powers over its employees do not extend to the right to imprison or keep them from seeking work elsewhere. Logically, starting from the public/private premise as it has developed, the case is a tie.

By the 1930s, it was difficult to predict when private associations would be seen as autonomous and which form of regulation, if any, would be imposed. Chafee (1930, p. 1021) said that judicial competence to settle disputes within associations rests on a balance of four normative factors which "may be called, for the sake of vividness, the Strangle-hold Policy, the Dismal Swamp Policy, the Hot Potato Policy and the Living Tree Policy. The first favors relief; the last three oppose relief." The strangle-hold policy involves a judgment about the seriousness of the consequences of expulsion or other injury done to a member: "some associations have a strangle-hold upon their members through their control of an occupation or of property which can be ill spared." The dismal swamp policy reflects the difficulty a court would face in learning enough to decide the case. For example, judicial review of "the highest tribunal of the church is really an appeal from a learned body to an unlearned body." Attempts at judicial control of the internal affairs of a powerful association which commands the devoted adherence of its members might cause great resentment and have small chance of success. Courts will hesitate to pick up such a hot potato. Finally, the value of autonomy itself may induce courts to leave associations alone. Chafee argues that

> [t]he health of society will usually be promoted if the groups within it which serve the industrial, mental and spiritual needs of citizens are genuinely alive. Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future. A due regard for the corresponding interests of others is desirable, but must be somewhat enforced by public opinion. Legal supervision must often be withheld for fear that it may do more harm than good . . . [for example, freedom] is desirable for schools and colleges. . . . The courts, like the legislatures, can hardly profess to be better

> qualified to decide how teaching shall be carried on than are the teachers and their administrative associates. [pp. 1027, 1028–29]

Views about this living tree policy may have changed somewhat since Chafee wrote, but the policy still commands respect.

About thirty years later, the editors of the *Harvard Law Review* (1963) recast Chafee's policy considerations as (1) interest in group autonomy, (2) practical limitations on judicial inquiry, (3) harm caused the individual and society by autonomy, (4) alternative methods of control, (5) extent of monopoly power, and (6) determination of whether a governmental grant of rights or powers imposes, by implication, corresponding duties. Of course, whatever its other functions jurisprudential writing that talks of weighing and balancing such factors is only generally descriptive or predictive. There is no scale on which to place these factors one by one and no dial on which to read their weights in grams or pounds. In most cases contrasting but equally plausible cases for autonomy and for accountability could be made. Indeed, after 117 pages of analysis, the *Harvard Law Review* tells us that judicial control of the conduct of private associations is "an area where few legal principles seem to have emerged" (p. 1100). We face all the problems of Kennedy's fourth stage—what he calls "continuumization." (See also, Ellman 1981; Fuller 1969; *Harvard Law Review* 1962; *Yale Law Journal* 1963.)

Klare (1981, p. 465) observed that liberal theory faces a difficult problem in rationalizing regulation of a supposedly private economy. "The core of the problem is to find a justification for public regulation which does not in logic lead to the notion that *all* economic decisions of societal consequence (e.g., all investment decisions by the 'top 500' corporations) should be subject to public control." As we shall see, legal decision-makers often are concerned about this slippery slope.

We can see many of the difficulties with the distinction between public and private by examining the legal treatment of the employment relationship and its close relative, the franchise. These relationships are social fields and sometimes structured private governments. Throughout the twentieth century, employees have sought to alter the balance of power between them and their employers, and they have enjoyed some success. In this section I will first paint, with very broad strokes, a rough history of the legal response to the claims for intervention in employment relationships in the United States in this century. Second, I will look at some of the factors affecting the actual balance of power in that relationship, including all of the legal activity. The discussion suggests an important question yet to be addressed adequately in the social study of law: why and when do people turn to the formal public legal system rather than some form of private government? I will also set the stage for considering evolutionary theories concerning the parts played by legal systems as the role of the state has changed in capitalist societies.

The starting point for considering legal reaction to the employment relationship in this century is the classic position that the matter is simply one of free contract. Regulation is not needed because if a job is, for example, more dangerous, employees will be paid more to take the risks. In theory, those employees who held contracts for specific terms held rights and were subject to duties determined by voluntary agreement. However, courts almost never would grant specific performance of an employment contract and force people into a distasteful close personal relationship. In most instances, an aggrieved party was left to seek damages. If an employer breached the contract, an employee usually would have to be paid the balance of the salary that would have been earned less any

income the employee received from a substitute job taken after being fired. If an employee breached by leaving the job, the employer's damages usually were worth so little that a suit would not be brought. As might be expected, if an employee left taking trade secrets or valuable skills to use in direct competition with the employer, courts might enjoin this attack on property.

However, at the turn of the century as today, most employees did not hold contracts for fixed terms but worked under an employment-at-will. In theory, equality is preserved. The employer is free to discharge the employee, and the employee is free to leave for good, bad, or no reason. However, in times of labor surplus, the employee is at a disadvantage. For example, in *Comerford* v. *International Harvester* (1938), the Supreme Court of Alabama held that a worker who had alleged that he was fired after his wife refused the sexual advances of his boss had failed to state a cause of action. It explained that the employer "could have well decided that it would be in the interest of good management not to have both plaintiff and the guilty assistant sales manager working together under the circumstances. It could have concluded that the services of the sales manager were preferable and retained him without in the least ratifying or condoning his conduct toward the plaintiff." In short, employees-at-will must please the boss or look for work elsewhere.

In the early decades of the century, reformers sought to gain statutes regulating certain aspects of the employment relationship. Legislation was passed in a number of states attempting to govern wages, hours, and working conditions. Of course, this led to the great constitutional battles concerning liberty of contract and substantive due process. Not until the 1930s was it clear that such legislation was constitutional.

The legal response to labor unions and strikes was hostile. Such activity could be attacked as tortious or as criminal conspiracy. Police and sheriffs used force to remove strikers from their employer's property, and union organizers were attacked by law enforcement officers with both legal and illegal means. Moreover, courts would enjoin union activity and strikes and enforce promises by employees not to join unions—"yellow dog contracts."

As part of the reforms of the New Deal, the American legal system took a very different stance. Collective bargaining was symbolically legitimated in terms of union democracy, a collective contract, and private adjudication through arbitration. The government supported and attempted to influence a private legal system. Employees in a bargaining unit could vote to determine whether they wanted to be represented by a union, and, if so, by which one. Once a union was certified by the National Labor Relations Board as the bargaining representative, the employer had a duty to bargain in good faith. The result of this process would be a contract governing wages and conditions of employment for a fixed term, which had to be ratified by the individual workers. The contract typically is interpreted and applied to specific problems through a grievance procedure. There are a number of steps, usually beginning with a complaint to a foreman and ending with arbitration. The courts, particularly since World War II, have supported arbitration in a number of ways and have sharply limited challenges to an arbitrator's power. Unions, in turn, have been subjected increasingly to a duty of fair representation in the grievance procedure. On the other hand, during the life of a collective bargain, employees lose the right to strike and wildcat strikes can be enjoined. All parties, as well as the public, are deemed to have an interest in continuing production. Displeasure with the grievance

process can be expressed legitimately only by seeking a new arbitrator for future disputes, by collective bargaining when the current contract expires, or by voting for new union officers or a new union.

Over half of the American labor force continues to work under only an employment-at-will, and there have been a number of developments over the last thirty years indicating an increasing willingness to cut away at the autonomy of the employment relationship. For example, franchisees have battled franchisors before courts, legislatures, and administrative agencies. Their successes influenced attempts of employees-at-will to gain rights.

Before the changes in the law that occurred from the 1950s through the 1970s, those holding franchises to sell nationally advertised products and services were in form independent business people but in substance they resembled employees. Franchisors create a nationally known product and a trademark. They plan how retailing is to be conducted and often select the location of each place of business. The franchisee contributes capital and management to the particular outlet and will share in the profit or loss generated there. However, a franchise was a highly dependent relationship. The franchisor could cancel at any time without having to show justification. If a franchisee had invested in the business and had built up a local reputation tied to the franchisor's trademark, the franchisee had a great deal to lose. Thus, there were real incentives to please the franchisor's supervisors in charge of the particular location. Franchisees often complained of a contradiction between the symbols used by the franchisors and the reality of the relationship—franchisees were supposed to be independent business people, but the form contracts drafted by Wall Street lawyers gave the franchisees few, if any, rights and reserved all power to a not always benevolent authoritarian ruler. While franchisees often look like small capitalists, before statutes offered some protection, their franchises could be terminated without cause. While franchisees may appear to be "running their own business," they actually occupy a position hard to distinguish from that of an employee-at-will. Franchisees, however, often can afford to organize and lobby for legislation while employees-at-will have been limited to individual appeals for help from the courts.

While there were some victories by franchisees before the courts, generally their decisions favored the large corporations that created the relationships. With some exceptions, the courts protected a property interest in the product or service and the trademark (see Jordan 1978). It was just a matter of free contract. Franchisees were held to have taken the risk when they accepted the standard form contract as the blueprint for the relationship.

Then automobile dealers and retail gasoline dealers gained statutes, both at the state and federal levels (see *Minnesota Law Review* 1975). These statutes were thought to affect the balance of power within the private governments of franchising. The symbols found in this legislation tend to involve due process, the use of a franchisor's power in good faith, or the existence of reasonable cause for its use after an opportunity to cure defaults by the dealer. However, the rights gained by the automobile and gasoline dealers were limited and subject to performance of duties. It seems clear that the legislators accepted the case offered by the lobbyists for the dealers but were concerned, as well, with what they saw as the franchisors' legitimate interests and the rights of the public. The statutes and their legislative histories exhibit great concern that there not be too great an invasion of private decision-making.

Another example of our willingness to whittle down the autonomy of the employment relationship can be found in the results of the civil rights struggles during the 1950s and 1960s. Legal protections against discrimination based on race, sex, and age are now widespread. Such laws may have the greatest impact on employees-at-will who lack union or contract protection against unfair treatment by their employers. Cases such as the *Comerford* decision, involving an employee fired because his wife rejected the sexual advances of his supervisor, likely are no longer the law.

During the 1970s, the employment-at-will doctrine was subject to challenge in many states, with very mixed results. Many states continued to uphold the older view. The Supreme Court of Alabama, for example, refused to find a cause of action when an employee of a hospital alleged she had been fired because she refused to falsify medical records as part of a fraudulent scheme. The court remarked that to rule otherwise would "abrogate the inherent right of contract between employer and employee." Any change had to be left to the legislature.

However, other state courts created causes of action for employees-at-will (see *Harvard Law Review* 1980). Cases have involved discharges for such reasons as refusing to respond to sexual advances, being absent from work to serve on a jury, blowing the whistle on illegal activity within a corporation, and making insurance claims which would affect the rates paid by the employer. The theories used to justify intervening in the employment relationship have varied widely, and, typically, the nature of the cause of action is left extremely uncertain. Some courts found an implied obligation of good faith inherent in any contract, but the requirements of that duty were left to case-by-case definition. Others appraised the reason an employee was fired to see if it violated public policy. The California courts recognize a tort cause of action for wrongful discharge that carries with it the possibility of punitive damages.

However, many courts which recognized some right of action also seemed concerned about making it too hard to discharge incompetent workers and prompting nuisance settlements when there was any doubt about the propriety of a termination. In *Pierce* v. *Ortho Pharmaceutical Corp.*, the Supreme Court of New Jersey required a "clear mandate of public policy" to be violated in the discharge before relief would be given. Such policy could be found in "legislation; administrative rules, regulations or decision; and judicial decisions," and in "certain instances, a professional code of ethics." An employee's own ethical objections to an employer's practices were not enough to justify a refusal to work on a project, and so firing the employee did not violate public policy. Employment still remains more private than public; employers still have a claim to autonomy, and accountability, so far, is reserved for cases involving atrocity stories (see Lopatka 1984).

Reflexive Rationality: The Legal System Working Through Private Associations to Achieve Substantive Goals We have seen that the relationship between the public legal system and private associations is uncertain and there is conflict among normative claims concerning autonomy and accountability. Teubner (1983, 1984a, 1984b) sees legal thought evolving through a number of stages to one where dispute resolution and social integration will be decentralized and handled within various private associations. Law will play a role at the margin, influencing outcomes by demanding procedures and new forms of participation rather than prescribing substantive results. We will consider his evolutionary theory in light of our discussion of the employment and

franchise relationships and attempts to influence the balance of power within them. Finally, we will consider Klare's challenge (1981, 1982) that such reflexive approaches only mask the exercise of power and stand in the way of further development of real decentralization of power and control to the level of individuals and small groups.

Teubner looks at neo-evolutionary theories about the place of law in society fashioned by Nonet and Selznick (1978), Luhmann (1982), and Habermas (1979) and offers a synthesis which predicts the direction development of legal thought is likely to take. All of these writers argue that while law is affected by social change, there are limitations on its adaptability. External needs and demands are selectively filtered into the legal system and adapted in light of the logic of normative development. This process, however, can lead to crisis. Legal structures may not provide the conceptual resources nor the effective regulation needed for maintenance of the overall social system. Moreover, legal action may be seen as illegitimate if legal norms are out of phase with social ones. There was such a crisis when the legal approach appropriate to early capitalism confronted its later development. We may face another today as the legal approach appropriate to the welfare state is under attack in many Western nations.

In the nineteenth and early twentieth centuries, capitalism was facilitated by what Max Weber (1954) called *formal rationality*. Internally, law was rationalized by rule-oriented reasoning, which was manipulated by professionals who shared a legal culture. The justification for this style of law rested on its contributions to individualism and autonomy from government control. Externally, this style of law facilitated private ordering by guaranteeing a framework within which substantive judgments could be made by individuals. In this manner, it contributed to mobilizing and allocating resources, and it appeared neutral and autonomous from political and economic power. With the rise of the regulatory welfare state in the mid-twentieth century, Western legal thought evolved to a style which, in Weberian terms, was *substantively rational*. Law lost most of its formal characteristics. Internally, law was then rationalized in terms of achieving substantive ends—law was an instrument and not an end in itself. It was justified in terms of the perceived need for collective regulation of social life because of the failures of the market. Externally, this style of law is the main instrument by which the state affects market-determined patterns of behavior. It is seen as legitimate when it works to provide full employment, end discrimination, assure consumers that they will get a certain level of quality, and the like. Formal rationality was primarily a judicial style; substantive rationality was a tool of legislatures and administrative agencies, although some courts followed legal realism in this direction.

Increasingly in the 1970s and 1980s, substantive rationality is caught in the crisis of the regulatory welfare state. (Cf. Tomasic 1984.) On the one hand, social processes and economic arrangements seem too complex to be governed by the kinds of regulatory arrangements that can be fashioned within our traditions. On the other hand, the regulatory welfare state has been losing legitimacy. Insofar as it was justified by its claims to gain substantively valued ends, to a great degree it just has not worked. For example, despite the claim that the economic system would be managed, inflation has cut real income and unemployment has become a significant problem in many Western nations. Despite promises to desegregate American society, race, class, sex, and ethnicity still affect one's life chances significantly apart from talent and effort. The substantive style of legal and political rhetoric loses its power to convince those who listen to it, particularly

in light of the claims of traditional formal rationality. Substantive rationality does not seem to be "law"; rather, the ends sought and the methods used can be labeled as the preferences of those who have captured power. In short, formal rationality can be turned against substantive rationality to delegitimate it.

One response to this crisis is to call for a return to formal rationality, deregulation, and governmental retreat. The public sector will withdraw and the private sphere will produce efficiency and freedom once again. There is reason to doubt whether such a strategy could succeed. Too many are interested in at least some of the benefits of the welfare state to allow a recreation of the governmental system of 1900—the cry often seems to be, "cut the budget for your programs but not mine." Moreover, even if such a recreation of what we think was the past could work, the transition from governmental systems of, say, the 1960s to a passive and neutral state likely would produce socially unacceptable burdens.

Teubner suggests, rather, that the next stage of legal evolution will be from substantive rationality to what he calls *reflexive rationality*. Here, the legal system would regulate self-regulation. Law would seek to facilitate rather than endanger self-regulatory processes, organizations, and the distribution of rights. Teubner (1984) notes that the model of social reality found in substantive rationality is

> rather primitive in comparison with the complicated self-referential structure of the various social subsystems. . . . Taking self-reference seriously means that we have to give up conceptions of direct regulatory action. Instead, we have to speak of an external stimulation of internal self-regulating processes which, in principle, cannot be controlled from the outside. [p. 298]

Law would not take responsibility for outcomes, seeing such an effort as often beyond its capabilities. The justification for this style of law would be success in coordinating forms of social cooperation. It would not be a return to formal rationality, merely adapting to or supporting what were seen as "natural" social orders. It would attempt to guide human interaction by redefining and redistributing property rights. Externally, reflexive law would structure and reform semi-autonomous social systems, by shaping both their procedures of internal discourse and their methods of relating to other social systems. The major goal would be neither power-equalization nor participatory democracy. It would be the design of organizational structures which made institutions such as corporations, semi-public associations, mass media, and educational institutions sensitive to the outside effects of their attempts to maximize their own goals.

He offers examples to lend some empirical support to his theory. "Labor law . . . is, with respect to collective bargaining, characterized to some degree by a more abstract control technique in which we can recognize a 'reflexive' potential." Teubner recognizes that a strategy of decentralization will fail if asymmetries of power and information successfully resist attempts at equalization through law. He suggests that the legal system can operate reflexively by imposing standards of good faith and public policy in order to prompt processes of social self-regulation in semi-autonomous social systems. Also private associations could be commanded to develop constitutions which require them to operate in harmony with the requirements of other social institutions. He concedes that the adequacy of such approaches is unclear. However, reflexive rationality is an attempt to gain many of the benefits of both formal and substantive rationality with fewer of the

costs of each. Whatever its normative status, one can find examples of this approach in modern law.

Teubner is unclear about how he thinks legal thought influences activity in other subsystems. Other subsystems may incorporate conceptions of legal rights and duties, transformed to meet their requirements, into their expectations and procedures. Legal thought may make issues salient and may affect background assumptions about what is natural or proper. Those acting within other subsystems may respond to the threat of the application of power to implement legal thought. However, there are many kinds of legal power. At one extreme, legal thought can be crystallized in a judgment which various state officials may enforce. People can be put in jail, property can be seized, licenses can be granted or revoked, and these orders may be enforced by agents of the state armed with weapons. At the other extreme, even the suspicion that another might commence legal action may affect behavior. Tacit and explicit threats to sue or seek new legislation or regulation may force the one threatened to examine legal arguments, the costs of defending a position in the process, and the impact on reputation of being challenged. The one threatened may decide to surrender, fight, or attempt to negotiate a settlement. Some legal agencies, such as higher appellate courts, often are relatively autonomous from direct applications of political and economic power. (However, one must recall the great contrast in views between judges appointed to the United States courts of appeal by Presidents Carter and Reagan.) Other legal agencies, such as administrative agencies and legislative committees, are influenced in varying degree by legal, moral, and political ideas as well as power and privilege. This, too, affects decisions about how to respond to actual or potential assertions of legal power.

We can only speculate about how Teubner would fit a description of the way legality is delivered into his theory. As we will see, it is easier to make the case for possible influence on self-regulation than for social integration. Many of the attempts to regulate employment and franchise relationships might be examples of what we could call indirect reflexive rationality. Even the chance that formal or substantive rationality might be exercised within the legal system may affect procedures and the balance of power within private associations. Whether such changes, in fact, serve to integrate the functioning of these associations with that of other social structures is hard to establish, but the possibility is present. I will look at the impact of some of the legislation and other legal activity dealing with, first, franchises, and, second, employment-at-will. Finally, I will turn to collective-bargaining law and the possibility that decentralized activity may prompt social integration at the price of the interests of individual workers.

The threat of lawmaking and negative public relations affected self-regulation in the area of automobile dealer franchises in the United States. The publicity given the hearings before a committee of the United States Senate and the challenging questioning of the top officials of the automobile manufacturers provoked a response that was more beneficial to the dealers than the statute that finally was passed (Macaulay 1966). After being embarrassed by testimony about the past practices of General Motors, its president sought to take the public relations initiative. During the hearings he announced a revised franchise contract which gave General Motors dealers a number of valuable rights. Moreover, dealers' representatives would meet regularly with the top officials of the company in a setting in which they could raise questions, offer suggestions, and learn of

the reasons for future plans. Furthermore, decisions to terminate a dealer could be reviewed through a process ending with a decision by a retired Justice of the Supreme Court. Other manufacturers followed suit, defining rights and duties in some detail, and creating different types of systems of review. Ford's revised contract with its dealers even looked like an elaborate statute, with definitional sections and a detailed index.

In several states, the dealers' association or the administrative agency regulating manufacturer-dealer relationships began mediating disputes. One important part of such mediation was bringing new representatives of the manufacturer into the transaction. Instead of a fight between a dealer and a zone or area supervisor who is judged by the rate of sales in the territory, dispute processing now involved the dealer, the zone or area supervisor, a representative of the manufacturer from the home office, and someone from the state agency or trade association. Instead of acting as the final authority, the zone or area supervisor's decision and past actions were now subject to review. It seems likely that the possibility of such review would have a deterrent effect. Before supervisors acted, now there would be a real incentive to get their facts straight and to build a file justifying terminating the dealer or taking other action. Moreover, bias, nepotism, and similar factors that are unrelated to the goals of the manufacturer but often play a role in dependent relationships also were likely to be deterred.

Of course, a number of cases were brought before the courts under the federal and state statutes by dealers against manufacturers. The dealers rarely won. Yet the flow of litigation itself may have had some impact on large bureaucratic organizations such as the automobile manufacturers. Lawyers and executives much more senior than those normally involved in day-to-day contact with dealers had reason to establish policies and see that they were implemented so that the manufacturers could defend themselves in litigation. Again, this was likely to restrain the discretion of area or zone supervisors who were directly responsible for decisions concerning dealers. In order to structure practice so that an automobile manufacturer was ready to cope with a flow of litigation involving its relationship with dealers, it would want evidence that the dealer had had the opportunity to retail the best-selling models and that the dealer had failed to do as well as other similarly situated dealers. Such record-keeping likely added to the objectivity of judgments about terminating dealerships.

> All of these private systems have far more meaning for most dealers than lawsuits for damages under the [federal] Good Faith Act or proceedings under [state] administrative-licensing statutes to revoke licenses of factory representatives. The major significance of these formal legal proceedings is that they support the private other-than-legal ways of dealing with problems. [Macaulay 1966, pp. 204–5]

The various civil rights statutes and the cases creating some remedies for employees-at-will may have a similar impact. There is some risk of legal challenge if an employer passes over for promotion or fires a member of a racial minority, a woman, a handicapped person, or anyone over forty. Drucker (1980) comments that "[i]t's getting harder to dismiss any employee except for 'cause.'" He continues:

> Standards and review will, paradoxically, be forced on employers in the United States by the abandonment of fixed-age retirement. For companies to be able to dismiss even the most senile and decrepit oldster, they will have to develop

> impersonal standards of performance and systematic personnel procedures for employees of all ages. [p. 18]

Such procedures, of course, will limit the powers of supervisors and constitutionalize more and more employment relationships. As Selznick (1968, 1969) has argued, once reasons must be given to justify action, those reasons are open to examination and challenge. At least in close cases, many supervisors are likely to avoid the burden of persuasion and give an employee a second chance to meet defined standards of performance.

The relatively few cases involving employment-at-will in which employees have gained some measure of victory have prompted a great deal of writing in business publications such as *Fortune*, the *Harvard Business Review*, and the *Wall Street Journal*, as well as the law reviews. A number of major corporations have created some type of internal review system governing discipline, failure to promote, and discharge of such employees. The cases and the writing may have made the matter salient to those in charge of personnel. Seminars and training sessions about coping with the new employee-at-will cases have been sold to personnel managers and corporate lawyers. Many consulting firms offer to create informal dispute resolution processes to deal with the rights and duties of such employees. Part of the reason for the interest in such programs may have been an attempt to show courts that new rights need not be recognized; part may have been an attempt to offset claims of unfairness in case firms were sued by an employee. The informal dispute resolution procedure adopted may be more or less elaborate, but most call for review by people without a personal stake in the case. Whatever the difficulties facing an employee claiming to have been treated unfairly before such an internal body, the chance that a supervisor's decisions might be reviewed by those who could affect the supervisor's career again could serve some deterrent function. Supervisors ought to be prompted to create files on employees which could withstand review. Of course, crafty supervisors could manipulate such files, and those who conducted the review might tend to back up supervisors automatically and distrust employees. Nonetheless, the need to be able to make a case should serve as some limitation on arbitrary power.

These may be examples of reflexive rationality. Certainly, legal action affected procedures of internal discourse, and we could say that property rights had been redefined and redistributed in the franchise and employment cases. However, Teubner stresses that reflexive rationality is neither power-equalization nor participatory democracy. In addition, this kind of rationality must affect the ways semi-autonomous social systems relate to other social systems. On the one hand, it may be that the cumulative effect of all the increases in the rights of employees and franchisees will be to raise costs and make it harder to discipline and discharge the lazy and incompetent. As a result of this factor and others, American products could cost more and become more shoddy. In turn, cheaper and higher quality foreign products could enter American markets, ultimately prompting unemployment and economic crisis. On the other hand, perhaps fair procedures, a measure of job security, and the accountability of supervisors diminish the price paid for the effects of arbitrary action by supervisors. Moreover, the systems described may aid supervisors to better target and deal with the truly incompetent or inefficient since responsibility and performance ought to be better identified and evaluated. Changes in a social institution such as employment probably will affect other institutions such as the family or the economy as a whole.

Teubner sees "reflexive potential" in the "abstract control technique" used in labor law. Here, public government fosters a private legislative and adjudicatory system for the social end of promoting labor peace while redistributing wealth and affording workers some influence over working conditions. Klare (1981, 1982a, 1982b) criticizes what he calls liberal collective-bargaining theory by showing that its inner logic "deflects and demoralizes popular participation and, through cooptation of popular struggle, ultimately reinforces the institutional infrastructure of capitalism" (1981, p. 482). Klare's argument enables us to consider Teubner's reflexive rationality in more detail.

Klare argues that liberal collective-bargaining law theory ultimately rests on a delegation of power to make socially important decisions to corporations and large, bureaucratically run labor unions. This delegation results in management decision-making about what is critically important and gives it the power of command in the workplace. Essentially, of course, this is the private government argument. However, Klare stresses that liberal theory actively promotes workers' rights in certain limited and carefully defined contexts. Our collective-bargaining law has engendered some democratic participation of employees in workplace governance. Unions do protect employees from some unilateral and arbitrary dictates of management. The grievance procedure is the most important source of whatever due process Americans have on the job. Unions can be a context within which workers form and express aspirations and experience the dignity that comes with having some influence on decisions governing one's life. Nonetheless, Klare argues that the accepted theory of collective bargaining defines for workers, for union leaders, and for the public what is possible and desirable in the workplace. It stands in the way of progress toward freedom there and toward gaining for workers a dominant voice respecting the organization and purposes of work and the disposition of the products of labor.

Liberal collective-bargaining theory uses a legislative and private government metaphor to serve a number of key rhetorical purposes. Workers vote for union representatives who negotiate a collective bargain in light of the power to strike. The bargain will concern wages and conditions of employment. However, management will not surrender control over such things as whether to open new plants or close old ones, or whether to adopt new basic manufacturing techniques. Management, for example, designs a new model automobile, plans the organization of the factory and the division of labor among people and machines, and then employs unionized workers who are governed by a bureaucratic chain of command within which decisions of importance often are made far removed from anyone at the local level. Collective bargaining can influence, but not control, this process.

Once a collective bargain, usually published as a small book written in legal language, is ratified by the membership, workers then lose their right to strike during the life of the contract. Workers, management, and the public are deemed to share an interest in continuing production or providing services. In place of a strike, during the life of the contract the exclusive remedy for disputes is the grievance process which leads, ultimately, to arbitration. But unions also become large bureaucracies removed from their membership. They are held responsible for the compliance of their members with the contract. Union officials develop their own interests which are not always congruent with those of the workers at a particular plant or in smaller work groups. Their role becomes political, involving manipulation of both managers and workers. Almost inevitably, some groups of workers will be favored over others.

Liberal collective-bargaining theory presents grievance arbitration as a technical and apolitical matter of contract interpretation. Collective bargains are seen as contracts which, as other contracts, primarily concern the parties. The role of public law is limited to enforcing a bargain, and since the agreement provided an institutionalized, private internal dispute resolution process, arbitration will be enforced. This helps vindicate a limited role of government in supporting the grievance arbitration process while still continuing to recognize a private character of industrial decision-making. The end result is that procedure is separated from substance so that the quality of working life and fairness of compensation turn on bargaining power rather than norms of substantive justice. The workers have only the form of industrial due process rather than democratic self-governance. They must surrender control of their disputes to union officials and ultimately to labor lawyers who transform them into grievances phrased as interpretations of the collective bargain. The process itself involves a multilayered series of stages, hearings, and legal forms which ensure that decisions are delayed. Arbitration may resolve the dispute as so transformed but leave the real problem untouched. Decision-makers, though deemed expert, may understand little of life in a particular plant or the experience of workers in general. Labor lawyers and law professors who serve as arbitrators seldom have experience of life in the workplace or the impact of layoffs and unemployment.

Moreover, workers often face disincentives at many plants to bringing a grievance and pursuing it. Whyte (1956, p. 13) reports that "[w]orkers don't like to be considered 'trouble-makers.' It isn't a case of the worker thinking, if I pass on this grievance, I will be fired; nothing as crude as that, but rather an uneasy feeling that if I put this in the grievance procedure, management will not forget and maybe somewhere along the line I will not get the breaks that I am entitled to." At one time, union officials also filtered out grievances that they thought unwarranted or tactically unwise to push in light of positions to be taken at the next collective-bargaining negotiating session. While the expanding definition of the duty of fair representation may inhibit the more open forms of gatekeeping, union officials cannot be expected to support fully what they see as unwarranted or unwise claims (see Weir 1976).

When workers see a major portion of their lives under the control of management and union officials and see collective-bargaining and grievance procedures as largely meaningless rituals, they may exercise what power they still retain (see Farrell 1983). When economic conditions are such that jobs are not scarce prizes, often they can slow down the pace of the work; do passable but not high-quality work; engage in horseplay and foolishness to confront boredom; take, sometimes as of right, goods and materials from the employer; or engage in an illegal wildcat strike (see Atleson 1973). They can also turn to factional fights within their unions. Such practices can damage the reputation of their company's products, subjecting the firm to competitive pressure. On the one hand, this may provoke new and better forms of work organization, but it may also provoke company demands for concessions from unions or spur decisions to use more industrial robots and high technology to eliminate the need for many workers.

Klare and Teubner differ in their appraisal of reflexive rationality. To a great extent, they are seeking different ends. Klare (1981, p. 456) sees the philosophy of collective-bargaining law as "an important effort to conceptualize, justify and legitimate the modern, regulatory state in the period of advanced industrial capitalism." Unions and large

corporations are seen as engaging in *private lawmaking*, "although their *de facto* power rivals or even supersedes that of public agencies and although their actions are of societal consequence." Welfare-state social democracy, acting in support of collective bargaining, loses sight of the ideal that "the highest aspiration of democratic culture should be to generate and nurture in all people the capacity for individual and collective *self*-governance and *self*-realization of their potentials" (1982a, p. 83).

Teubner, on the other hand, does not see the main goal of reflexive rationality as "power-equalization nor an increase of individual participation in the emphatic sense of 'participatory democracy' " (p. 440). He tells us that, rather, "law must act at the subsystem-specific level to install, correct, and redefine democratic self-regulatory mechanisms. Law's role is to decide about decisions, regulate regulations, and establish structural premises for future decisions in terms of organization, procedure, and competencies" (p. 437). The goal is "to create the structural premises for a decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems" (p. 417). Integration requires that corporations, semi-public associations, mass media, and educational institutions be sensitive to the outside effects of their attempts to maximize internal rationality (cf. Cohen 1983). Teubner would like to have both social integration by decentralized means and power equalization in self-regulatory processes. However, he recognizes the danger that reflexive rationality could be "perverted easily into a sheer moralistic appeal" (p. 439).

Whatever our views about social integration and increasing individual control of one's own life, there is a tension between self-regulation and social integration. This suggests that while the law may be evolving toward some version of reflexive rationality, the process may not solve all problems and avoid crises. It may be that the legal system is doomed to make a succession of vain efforts to offset the contradictions of late capitalism and late socialism as it is practiced in the Soviet Union and eastern Europe today (see Bowers 1982; Sabel and Stark 1982; Simis 1982).

Moreover, we can note that both Teubner and Klare seem curiously apolitical. Klare writes as if those who worked to gain the rights for workers to organize and collectively bargain were free to write any program they pleased. Teubner writes about evolution from formal to substantive to reflexive rationality. Evolution in a biological sense implies that things just happen, perhaps by a cumulative series of accidents and a process of natural selection. In social science, evolution seems to connote a systematic and almost inevitable progression following an inner logic. Taken either way, there is some plausibility to the idea of evolution from one legal style to another. However, we may be disquieted by the absence from the picture of those who attempt to plan changes or individuals and groups struggling for advantage and power. (Cf. Ray's criticism [1983] of Luhmann's theory, a theory that serves as part of the foundation for Teubner's position.) In Joerges' words (1983, p. 29), "the Achilles' heel of reflexive rationality . . . is that a requirement [that affected groups] . . . renegotiate does not change the balance of power which determines the outcome of the negotiations." (Cf. Hearn 1984.)

Insofar as we accept the idea of an evolutionary tide as the product of natural forces, however, there is no reason to assume that evolution will stop with reflexive rationality. This is particularly true as long as we continue to have difficulty distinguishing public from private action. Reflexive rationality would seem only to postpone the day of reckoning for a distinction that Kennedy (1982) tells us is hard to take seriously.

Teubner's progression assumes a legal system with sufficient autonomy to control other social systems so that they will be integrated into a total collective unit. However, if an empirical picture of modern societies shows interchanges between and interpenetration among legal and other systems, major questions remain unanswered. It is easy to imagine legal agencies delegating self-regulatory power to various social units; it is harder to see how reflexive law would enable legal officials to coordinate and resolve conflicting claims in light of the powers of private governments and social fields and networks to influence legal outcomes and evade commands.

If Klare clears away the mystifications of liberal collective-bargaining theory, he seems to assume that the way will be open for "democratic self-management of the workplace by workers; [for] . . . giving a dominant voice respecting the organization and purposes of work and the disposition of the products of labor to those who perform work . . ." (1981, p. 451). However, the abandonment of "industrial democracy" might lead to a kind of corporatism or state socialism where workers had less power rather than more. The experience of those who have attacked liberal institutions in the name of lifting false consciousness is not reassuring.

On the other hand, due process, rights, and bureaucratic structures often break down into bargaining in the shadow of the law. Henry (1982) reports that a number of legal measures in Great Britain during the 1970s prompted management to formalize rules and procedures to deal with the disciplining of individual workers for acts such as theft of company property. In a sense, this was another example of reflexive rationality. However, as Klare might have predicted, Henry reported that the procedures functioned to give management a legitimate method of dismissing workers without being subject to question. Henry found, however, that many employers had moved from formal internal procedures to reliance on automatic employee self-discipline, often reinforced by a trade union. This

> was especially apparent where work was structured into small teams or gangs, working for pooled bonuses. Under such circumstances, said one employer, "employees wish to be seen contributing to their working groups and are reluctant to disrupt the normal pattern" since, as another pointed out, "equal effort is required by gang members." Here there can be "pressure from other workers on slackers" or "sanctions on people whom the team don't feel are pulling their weight." This pressure can be informal, "from colleagues to the offending employee" or more formally by "shop stewards who make points cautioning members who break company rules" and whom they "get to toe the line" by either having a "quiet word" or in extreme cases, "advising local district officers of the union." [p. 374]

Henry sees the possibility that, as suggested by Abel (1981) and Santos (1980), "participatory disciplinary technology becomes the ultimate form of capitalist control" (cf. Scraton and South 1984). However, participation of this type may also bring with it some limited autonomy and self-confidence. This could bring about the "penultimate stage of the process whereby the existing relations of production are undermined and replaced." Perhaps this is the road an evolution to reflexive rationality will take, and perhaps it will prompt the next evolution (cf. Derber and Schwartz 1983; Feldberg and Glenn 1983).

I doubt that those capitalists who now benefit by the distinction between public and

private spheres and the delegation of power justified by it will be content to sit and watch the "natural" evolution to worker control. Indeed, Blankenburg (1984) points out that instead of an evolution from stage to stage in the style of legal thought, all forms of rationality may exist at once. Substantive rationality did not end the claims of formal rationality, and reflexive rationality is unlikely to erase formal or substantive rationality from the minds of those concerned with legal thought. Distinguished jurists often use inconsistent styles of legal thought. They serve as ideological ploys rationalizing shifting positions about autonomy and accountability of private social control. They reflect the power of those who control associations and those affected by them.

CONCLUSION

As we have seen, viewing society as involving relationships between only the state and individuals presents major difficulties for the social study of law. Theories about the state or society tend to overlook the remarkable ability of individuals to cope with attempted regulation by evasion, manipulation, conscious ignorance of the law, and bargaining in the light of more or less plausible legal arguments. Yet a picture of law confronting or confronted by isolated individuals also is too simple to capture enough of reality for many purposes. We live in a world of legal pluralism. Private governments, social fields, and networks administer their own rules and apply their own sanctions to those who come under their jurisdiction. Sometimes individuals are insulated from public governmental activity by social fields; sometimes public government officials are members of social fields which cut across formal boundaries of the public and the private.

These complicated interrelationships are important for the social study of law. An article in the *New York Times* (1982), for example, reported that those who supply and those who use cocaine constitute an integrated social field. In return for access to the drug, lawyers provide information on changes in the narcotics law, and on the doctrine of search and seizure, and keep track of arrest warrants. From these lawyers, dealers have learned to use occupied buildings because police need a warrant before they can enter. Often the process of obtaining a warrant will prompt a warning so that drug operations can be moved. Plumbers who use cocaine convert the pipes in a building so that drugs can be sent in tubes to other rooms quickly. Telephone repair people and others with experience in electronics make their contribution by installing sophisticated equipment so that conversations in other rooms can be monitored. Electricians install doors that can be opened only by remote control. Scanners are used to listen to police radio calls, and communications equipment helps alert people on upper floors that unwelcome visitors are entering the building. Of course, police officers, too, can become users of cocaine, and they are in a position to make valuable contributions to the maintenance of the network.

Clearly, this report suggests some of the limits on effectiveness of drug laws. However, it also suggests some of the difficulties with theories that see people as so socialized to comply with law that it is part of their personality. We can question whether the story describes a true deviant subculture or just a social network in which commonly held values other than complying with the law are stressed. Americans are socialized to gratify their desires. They learn to win at games, and clever shading of the rules is a matter for amusement rather than horror. Law enforcement officials commented that many in the middle class no longer thought of cocaine use as against the law.

Many involved in the cocaine trade learn and use entrepreneurial skills which they, because of class or race, could not learn or use in legal occupations. A large part of underemphasized American history involves ill-gotten gains serving as the base for the next generation of a family or a group moving into mainstream society. We can view participation as a form of rebellion and taking control of one's life, or we can see it as exploiting the weaknesses of one's fellows for personal gain. Undoubtedly, the illegality of the cocaine trade has prompted the creation of deviant norms within the group of users and suppliers as well as the use of swift and severe sanctions for even suspected deviation. I wonder whether Teubner would want to find "elements of reflexive rationality" in this decentralized system of private lawmaking. Do networks distributing illegal drugs contribute to social integration or disintegration? All in all, the example is a good one with which to test the kinds of theories about law and society which have been discussed in this paper.

The relationships between the state, individuals, and various human associations ranging from the family to multinational corporations are as poorly described in the law-and-society literature as they are difficult to evaluate. It is often assumed that there has been a great loss of community in modern industrial societies. Novelists and playwrights dramatize these themes. In this view, people are but cogs in an industrial machine who live rootlessly in interchangeable neighborhoods, unencumbered by real ties to family, friends, those who share their job skills or their tastes in recreation, or those who share religious observances. This picture undoubtedly shows some of the reality of modern life, but it is an overstatement, more applicable to some people than others.

Even at the bottom of the economic and status ladder, one often finds strong family ties, a religious-based system of coping with problems, and associations functioning to provide recreation and self-defense. Irving (1977, p. 879), after studying people in urban settings in England and the United States, concluded that social networks "remained close-knit in a surprising variety of urban situations, and they continue, even in this mobile age, to remain substantially rooted in the residential locality." Galanter (1979) reminds us that the

> survival and proliferation of indigenous law in the contemporary United States remains concealed from those who are looking for an inclusive and self-contained *gemeinschaft*, unsullied by formal organization, which enfolds individuals and integrates their whole life experience. What we find instead is a multitude of associations and networks, overlapping and interpenetrating, more fragmentary and less inclusive. . . .
>
> Such partial communities, linked by informal communications and sometimes by formal communications devices as well, provide much of the texture of our lives in family and kinship, at work and in business dealings, in neighborhood, sports, religion, and politics. There are varying degrees of self-conscious regulation and varying degrees of congruity with the official law. This is a realm of interdependence, regulated by tacit norms of reciprocity and sometimes by more explicit codes. The range of shared meanings is limited but the cost of exit is substantial. If we have lost the experience of an all-encompassing, inclusive community, it is not to a world of arm's length dealings with strangers, but in large measure to a world of loosely joined and partly overlapping partial or fragmentary communities. In this sense our exposure to indigenous law has increased at the same time that official regulation has multiplied. [pp. 16–17]

Ferguson (1983, p. 51) says that "[t]he standard anarchist recommendations for post-revolutionary society—workers' collectives, producers' and consumers' cooperatives, neighborhood councils—are all attempts to provide . . . [an open public] . . . space, where the ideas and goals of diverse individuals could come together and form the direction for collective action." She continues to say that "[i]n an open public situation, with full participation by all members, power need not be seen as the ability of some to make others do that which they would not otherwise have done. Instead, power could become the capacity to shape the collective situation—a positive force enabling individuals to do together that which they cannot do separately." However, Ferguson recognizes that anarchism cannot eliminate all coercion and all law. The pressure of one's peers is not the most innocent kind of coercion. In contrast to Kennedy, she concludes that "[t]he members of the collective must continually establish and reestablish the boundary between public and private acts, and not try to either erase the boundary or fix it once and for all."

Those who have been frustrated by the mindless operation of bureaucratic formal rationality can see much to admire in the anarchist vision. Yet there are two matched classic objections. Frug (1980, p. 1070) tells us that "[w]hat makes the concept of popular participation so unrealistic to us is not only its frightening unfamiliarity, but also our conviction that all decision-making requires specialization, expertise, and a chain of command." We can imagine a chaotic attempt to design a new automobile or stereo receiver and produce it by popular participation or an attempt of a major symphony orchestra to produce a work of the stature of a Beethoven concerto by a collective participatory process. Efficiency, our civil religion, seems to demand supporting hierarchies by deeming an area to be private, by leaving matters to the logic of property and contract. Yet the benefits of a division of labor do not establish that present chains of command are natural or inevitable. Ferguson mentions the second concern. All collective action is a threat to the individual who does not agree, who promotes an alternative view, or who just wants to be left alone. One speaking with the authority of the collective may act against such individuals for the good of the group or for the official's own self-interest. Given all the difficulties in asserting rights successfully—the cost barriers to litigation, the contradictory nature of our theories of rights, and the power of those with whom one has long-term relationships to retaliate later—rights are a feeble defense against power. Yet until we think of a way to achieve what now looks to be a utopia where all power is neatly equalized and balanced, rights may be all we have. As Kennedy (1981, p. 506) observed, "[e]mbedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom." These normative contradictions help explain the problematic relationships between the larger public government, private governments, social fields, and networks.

An appreciation of the role of private governments, social fields, and networks, as we have seen, is critical for the development of many of the classic topics of the social study of law. The relationship of public and private normative orderings tells us much about the place of law in society and the fate of attempted reforms. Lurking in all of these concerns are great questions about freedom and control of individuals and their associations, the autonomy of centers of power and their integration into a functioning society, and

problems of the interrelationships and interpenetration of public governments and private associations. Our present understanding of more and less institutionalized social fields and their connections with the larger legal system is, to say the least, underdeveloped and in need of attention. Articles surveying fields often end by calling for either more research or more theory. Here, I can safely do both. In addition, we ought not forget what we already know. Private government performs many of the functions commonly associated with public government, and it is likely that the more decentralized the structures for carrying out a social function, the greater the problems of coordination and integration. At the same time, the public/private distinction is suspect. While it may be useful or vital to carve out areas of activity and put them beyond public control, reifying public and private governments and seeing them as distinct entities only obscures reality. In Zimring's words (1981):

> It is sometimes possible both to know something important and to ignore that knowledge. To do this is to generate the phenomenon of the well-known secret, an obvious fact we ignore. When Edgar Allan Poe suggested that the best location to hide something is the most obvious place, he was teaching applied law and social science. [p. 867]

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10

ACCESS TO JUSTICE: CITIZEN PARTICIPATION AND THE AMERICAN LEGAL ORDER

Austin D. Sarat
Amherst College

INTRODUCTION

The study of citizen participation in the legal system has yet to achieve the status accorded the analysis of participation in the overtly political institutions of constitutional democracies (see Verba and Nie 1972; Dahl 1961; Arendt 1959). Whereas the latter has a long-standing tradition and addresses a fairly coherent set of questions, the study of participation in the legal system is not a well-defined subject matter.[1] There are few clearly recognized research traditions or theories that take participation in the legal order as a central focus or locate it in a coherent body of theory.[2] Nevertheless, there is now available a wide-ranging literature in the sociology of law which discusses, albeit often

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[1] Indeed some would suggest that the subject of participation in the legal order is too diverse and elusive to be comprehensible in a single treatment. They question whether participation is, or is yet, a subject. "There may be less intellectual substance than meets the eye: a fashion pretending to intellectual substance. Reality may take its revenge on such moral forwardness. Or, to the contrary, we may be seeing the beginning of a tendency that will grow larger and more urgent and therefore call for a lot of good thought: conceptual as well as historical analysis" [Kateb 1975, pp. 89–90; see also Braybrooke 1975].

[2] The study of disputes and disputing may be an exception (Trubek 1980–81). Yet, most research on disputing is concerned with the analysis of different types of dispute processing institutions rather than the behavior of disputants (for exceptions, see Miller and Sarat 1980–81; Ladinsky and Susmilch 1983; Merry and Silbey 1984).

indirectly, the nature, extent, antecedents, and consequences of citizen participation in the legal order. That literature highlights the social organization of citizen participation, its significance in liberal legal orders, and the dilemmas and contradictions of citizen participation in legal institutions.

It is, of course, very difficult to define precisely and to limit clearly the idea of citizen participation in the legal system. Most treatments of the subject present no definitions. They present themselves not as studies of participation in general but rather as studies of particular, discrete, well-defined forms of participation such as litigation or complaining. Alternatively, discussions of citizen participation are often presented as part of a broader concern with access to justice. Where that is the case, the definitional problem is further compounded.

Lawrence Friedman (1978, p. 5) points out that "when people talk about 'access to justice' they may mean many different things. But every discussion assumes a goal called 'justice' and assumes further that some group or type of person . . . finds the door to justice closed, or at least too stiff to move on its hinges." Access to justice is typically and uncritically taken to mean access to legal justice. Moreover, while discussions of access pose empirical questions, the concept of "access to justice" has no empirical referent (Griffiths 1977, p. 280). The concept refers only to the freedom to bring a nearly infinite range of issues and problems to the attention of legal officials. In this sense access to justice and citizen participation are treated as equivalent concepts. Where this is the case, it is possible to avoid

> the error that writers in the "access" tradition continually fall prey to: treating as an empirical notion their idea that people (especially the poor) ought to be using legal services more than they do. One would also avoid the mistake of confusing the political problem of unequal access with the empirical fact of unequal use. [Griffiths 1977, pp. 281–82]

While the equation of access and participation may help solve the problem of equating *is* and *ought,* it does not solve the conceptual problem of bounding the behaviors to be observed and interpreted. Ultimately no resolution will be fully satisfactory. Following Nie and Verba (1975, p. 1), I use participation in the legal system to refer to legal activities by which private citizens, acting individually or in organized groups, seek to influence the actions of officials charged with administering, enforcing, or interpreting the law. Participatory activities include those through which citizens seek to enlist the state to help remedy some individual problem or achieve some individual goal as well as those that seek to shape public policies through judicial or administrative action (see Scaff 1975). This conception of citizen participation in the legal system thus covers a broad range of both activities and institutions.

Modes of participation in the legal order vary in terms of what political theorist Carl Cohen (1971) calls their "breadth," "depth," and "range." Breadth refers to the number of people who actually participate in the legal process. Here sociologists of law have attempted, for example, to calculate litigation rates as a portion of potential legal problems (Miller and Sarat 1980–81). A fully participatory legal order would be one in which all citizens seeking to use legal institutions to deal with their problems had the opportunity, in fact as well as in theory, to do so. A fully participatory legal order would be one in which all citizens affected by a decision may and do participate in determining it (Mayo 1960). While such an ideal is, in practice, unachievable, the degree of participation in

the legal system can be ascertained by determining "the proportion of those in a community affected by a decision who do or may participate in the making of it" (Cohen 1971, p. 8).

The second dimension of participation is its depth. Participation is deep to the extent that participants are involved in activities "to identify issues, formulate proposals, weigh evidence in argument on all sides, express convictions and explain their grounds . . . and in general to foster and strengthen deliberation" (Cohen 1971, pp. 17, 18). The deeper the participation provided, the more "democratic" is the process in which that participation occurs—presuming always that the opportunity for and extent of citizen participation are already fairly broad. The deep participation of a few is no substitute for the participation of the many. Voting, on the other hand, is the clearest example of participation that may be relatively broad but is rarely very deep.

The discussion of the depth of participation also raises the empirical question of what exactly constitutes participation. To file a lawsuit, for example, one does not necessarily, or even usually, have to engage in deliberation or in the process of reasoned argument. Filing may be a purely formal act, whose real importance has little or nothing to do with adjudication or any other legal process. There is some evidence that filing may be a symbolic act, a way of "letting off steam" not meant to initiate legal proceedings (Sarat 1976). Most contacts with legal institutions do not lead to prolonged engagement in deliberative activities but are intended and serve only to facilitate processes of private bargaining or interaction in which the role of law is purposely minimized (Mnookin and Kornhauser 1979; Michelman 1973; Steadman and Rosenstein 1973; Black 1971). Insofar as the sociology of law has attempted to quantify access to justice and to measure citizen participation, it has generally treated each type of contact with legal institutions as of equal weight and importance. Variation in the intensity, duration, or depth of involvement is rarely considered.

Another important aspect of participation in legal processes is its "range" (Cohen 1971, p. 22). Range refers to the scope of the questions on which citizens' involvement is welcome. Once it is known how many people can and do participate and how deeply they are involved with the legal system, it becomes possible to ask about the range of issues and concerns they become involved with. The greater the range of participation, the more democratic is the legal order. A fully democratic legal order would, in theory, open most if not all questions to citizen input and would respond to most if not all the types of problems citizens encounter and desire to bring to it. Legal orders and specific legal institutions establish rules and procedures to provide the framework and the limits within which participation can occur. These rules screen out particular types of issues owing to the limited competence or capacity of particular institutions (Cavanagh and Sarat 1980) or to protect decision-makers from the pressure of citizen demand (Scott 1973). Variation in the strictness of such rules reflects tensions and contradictory impulses, toward autonomy and responsiveness, built into a liberal legal order.[3]

[3]Perhaps the most important and controversial of the rules governing the range of participation are those affecting standing to sue in the federal courts. These rules are a general derivation of the case-and-controversy provision of the Constitution which, as interpreted by the federal courts, requires that citizen participation in the courts be limited to matters on which there are genuinely adverse positions—that is, matters on which there is some substantial opposition of interest between or among the parties—as reflected in an actual and ongoing dispute amenable to judicial remedy. While the constitutional provision defines what is a case and limits the decision-making activities of courts to the resolution of cases (see Sedler 1972),

Although my consideration of participation includes many elements, five principal exclusions should be noted. The first is involuntary forms of contact between the citizen and the state—contacts growing out of the use of the state's coercive power. Although criminal defendants have contact with the legal process, the idea that they participate in it in the same sense that a voter or a plaintiff in a civil case participates makes little sense.

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rules of standing refer to the characteristics of the parties seeking to litigate particular cases. Standing should be viewed

> as involving problems of the nature and sufficiency of the litigant's concern with the subject matter of the litigation, as distinguished from problems of justiciability—that is, the fitness for adjudication—of the legal question which he tenders for decision. . . . More precisely stated, the question of standing . . . is the question of whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality. [Hart and Wechsler 1953, p. 174; see also *Warth* v. *Seldin* 1975]

The core of the standing doctrine, which the courts have derived from the Constitution itself, is that citizens will be allowed to litigate only if they have demonstrated a personal interest in the outcome of the matter they bring to court and if the interest asserted by the plaintiff amounts to a legal right arguably within the boundaries of common law, statutes, or the Constitution (Vining 1978). The courts have, however, added meaning and interpretations to this core in an uncertain, sometimes contradictory, and complex line of cases. Such cases led former Justice William O. Douglas to suggest that "generalizations about the standing to sue are largely worthless as such" (*Association of Data Processing Service Organizations Inc.* v. *Camp* 1970).

In recent years, the range of participation allowed under rules of standing has been most in question with respect to issues involving public law and the actions of the state (see Jaffe 1965, 1968; Berger 1969; Albert 1974; Stewart 1975). The controversy centers on the conditions under which individuals or groups will be allowed access to challenge the actions of administrative agencies or other public bodies. The difficulties of establishing the range of participation in this area are great, since it is difficult, if not impossible, to determine the nature, if any, of injuries resulting from public actions or the identity of people affected (see Kalven and Rosenfield 1941; Zacharias 1978).

While the general movement has been toward an expansion of the range of participation through the liberalization of standing (see *Flast* v. *Cohen* 1968; *Association of Data Processing Service Organizations Inc.* v. *Camp* 1970; *Sierra Club* v. *Morton* 1972; *U.S.* v. *Scrap* 1973; *Duke Power* v. *Carolina Environmental Study Group* 1978; Davis 1970; Hasl 1973), that movement has not been uniform and consistent. For example, in 1973 the Supreme Court ruled that standing requires not only that the plaintiff demonstrate a concrete injury, but that the injury be "directly" related to the claim and action subject to adjudication. Thus, an unwed mother was not allowed to sue a district attorney for failing to prosecute the father for nonsupport; the plaintiff could not show that her failure to receive support payments resulted from the failure to prosecute (*Linda R. S.* v. *Richard D.* 1973). In 1975, the Court denied standing to a coalition of individuals and organizations that tried to challenge a zoning ordinance on the grounds that it unconstitutionally discriminated against low-income individuals by restricting the range and availability of affordable housing. In deciding that the rules of standing require demonstration that the asserted injury was the consequence of the actions of the defendant and that the relief desired would remedy the alleged harm, the Court argued that the plaintiffs had failed to meet those tests and that it was insufficient to "rely on little more than the remote possibility . . . that [the plaintiffs'] situation might have been better had [the defendants] acted otherwise and might improve were the Court to accord relief" (*Warth* v. *Seldin* 1975; see also *Simon* v. *Eastern Kentucky Welfare Rights Organization* 1976).

The uncertain path of decisions affecting the rights of citizens and organized groups to litigate claims against the government reflects the uncertain relationship between autonomy and responsiveness in the American legal order. In essence, the rules of standing are a "legal fiction" used by the courts to control the amount and kinds of citizen participation. While they have some foundation in the Constitution, they are for the most part simply "prudential" (Cavanagh 1979). The regulation of standing also regulates the fora in which participation and conflicts are allowed. The liberalization of standing allows relatively weak or loosely organized groups to contest the actions of better-organized and more powerful social groups able to exert their influence in the legislative and administrative process. Thus, when environmentalists sue the Atomic Energy Commission, they are carrying into the courts a dispute with a public utility that they were unable to win in or through private or other public action (*Calvert Cliffs Coordinating Committee* v. *A.E.C.* 1971). As a result, expanding the range of participation in the judicial process serves to increase the responsiveness of the legal order at the same time that it protects a pluralist system of group representation and social life (Lowi 1979).

Even a juror has, in effect, the prerogative of refusing the state's invitation to serve. No such option is open to the criminal defendant (contrast Ross and Littlefield 1978; Casper 1978). Coercion is antithetical to participation.

The second and closely related exclusion involves what might be called "ceremonial" participation (Nie and Verba 1975, p. 2)—activities in which citizens take part in organized expressions of support for the authorities. While every act of participation carries with it some component of support, participation is, at its core, a demand activity (Easton 1964). Participation is a form of behavior through which citizens influence the legal process, through which they make claims on each other and on the state, and in which interests are expressed (Milbrath 1965; Pennock 1979; D. Thompson 1970). Citizen participation can be contrasted with the activities of political mobilization in which the state overtly organizes demonstrations or ritualistic, noncompetitive elections to support or sustain its claims to legitimacy and through which citizen activities and energies are directed toward the achievement of purposes defined by and for the state (Edelman 1971; Nettle 1967). Thus, following my definition, much of what is called participation in nondemocratic nations would not be so labeled.

A third exclusion concerns the standard forms of electoral participation and the activities associated with them, activities through which the "directive" officials of a constitutional democracy are selected (Cohen 1971). This is not to say that such activities are unimportant or even unrelated to participation in the administration and enforcement of the law. One unexplored area of inquiry involves the relationship between political and legal participation. It may be that the two are linked through feelings of efficacy (Jacob 1969) or that they occur sequentially; individuals resort to litigation, for example, when legislative or executive institutions prove impenetrable or unresponsive (Dolbeare 1967; Kluger 1976). Alternatively, legal participation may provide a stimulus to a broadened interest in, or ability to take part in, the activities through which majority rule operates (Scheingold 1974). The distinction between activities through which the majority exercises its directive influence and activities through which citizens and groups vindicate claims to rights is used by some to differentiate political and legal participation (Commager 1941).

My definition begins by referring to "legal activities"—that is, activities permitted or sanctioned by the legal system itself. This qualification eliminates from treatment a wide range of activities—for example, riots and violent demonstrations—that citizens may use to press their claims on legal institutions. These admittedly important activities constitute a separate topic. It may be that nonconventional participation is crucial in shaping the context for more conventional activities and the functions of the legal order. Placed under the stress of civil disorder, institutions may be forced to take demands seriously that would otherwise be ignored (Piven and Cloward 1972) or to breach normal procedures (Balbus 1974). The threat of activity in the streets puts pressure on legal institutions and may lead them to be more responsive to demands of a more conventional nature (Lipsky 1968, 1970).[4]

[4]In this framework, how can civil disobedience be classified? In a constitutional democracy, is it participation of a conventional kind or is it unacceptable behavior? These questions are the very stuff of which entire jurisprudential theories can be woven (see Dworkin 1978). By definition, civil disobedience is a refusal to obey the law. Generally it is thought to refer to (1) a deliberate violation of a valid law, (2) committed as a form of protest and is (3) nonrevolutionary, (4) public, (5) nonviolent, and (6) designed to educate or persuade either majority sentiment or specific legal officials (Bedau 1969). Civil disobedience may

Last I exclude from consideration jury service. This exclusion is, in many ways, the most serious. As jurors, citizens become decision-makers; their participation is deep and highly significant. Nevertheless, I exclude jury service because it is virtually unique as an example of such participation and because its inclusion would carry us far afield from the main body of sociolegal work on citizen participation.[5]

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be thought to be conventional in that the civil disobedient typically acknowledges the legitimacy of the legal order. It is not a repudiation of public values. "Practitioners of civil disobedience maintain an allegiant perspective, at least to the extent of not repudiating totally the authority of political officials, or of the regime and its self-proclaimed values. . . . [T]hey indicate to the regime their willingness to carry on the conflict in a fashion which presumably permits the regime to respond in an equally civil manner" (Zashin 1972, p. 115; see also Cohen 1964; Keeton 1965). The nonviolent character of civil disobedience is what makes it civil and what makes a civil response possible. Thus, it is a further acknowledgment of the legitimacy of the legal order.

But is civil disobedience within the boundaries of conventional citizen participation? Surely it is not usual. No claim has been made that civil disobedience is or ought to be the regular fare of citizens or of the society. Some argue that civil disobedience is outside the boundaries of conventional participation because it represents an assertion by particular groups that they stand above the law. Such critics argue that civil disobedience represents a significant threat to a society of consent and to the avenues through which individuals participate in the administration and/or enforcement of the law. When particular groups appear to establish themselves as the ultimate judges of the validity of law, participation is threatened by a challenge to the rules governing participation and the responsibilities and duties citizens assume in any participatory legal and social order (Rostow 1971).

Others contend either that civil disobedience is a form of normal citizen participation or that it contains within it all the constituent elements of participation, properly understood. It has been suggested that, under strict conditions, civil disobedience may be considered an aspect of constitutional litigation (Fortas 1968). The most important of these conditions is that those employing civil disobedience accept punishment for their violations of law and only violate laws they intend to challenge. Abe Fortas argues that, by breaking the law and submitting to punishment—or, more accurately, arrest—the civil disobedient forces the courts to adjudicate his claim that the violated law is invalid. Employing litigation to settle the rightness of claims is a characteristic form of legal participation. No less a scholar than Alexander Bickel (1965) contends that the kind of "testing" civil disobedience engenders is within the boundaries of acceptable participation in a constitutional democracy. Civil disobedience is "an appeal—almost in the technical-legal sense—to higher lawmaking institutions, which the system provides. In such a system some flouting of the local law, aimed at provoking action by the higher sovereignty, is virtually invited" (p. 79).

More generally, civil disobedience may be considered compatible with citizen participation in a constitutional democracy because it is closely analogous to other forms of conventional participation (Zashin 1972, p. 117). Civil disobedience may be a particularly dramatic technique of persuasion, but its effectiveness depends on convincing others of the dissonance between particular laws and basic and widely shared values. "Acts of civil disobedience seek . . . to call public attention to the view that a principle of moral importance is held to be violated by a law or policy sanctioned by public authorities" (Bay 1966). Civil disobedience is political communication directed at both citizens and public officials. In a constitutional democracy, civil disobedience presumes that public officials will be tolerant and restrained enough to differentiate it from civil disorder (Gurr 1976).

Those who accept civil disobedience as a legitimate form of citizen participation in a constitutional democracy view it as a highly principled response to the inability to vindicate claims or win reforms through other forms of participation (Spitz 1954; Wasserstrom 1961). Civil disobedience "seems to arise out of a sense that the system is not really open to . . . change or to certain conceptions of the good society. . . . It emerges from the experience of repeated failure to achieve more than gradual reform despite an abnormally large amount of . . . conventional political action" (Zashin 1972, p. 319). Nevertheless, the effect and effectiveness of civil disobedience can be assessed only in particular cases and with reference to particular circumstances. Its overall place in an understanding of citizen participation in the legal order remains in contention.

[5]Research on citizen participation and the jury is distinctive in its variety and its concern for uniting empirical and normative questions. Given the prohibition against penetrating the jury room, research on juries has had to rely heavily on post hoc reconstruction and even more heavily on simulation (Kessler 1975; Thibaut et al. 1972; O'Mara 1972). Typical research presents a college student with a hypothetical, or

CITIZEN PARTICIPATION AND THE DILEMMAS OF LIBERAL LEGALISM

Citizen participation, no matter how it is defined, occupies an ambiguous and contradictory position in liberal legal theory and in liberal legal orders. Liberalism, because it is inexorably linked to the idea of limited government (Hayek 1960; Corwin 1948), limits popular sovereignty by prescribing the means through which it may be exercised and proscribing its exercise in entire portions of the state apparatus. While citizens are invited to play a part in the selection of legislators and even, in some jurisdictions, of judges, they are not, with rare exceptions, expected to play a directive role in decisions about the application, enforcement, or interpretation of legal norms. Instead, those functions are, in liberal theory, to be performed autonomously by courts or administrative agencies. Here liberal legalism requires a separation between law and politics, with citizen participation, in its fullest sense, relegated to the realm of the political. Judicial and administrative decisions are made according to rules (Fuller 1971b; Lowi 1979, chap. 11); discretion is to be limited; the pressure of citizen demands, majority sentiments, or interest group activity is deemed to be out of place. Fair procedure, the morality of the game, rather than responsiveness, is seen as the key to legal justice (Resnick 1977; Kennedy 1973).

> Law is elevated "above" politics; that is, the positive law is held to embody standards that public consent, authenticated by tradition or by constitutional

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perhaps filmed, case and manipulates the subject to test comprehension, bias, or deliberative characteristics (see, for example, Lawson 1970). Perhaps even more characteristic of jury research is its attention to the relationship between the actual operation of juries and certain normative standards, most often derived from the law governing the selection, structure, and decision-making of juries (Erlanger 1970). Jury research has placed empirical inquiry at the service of evaluation, demonstrating the way in which prescriptive or normative premises can guide empirical investigation. To this extent, it may not contribute to a cross-culturally valid theory of the behavior of law (Black 1976), but it does test the compatibility of legal rules and legal behavior.

Among the subjects covered by jury research are the effects of size and rules governing unanimity on jury decisions (Zeisel and Diamond 1974; Walbert 1971); the frequency of jury "nullification" (Myers 1979; Howe 1939); and the prevalence of racial, sexual, class, or personal biases in jury decisions (Hoffman and Brodley 1952; Boehm 1968; Landy and Aronson 1969; Levine and Schweber-Koren 1976). From the perspective of concern with participation, the most important issues in jury research are jury representativeness and jury competence. These two issues address the breadth and depth of citizen participation in serving the legal order.

From its beginnings, the legitimacy of the jury has been based, at least in part, on the claim that juries represent the voice of the community (Wells 1911). Defining the boundaries and nature of the communities from which legal juries are to be drawn has been persistently difficult, but the ideal of fairly accurate reflection of community sentiment remains strong. Thus representativeness deals with the breadth of participation achieved in the jury system.

The introduction of nonprofessionals into the legal system has, however, often been questioned. Criticism has focused on the ability of juries to effectively discharge decision-making responsibilities (Redmount 1971; R. Simon 1967, 1975; Kalven and Zeisel 1966). Since the mid-nineteenth century, juries in America have been limited to considering questions of fact (*Yale Law Journal* 1964); a competent jury is one that does not judge the applicability or fairness of the law (for another perspective, see Kadish and Kadish 1973). In addition, juries are supposed to decide cases on the basis of the evidence presented to them, without any form of prejudice. Given the complex and technical nature of legal procedures, many scholars wonder "whether uninitiated laymen are . . . able to comprehend the evidence and . . . instructions, and whether court procedure is not so organized as to diminish rather than increase the possibilities of a rational judgment of the facts" (Erlanger 1970; see also Strawn and Buchanan 1976).

> process, has removed from political controversy. The authority to interpret this legal heritage must therefore be kept insulated from the struggle for power and uncontaminated by political influence. In interpreting and applying the law, jurists . . . have a claim to the last word because their judgments are thought to obey an external will and not their own. [Nonet and Selznick 1978, p. 57]

Liberal legalism derives its claims to legitimacy, in large part, from this sense that law is autonomous, that it is above the play of politics.[6] As a result, the role of citizen participation must be limited. In an autonomous legal order the business of law is "technical." At issue are questions about the meaning and applicability of legal rules. Decisions must be made in a disinterested and impartial manner. There is, in the United States, a long-standing suspicion of the capacity of citizens to display the restraint necessary to allow for such impartial judgment (Tocqueville 1863; Redford 1969). Citizen participation designed to pressure legal officials threatens their capacity to make legally correct decisions and the legitimacy of any decisions they make.

Liberal legalism portrays citizens as self-regulating and independent and the role of law as residual. Citizens are allowed to mobilize the law through carefully defined channels. Rules of standing, which govern access to courts and other legal institutions, require individuals to demonstrate that they have suffered a "real injury" before they are allowed to present their case (see Jaffe 1968; Scott 1973). Citizen participation in the legal order is, thus, instrumental and defensive. The legal culture "assumes that each citizen will voluntarily and rationally pursue his own interests, with the greatest legal good of the greatest number presumptively arising from the selfish enterprises of the atomized mass" (Black 1973, p. 138). When citizens participate, they do so individually, and the legal system proceeds case by case. Responsibility for broad-based social decisions is assigned to legislative bodies presumably directly responsive to popular sentiment (Hayek 1973).

Moreover, even where participation is encouraged, liberal theory stresses the limits of citizen competence. Participation is facilitated by the intervention of a trained legal specialist (Simon 1978). Lawyers speak the language of the law, and it is their responsibility to serve each client by exercising professional judgment and responding to particular problems (Freedman 1975; Hazard 1978). The lawyer mediates between the citizen and legal order, acting as gatekeeper and partisan advocate for a limited cause (Casper 1972).

Citizen participation is, in liberal legalism, not, however, completely denigrated. One need only note the importance of the jury in Anglo-American legal theory to recognize that that theory is not perfectly consistent in its attitude toward citizen participation. Indeed, rhetorically, the jury receives far more than its due as a domesticator of state power and an avenue for direct citizen involvement. While jury service is one of the most intensive, and remarkable, forms of citizen participation, it is clearly anomalous, the exception rather than a model from which generalizations can be drawn in understanding the role of citizens in a liberal legal order.

Citizen participation is, in general, neither as extensive nor as decisive as it is when citizens take on the mantle of juror. In the usual pattern participation is limited to the

[6] As Roberto Unger (1975, 1976) has argued, autonomy is a quite recent legal norm, which developed with the emergence of liberal culture and social institutions. Its viability is linked to the viability of that culture and those institutions.

activities associated with the initiation of the legal process, the mobilization of law enforcement, or the presentation of facts and arguments before a competent tribunal. Participation becomes litigation, complaint, petition, on the one hand, and a highly ritualized form of discourse, generally carried out by paid intermediaries—lawyers—on the other. In this sense, citizen participation in the legal order is typically limited and indirect. (It is on these most typical patterns that this chapter focuses.) Due process not popular sovereignty is the governing ethos.

The rules of due process themselves provide a formula for participation in the legal process (Fuller 1978). Although it does not require citizens to select those who will judge them, due process does require that individuals be heard by those who sit in judgment and be allowed to take part in a contest of reason and argument. "It confers on the affected parties a particular form of participation . . . that of presenting proofs and reasoned arguments for a decision in their favor" (Fuller 1978, p. 45; see also *Mullane* v. *Central Hanover Bank & Trust Company* 1950). While liberal legal theory guarantees citizens a role as plaintiff, complainant, defendant, or respondent in procedures in which their lives, liberties, or property are at stake, the precise contours of such participation—what it requires and when it must be made available—are by no means fixed or clear (Kadish 1957). Recent expansion of the scope of due process to include more of the implementation and enforcement of the law is thus both an acknowledgment by the state of the expanded reach of its powers and a provision for an expanded opportunity to participate in the exercise of those powers (Rubenstein 1976; Currie and Goodman 1975; Miller 1977; Davis 1970).

By treating citizen participation in the legal system as an aspect of due process, liberal theory transforms the claims of participation into arguments for access to justice. In the American legal tradition access to justice and due process of law are inseparable and both are considered to be minimum prerequisites of justice itself (Scanlon 1977; Simon 1978). The right to one's day in court, the right to be heard, the right to take part in procedures through which one's fate is determined all provide the basic substance of due process, which is, in turn, at the heart of our conceptions of fairness and justice (*Boddie* v. *Connecticut* 1971; *Goldberg* v. *Kelly* 1970; see also Abram 1978). Moreover, in liberal legal theory access to justice not only is essential in insuring fairness to individuals but is portrayed as necessary in domesticating the exercise of power. Citizen initiative, complaint, and involvement provide an opportunity to check and oppose the arbitrary use of state power. The image of a public official or agency called to account by a citizen before an independent, impartial court of law occupies a central place in contemporary liberal thought (see, for example, Ackerman 1984 and Ely 1980). As Justice John Marshall Harlan put it,

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of the members enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . . It is to courts . . . that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. . . . [Yet] without due process of law, the state's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we

> hope to maintain an ordered society that is also just. [*Boddie* v. *Connecticut* 1971, pp. 374–75]

Along with the right to vote, the right to participate in the legal process is fundamental to liberal theory. It is both through elections and through appeals to autonomous legal institutions, especially the courts, that citizens preserve all their other rights (Michelman 1974). The general anticipation of accessible legal justice and being able to participate in the legal order transforms, according to that theory, all social relationships and shapes the way individuals experience the meaning of citizenship. "This anticipation matters both on account of its deterrent effects on the behavior of those who must contemplate being voted on or sued and on account of its effects on the potential participant's own understanding of society and his or her place in it" (Michelman 1974, p. 536; see also Dam 1975).

Moreover, by making legal justice accessible, the legal order invites citizens to participate in rituals of affirmation. By accepting the invitation to employ legal processes, citizens in effect affirm their faith in legal norms and their belief in the relevance of those norms to the social order (Grossman and Sarat 1981). When citizens bring their grievances to legal institutions they express a hope, if not a belief, that their status as rights holders will be recognized by law, that their legal rights, once recognized, will be realized in practice and that that realization will, in fact, make a difference in their lives (Scheingold 1974).

Access to justice and citizen participation help to legitimate the legal order by making law appear open, available, and responsive to those with significant grievances and needs. Of course, not all grievances and needs are legally cognizable (Vining 1978), but paradoxically the law, precisely by limiting access, is able to strengthen the perceived boundary between law and politics as well as the perceived subservience of legal decision-makers to the model of rules (see *Harvard Law Review* 1976). The legitimacy of liberal legalism thus depends in important ways on maintaining the precarious balance between justice accessible according to rules and justice available on demand. This is a balance that, in any liberal legal order, moves and changes over time. Law both encourages demands for increased access by recognizing new rights and responds to social conflict by recognizing or restricting rights. The history of citizen participation in the legal order is, as a result, a history not of even and predictable progress but instead a history of reform and resistance.

Access to justice and citizen participation are not, however, uniformly aids to the legitimacy of law. Indeed, they may pose threats to that legitimacy in several ways. First, to the extent that a liberal legal order coexists with democratic, or representative, political institutions, citizen participation in the legal system may appear inadequate by comparison. What has, in other contexts (see Ely 1980; Edelman 1984), been called the "majoritarian dilemma" works in the legal order to push for an expanded role for citizens. Restrictions on access, no matter how well justified in liberal theory, will, in the context of the majoritarian presumption, always appear suspicious and unjustified. Democratic participation establishes a standard and an expectation against which the rather limited forms of participation available in the legal order may appear inadequate. This tension requires apologists for liberal legalism to work hard to maintain the distinction between politics, where participation is acknowledged to be more fully appropriate, and law, in

which impartiality, neutrality, objectivity, and reason provide the essence of decision (see Fuller 1978 and Fiss 1982). Acknowledgment of the limits of impartiality and reason in legal decisions (see Singer 1984) would legitimate and encourage demands for greater and more extensive participation than a liberal legal order could easily accommodate. Thus, participation, demanding as it does greater citizen involvement and responsiveness on the part of legal institutions, threatens the very legitimacy it helps to establish.

The contradictory relationship between participation and legitimacy is seen in yet another way in demands that access to justice be made available more widely and more equally. Arguments about access to justice typically begin with the observation that access is unevenly and unequally distributed throughout the population (see Carlin et al. 1967; Cappelletti and Garth 1970). The recognition of unequal access threatens the legitimacy of liberal legalism by pointing to gaps and inadequacies in the fulfillment of its own self-proclaimed commitment to equal justice under the law. Discovery of systematic inequality in the ability and opportunity to use legal institutions and resources thus undermines our faith in the capacity of law to treat all citizens with dignity and to serve all who merit its service. At the same time, those arguments typically call for reforms in legal rules and practices or in the provision of legal services, which have the effect of suggesting that law itself can overcome this defect and that the problems of those without adequate access can be properly addressed through legal change. Demands for equalizing access to justice ultimately

> communicate a symbolic message . . . that formal justice can be attained within a capitalist legal system and, once attained, will produce substantive justice. They define the problem as a "gap" . . . between the promise of redistributing lawyers' services and the peformance. The proximate goal of closing the gap is thereby substituted for the ultimate goal of justice. In place of questions about the capacity of legal reform to effect fundamental change in political, economic and social institutions, we are directed back to the legal system conceived as an autonomous entity, to be evaluated by the unique standards of formal justice. [Abel 1979c, p. 40]

Here critique turns into affirmation, and threats to legal legitimacy turn into support.

A third element of citizen participation that may challenge the legitimacy of law arises when contact with the legal system has the effect of disillusioning or disappointing citizens. To the extent that citizen participation in the legal system acquaints citizens with the "reality" of the day-to-day operation of the legal system, it may have the effect of diminishing respect for and belief in the idealized visions of law which people may possess (see, for example, Casey 1974; Sarat 1977). On the other hand, where citizens come to see the gap between the law's ideals and practices, legal legitimacy may not be damaged if citizens revise their expectations and develop a more pragmatic approach to law (see Merry 1985) or if they blame failures on officials or incumbents while continuing to credit and endorse the legal order's aspirations. In any case, citizen participation holds the potential for undermining the claims of liberal legalism even as it appears to signify acceptance of them.

There is, of course, more to citizen participation than its impact on legal legitimacy. It has, for both the legal order and the citizens who use it, instrumental effects which, like those associated with legitimacy, are contradictory. At the level of the legal order itself, access to justice and citizen participation play an important role in keeping law in touch

with the social order in which it is embedded. This is not to say that citizen participation is the only vehicle through which legal institutions can learn about their environment. Every legal system relies upon a mix of "reactive" and "proactive" intelligence-gathering mechanisms (Black 1973, p. 128).

The balance between proactive and reactive elements found in a legal order varies over time in response to specific problems (Nonet and Selznick 1970). The more reactive a legal order, the more it depends on citizens to detect the problems, articulate the disputes, or uncover the violations upon which legal policy can be based. The limits of legal policy are effectively set by citizens (Pennock and Chapman 1975). The legal system that relies on reactive methods is unable to act on matters that "citizens are unable to see, fail to notice, or choose to ignore" (Black 1973, p. 130).

Such a legal order can regulate how much it "knows" about social problems by raising or lowering barriers to citizen participation. Citizens may want to bring matters to the attention of legal officials in order to demand redress or explanation, but they may be unable to meet the qualifications or standards the law establishes (Vining 1978). Alternatively, their intentions may be diverted by lawyers who serve as the major channeling and linking devices for citizen participation in the legal order (Parsons 1954). Yet the greatest barriers to participation undoubtedly reside in the articulation and linkage of the prevailing legal ideology and the social relations in which potential legal problems arise (Bumiller 1984). In America today, despite the frequent complaints about excessive legalization (see, for example, Ehrlich 1976), "the reluctance of citizens to mobilize the law is so widespread . . . that it may be appropriate to view legal inaction as the dominant pattern of empirical legal life" (Black 1973, p. 133; see also Miller and Sarat 1980–81).

The greater the reliance on reactive methods of citizen participation, the more the legal system will reflect the biases, prejudices, and moral diversity of the society in which it is embedded. The legal order participates in a pattern of selective enforcement determined by the citizenry. "Each citizen determines for himself what within his private world is the law's business and what is not; each becomes a kind of legislator beneath the formal surface of legal life" (Black 1973, p. 142). Seen in this light, the decision not to participate is in itself a form of participation, an important determinant of the reach, scope, and capacity of legal control (Cobb and Elder 1972).

The refusal of citizens to bring problems to the attention of legal officials may result from the internalization of an ideology of self-blame (Sennett 1980), a predominant cultural preference for private resolution (Sarat and Grossman 1975), doubts about the efficacy of legal intervention, individual cost/benefit calculations (Johnson 1978a), and/or a crisis of legitimacy in which the appropriateness of the entire structure of legal control is questioned (Nisbet 1975; Wolin 1980).[7] In addition, citizens may avoid invoking legal processes because those processes are relatively predictable, so citizens feel that they can surmise what the legal decision would be and act in light of that prediction. The refusal to bring problems to law, no matter what their cause, sets the effective boundaries of law, the extent to which legal institutions have the chance to respond to social problems.

[7] The question of what constitutes such a crisis of legitimacy is recurring and unanswered (J. Freedman 1978). Refusal to take part is itself a form of withdrawal of consent, but what level or threshold must this reach before there is a crisis of legitimacy?

When people turn to law, when they seek to participate in the legal process, their participation has the effect of extending or reinforcing the reach of legal norms. Participation is, in this sense, as necessary in determining the penetration of law as it is in shaping the structure of legal intelligence. Citizen participation in the legal order involves the attempt to apply officially recognized legal norms to regulate social behavior (Lempert 1976, p. 173), to bring those norms to bear in situations where their previous presence was insufficient to protect rights or secure redress for injury, or to use them in preference to informal, private, customary canons of behavior (see Fitzpatrick 1985; Bohannan 1967). Law is used not to displace those canons of behavior but rather to complement them.

In any society, however, the invocation of law is one measure of its social significance and centrality in the total system of normative ordering. This is not to say that the penetration of law and legal norms can be fully understood by measuring the level of citizen participation. Surely that is not the case. The relevance of legal norms is seen in the way those norms are incorporated into the culture and come to order social relations. This incorporation, what some have called "the living law" (Ehrlich 1975) and others "hegemony" (Gramsci 1971), is the true measure of the law's influence. But that influence is unlikely to endure very long without the regular mobilization and application of legal norms to particular cases that citizen participation may engender.

Here again the status of citizen participation in a liberal legal order is contradictory. Just as participation may be said to increase the range of legal intelligence and the penetration of legal norms, so too may it strain the institutional capacity of legal institutions and challenge the authority of existing legal norms. Too much participation or participation that is too intense threatens the ability of a liberal legal order to function effectively (Huntington 1975). Legal institutions do not, or so the argument goes, possess the institutional resources or capacity to deal with a high volume and wide range of citizen demands. Typical is the complaint of former Judge Simon Rifkind (1976, p. 5) concerning the so-called litigation explosion. "The courts," Rikfind argues, "are being asked to solve problems for which they are not institutionally equipped or not as well equipped as other available institutions."

Discussions of the capacity of legal institutions, like courts, assume that they display a set of relatively fixed attributes and modes of decision-making and that these attributes generate inherent limitations on the volume and kinds of issues and problems that such institutions can reasonably be expected to manage effectively. Institutional capacity refers to the fit between what these institutions are and what they do, and the way in which their resources, expertise, and procedures bear on their ability to provide effective service. Some issues and problems cannot be dealt with by liberal legal institutions. A too insistent participation, or justice that is too accessible, by bringing such matters forward threatens to precipitate a crisis of institutional capacity (compare Horowitz 1977 and Cavanagh and Sarat 1980).

Participation, even as it informs and extends the reach of legal norms, restricts the ability of legal institutions to satisfy the demands made upon them. The capacity of the legal order to function effectively depends on an imbalance between rights proclaimed and rights actually claimed (Friedman 1971). Because not all citizens can or will seek to vindicate the full range of rights available to them (Miller and Sarat 1980–81), the legal order can be more generous in its recognition of rights. A legal order in which the full

range of recognized rights is in fact realized by the entire citizenry is inconceivable. The appropriate balance of participation and nonparticipation, and the appropriate intensity of participation, cannot perhaps be determined empirically; nevertheless, the maintenance of such a balance is an important condition to effective legal control. Too much participation, and the institutions of law are overwhelmed; too little, and they are isolated (Keim 1975).

The spirit of participation in a liberal legal order partakes of the spirit of criticism and challenge. Citizen participation frequently requires legal institutions to examine and revise legal rules and to scrutinize the rules and procedures of other parts of the state apparatus. The universal promises and commitments of a polity committed to the rule of law provide a standard against which its performance can be measured. Citizens disempowered in the political process are thus enabled to employ legal institutions as arenas of struggle (Thompson 1975; Santos 1977). That participation may involve a demand that the interests served by liberal legalism live up to their legitimating ideology and an attempt to use that ideology in political struggles against prevailing structures of power. Thus it is now widely recognized that "law," as Samuel Johnson observed (Boswell 1969, p. 498), "supplies the weak with adventitious strength."

These tensions and dilemmas of citizen participation lead in the United States today to the simultaneous, and contradictory, claims that law is at once insufficiently accessible (Nader 1980) and overwhelmed by the demands made upon it (Tribe 1979). These claims have given rise to two different social movements, a movement for "access to justice" (Cappelletti and Garth 1978) and a movement for delegalization, deregulation, and the development of alternatives to legal institutions (Harrington 1982). While there are points at which these movements are linked, they thrive on two different impulses, impulses that pull at our legal order in different ways and pull it in different directions.

Over the past two decades arguments for making legal justice more accessible have covered the entire range of forms of legal participation. Those arguments have been classified into "three waves," each with a different conception of the meaning of access and the proper reach of citizen participation in the legal system (Cappelletti and Garth 1978). The first wave was embodied in the legal-aid approach, which takes for granted that access to justice requires an equal opportunity for all citizens, regardless of socioeconomic status, to obtain the services of a lawyer. Participation was understood to be individual and remedial, as well as rather formal. The ability of particular classes of people to act within the traditional avenues made available by the liberal legal order was put in question. The solution for problems of access was generally believed to be governmentally subsidized legal services (Carlin and Howard 1965; Cappelletti and Gordley 1972; Johnson 1974). If the technical expertise needed to make justice comprehensible and accessible could be more broadly diffused, the problem of unequal access could be overcome.

The second wave of access-to-justice arguments begins with the proposition that individuals as such are not disadvantaged. Rather, the growth of modern, complex, bureaucratic institutions inflicts injustices and problems on whole classes of people without common connection or organizational affiliation. These problems of mass injury raise classic "public goods" and "free rider" problems (see Olson 1971; Trubek 1978a), in which no single individual may have the knowledge, ability, or incentive to act for the entire affected "diffuse interest" (Cappelletti and Garth 1978). Access and participation

are considered to be group-based and more than remedial. The argument calls for "radical" rethinking of traditional legal notions, including concepts of standing, fair procedure, and legal representation itself (Cappelletti et al. 1975). Expanded class action rules (*Harvard Law Review* 1976), altered standing rules that allow private groups to act in courts and before administrative agencies for the public interest (Jaffe 1968), and the growth of public-interest law (Handler et al. 1978; Rabin 1976) promote the growth of "social advocacy" as a model for access and participation.

The first two waves of the movement share a concern with "finding effective legal representation for interests otherwise unrepresented or underrepresented" in the legal process (Cappelletti and Garth 1978, p. 222). In its third wave, the access-to-justice movement comes together with the movement for delegalization to support the development of a range of institutions and procedures outside the formal legal order, the function of which would be to provide access to justice instead of access to *legal* justice. In this wave, the access movement seeks to move beyond and to supplement previous advances in equalizing legal representation and providing avenues for redress of mass injuries by expanding the range of quasi-legal institutions through which justice is provided (Sander 1976; McGillis and Mullen 1977; Galanter 1976; Johnson 1978b; Danzig 1973). The creation of new fora, such as Neighborhood Justice Centers, was an attempt to expand the range of issues and people on which and for whom justice might be provided. It was an attempt to stimulate citizen participation by providing arenas for participation that are both informal and more clearly geared to providing services tailored to the characteristics of disputes and disputants (see Harrington 1984).

New fora in theory provide the vehicles through which citizens and groups can enforce rights. New fora may even affect the motivation of citizens and groups whose problems are possibly amenable to legal redress. Limited available evidence suggests, however, that such expectations may be exaggerated (Buckle and Thomas-Buckle 1981) and that the price of this expansion of fora is to expand the social control capacity of the state without subjecting that capacity to legal procedures, to neutralize and defuse potentially significant political conflict, and to take pressure off legal institutions (Abel 1982; Blomberg 1977). Recently, in fact, efforts have been made to roll back the earlier waves of the access movement (Sarat 1981) while encouraging the proliferation of nonlegal alternatives.

The delegalization movement supports such a development not out of a concern to expand the range of citizen participation but out of a desire to minimize the costs and inefficiencies associated with the kind of formality and procedure demanded by law (Tribe 1979) and in order to preserve and protect the allegedly limited capacity of existing legal institutions (Council on the Role of Courts 1984). Here the overriding concern is with efficiency in the dispute resolution and social control tasks peformed by legal institutions (Abel 1979a). Whereas the access-to-justice movement seeks to resolve the tensions posed by citizen participation in a liberal legal order by furthering democratizing law, the response of the delegalization movement is technocratic and managerial. That movement seeks to use nonlegal alternatives not to supplement but to replace expanded access and to resolve the dilemmas of citizen participation by limiting and diverting it.

The divergent impulses of the access-to-justice and delegalization movements indicate the depth of the dilemma of participation in the American legal system. The contradic-

tions embodied in these movements display in sharp relief the fundamental contradictions of liberal legalism. The tension created by simultaneous pulls toward greater and lesser accessibility provides the frame for understanding the role of citizen participation in the American legal order. This tension has existed throughout United States history (Purcell 1973). How it is resolved at any time—that is, how much and what kind of participation is allowed and occurs—goes far in tracing the development of the legal order, its self-confidence, and its effectiveness.

CITIZEN PARTICIPATION AND THE SOCIOLOGY OF LAW

As we move to consider what is known about participation in the sociology of law, we move away from its contradictory connections to the legal order and toward a concern for its determinants and consequences at the level of individual participants. Sociological research, given its predominantly pluralistic and positivistic orientation (Trubek 1984), has concentrated on explaining why citizens do or do not participate and has given little attention to the problem of tracing the linkages between participation and the status of liberal legalism (for an exception, see Abel 1979b). It has surveyed a wide range of modes of participation and has recognized that participation may arise as the isolated behavior of individuals seeking specific redress for an injury or as the actions of voluntary associations and bureaucratic organizations, as well as by diffuse classes or groups, seeking to give legal form to their shared position. Sociological research demonstrates that participation helps shape the law in action and may help to change the law on the books. Remedies for past offenses become vehicles for the creation of new public norms or reinterpretation of old ones.

Out of all the recognized diversity of access and participation, two distinct patterns emerge in the sociological literature. The first arises from the interested behavior of discrete and identifiable actors who participate in the legal process for themselves and who mobilize the law for remedy, redress, or vindication. This is legal participation as remedy-seeking behavior. The second involves the activities of advocates for diffuse interests—for example, consumers and environmentalists—who involve themselves in adjudication and administration to represent those interests affirmatively as well as defensively. Here participation moves beyond remedy to reform; here participants are as interested in changing rules or practices as they are in winning particular cases.

The separation of remedial and reform-oriented participation is, of course, in actuality never quite that neat. Particular participants may play for the rules in any form of legal participation. Reform goals often begin with the recognition of, and the desire to remedy, a pattern of discrete but related injuries. Moreover, this separation should not be taken as an implicit endorsement of the law/politics distinction. Indeed, quite the opposite is intended. By including reform-oriented participation under the rubric of citizen participation in the legal order and by noting continuities between remedy-seeking and reform-oriented participation I intend to suggest that it is possible to read the literature on citizen participation to show how legal processes are used purposively and instrumentally and how those processes are employed as part of ongoing political struggles (Nonet and Selznick 1978; for specific examples, see Thompson 1975; Kluger 1976; Sarat 1982).

Participation as Remedy-Seeking Behavior

One of the most common images in the sociology of law is the image of the troubled case, of the dispute, disruption, or disorder. In this image citizens come to law to get help in dealing with social problems. Legal institutions are described as performing remedial work when the normal patterns of social cohesion are broken (for an interesting criticism of this perspective, see Engel 1980). They are portrayed as but one of a variety of mechanisms that function to deal with human troubles and disputes (Sarat and Grossman 1975; Engel and Steele 1979). Citizens participate by choosing law either as a complement to or instead of another of those mechanisms for processing or resolving their grievances.

Citizen participation, in this image, results from two kinds of failures. The first is the failure of citizens to avoid, or autonomously manage, social problems. The mobilization of law or the invocation of any third-party process is indeed a request for authoritative intervention. Autonomy is relinquished, at least in some part of one's life; authority is appealed to. The turn to law thus represents an acknowledgment of the limits of individual self-regulation. The second failure is the failure of informal, embedded mechanisms of social control. Here the literature that treats participation as remedy-seeking displays a powerful preference for social order. Conflict, disruption, disorder are treated as a kind of social disease. The job of law is, in this view, to repair the fabric of social relations such that conflict can be avoided or repressed.

The first interest in research on remedy-seeking is with the question why some events are perceived as troubling while others are not, or why some people are more grievance-prone than others. There has been almost no empirical research on these questions (for an exception, see Bumiller 1984). Yet, remedial participation begins with the perception that something needs to be remedied, and it becomes possible when that matter is translated into a form for which the law can provide a remedy (Felstiner, Abel, and Sarat 1980–81).

While virtually every problem can be framed as a legal grievance and therefore can enable the mobilization of law, sociolegal research talks about a wide range of alternative mechanisms that might be used to obtain redress. In so doing, sociologists of law have unwittingly exaggerated the availability and use of private remedies by discussing them in such abstract terms as "mediation" or "arbitration." In any specific case, however, finding mediation or arbitration may be quite difficult (Nader 1979). While the aggregate of private and public alternatives to law may be sizable, such alternatives will rarely be able or willing to deal with more than a narrow range of problems. Furthermore, the movement of problems between and among private remedy agents and between the private and the public realm has yet to be mapped.

No reliable evidence exists on the variety of paths particular disputes might take or on the conditions governing their routing. It is not known how much of the entire range of society's remedial activity takes place in and through legal institutions. However, research on everyday, intrapersonal disputes indicates that most are managed through one or another variety of "self-help" without any explicit form of legal intervention (see Buckle and Thomas-Buckle 1981, 1982; Engel 1984; Baumgartner 1984; Berk et al. 1984). A recent study of a broader array of civil disputes found that approximately 10 percent led to litigation (Miller and Sarat 1980–81). To consider remedial participation

in the legal system as a whole, it is necessary to imagine a measure by which such activity can be indexed against all the events individuals perceive as needing remedy (Lempert 1979). Decision-making behavior must be imagined in which participants decide where and how to carry on activities designed to resolve their problems.

Explaining Remedy-Seeking

Traditionally, when sociologists of law have examined access to justice in the context of remedy-seeking behavior, they have described individuals and groups making choices on how to handle problems among a wide variety of known alternatives, each of which varies in its procedures and, most important, in the associated costs and benefits (Johnson et al. 1978; Carlin et al. 1967; Sarat 1976). Some have even attempted to describe access to justice as analogous to consumption decisions (Jacob 1969).

It has recently been suggested that remedy-seeking can be better understood as investment behavior, in which individuals invest time and money in various activities designed to facilitate remedy and redress (Trubek 1979; Ordover 1978). In this view, the activities or remedial participation are carried out under conditions of imperfect information and uncertainty. Participants, unaware of all the possible alternatives open to them, cannot regularly and reliably anticipate the outcome of participation in one or another activity carried out in any dispute-processing institution (Komesar 1979). The investment approach sees costs "created" in and through the process of participation. Time and money are expended within precise contours determined by the participants. The monetary costs of litigation, for example, may be allocated among lawyers' fees and court costs; more appropriately, they may be thought of as the result of specific activities, such as seeking information through discovery. Thus the time and money invested in participation represent a dependent variable that requires explanation, rather than an independent variable that can itself be used to explain patterns of participation.[8]

The investment analogy suggests that citizens participate in legal processes to maximize the likelihood of obtaining maximum redress (for a similar argument, see Riker and Ordeshook 1968; Landes and Posner 1979). They calculate an "expected value" for each decision they must make in structuring their participation. That calculus is a function of the participant's perception of the best outcome of his or her activities, of the probability of obtaining that outcome, and of the time and money required to do so. Since expected values are calculated under conditions of imperfect information, participants may discount their calculations in accordance with their faith in the reliability, accuracy, and completeness of the information at their disposal (Shapiro 1969).

[8]This is not to suggest that monetary costs may not act as a barrier to participation. Such costs can and do limit access. Since so many forms of participation in the legal process require the assistance of trained legal counsel, the monetary costs of participation are particularly important. While few systematic descriptive data are available on the costs of various types of participation, some suggest that legal fees for handling even such relatively simple matters as uncontested divorces may be beyond the means of middle-class citizens (Johnson 1978b, pp. 921–22). Obviously, the costs of using a lawyer's services vary greatly (Trubek et al. 1983; Kritzer et al. 1984). What matters is that particular kinds of people are effectively barred from participation simply because they cannot afford its economic costs. Government-subsidized legal services and contingent-fee arrangements cannot entirely eliminate this barrier. Furthermore, the cost means that "litigation by persons of any income level will be effectively foreclosed when the stakes are rather modest. In many cases, a disputant would incur more expenses in participating in the lawsuit than he stands to gain or save from winning. Moreover, the uncertainty inherent in most litigation means that the stakes must exceed the costs by a substantial margin before it is rational to file or defend a claim in courts" (Johnson 1978b, p. 9).

An understanding of remedy-seeking from this rational choice perspective requires that the expected-value calculus for any participatory activity must be explained. Four basic factors, in this view, affect remedy-seeking participation: they are party capability, participant goals, the perceived characteristics of alternative means of obtaining redress, and the capability of intermediaries or agents such as lawyers. All these factors presume that the opportunity to participate in the full range of desirable legal and private processes is open, that is, that the rules under which these processes operate permit the kind of participation envisioned in any particular case. This simplifying assumption is generally made in empirical studies of remedy-seeking. Yet, even within the confines of such a simplification, it is striking how little is known about each of the factors.[9]

Party Capability The phrase "party capability" was first made popular in the sociology of law by Marc Galanter (1974), who argued that participation in legal processes, litigation in particular, can be understood in terms of the differential abilities of litigants to employ legal institutions. The participation of any party is a function of that party's ability and willingness to participate. "Party capability" thus refers to individual resources and dispositions. If remedy-seeking behavior in legal institutions is unevenly distributed throughout the population, it is because party capability is itself unevenly distributed (see Carlin et al. 1967).

The resources necessary for remedy-seeking behavior are time, money, and skill. Different forms of participation may require each of the three to a different degree and in a different mix. Little attention has been devoted to the first of the resources, since conceptualizing and measuring time is very difficult and the time requirements for different forms of participation vary greatly. Yet, it is widely recognized that time affects participation.

Many studies of small-claims courts, for example, suggest that individuals' failure to bring or prosecute cases is in no small way a function of the "opportunity costs" associated with these courts (Steadman and Rosenstein 1973; Moulton 1969; Yngvesson and Hennessey 1975). Furthermore, the difficulties encountered by such newly developed informal tribunals as Neighborhood Justice Centers in attracting participants to some extent may be attributed to the time-intense nature of the proceedings they conduct (Institute for Social Analysis 1979). Paradoxically, more informal procedures, such as mediation, may be less attractive and accessible to citizens than their advocates believe because they require participants to engage in an extended sequence of discussions and bargaining (Felstiner and Williams 1979; Sarat 1984). The reduction of economic costs and even the minimization of delay may not compensate for the relatively intense and direct involvement.

The most intense use of time is required in those forms of participation in the legal

[9]The limits of empirical inquiry become all the more striking if participation in legal processes is seen as both dynamic and interactive. Few, if any, empirical studies have traced the development and continuity of remedy-seeking behavior or have systematically examined the way remedy-seeking begins and changes (for useful theoretical work, see Vidmar 1979; Felstiner, Abel, and Sarat 1980–81; Mather and Yngvesson 1980–81). Finally, little or no empirical work in this area attempts to understand participation in the context of the interactions that occur between and among the various parties engaged in remedy-seeking. These facts should caution against too heavy a reliance on available empirical work and suggest the outlines of one avenue of future research on citizen participation and remedy-seeking in and through the legal process (Trubek 1979).

system that are "deep." The clearest example is, of course, jury duty. The juror must sacrifice substantial amounts of time, most of which will be consumed in waiting or participating in the rituals through which juries are actually empaneled (Ashby 1978; Richert 1977; Vanderzell 1966).

The most common explanations for variations in remedy-seeking focus not on time investment but rather on some measurement of position in systems of social stratification. Socioeconomic status provides a summary concept that includes both money and skill. The money, or income dimension, is rather obvious. Skill refers to knowledge, experience, or facility in the kinds of activities that compose remedy-seeking. Indicators of skill include education, information or knowledge about law and the legal system, and prior experience with it. When monetary resources and skill, considered as expertise and experience, are considered, the most significant source of variation in remedy-seeking is, in the view of some, not socioeconomic status differences between or among individuals but the difference between individuals, typically "one shotters," and organizations, usually "repeat players" (Galanter 1974).

Some data support the hypothesis that organizations are more frequent users of courts than are individuals; "figures from a variety of courts suggest that plaintiffs are predominantly business or government units while defendants are overwhelmingly individuals" (Galanter 1975, p. 348). Such organizations command the resources to participate in courts and the expertise and experience to do so effectively. They are able to exploit those abilities to the fullest extent when they are opposed by single individuals. According to research by Wanner (1975), "business and governmental plaintiffs win more often and more quickly than do individual plaintiffs. Not only are they more successful overall . . . but they are more successful in almost every one of the heavily litigated categories of cases" (cited by Galanter 1975, p. 357). Wanner's research (1974) further documents the pattern of litigation in which organizations are more frequent users of courts. In the three courts he studied he found business and governmental units to be plaintiffs in almost 60 percent of the cases. While other research in other courts is equally supportive of Galanter's hypothesis (Pagter et al. 1964; Dolbeare 1967; Hollingsworth et al. 1973; Kagan et al. 1977), recent studies of state and federal trial courts of general jurisdiction show considerable variation in the pattern and configuration of participation (Grossman et al. 1982; Trubek et al. 1983; see also Vidmar 1984).

There is little doubt that organizations as participants are advantaged by certain institutional factors. Because they are often "repeat players" (Galanter 1974, p. 97), they are able, for example, to develop expertise as well as informal relations with decision-makers, and to structure rules over a series of contacts with legal institutions. Thus when participation involves a contest between such organizations and individuals, it raises questions about equal justice of a kind not ordinarily recognized as within the scope of equal protection.

Nevertheless, there are important problems with this argument. First, the concept of organization is itself too diffuse and inclusive to have much analytic utility. The category of organizations includes everything from the neighborhood grocery store and the Boy Scouts of America to General Motors and the United States Department of Justice. The claim that organizations are more capable remedy-seekers hides considerable variation within that category even while it suggests that the legal system is itself structured in such a way as to respond to bureaucratic rationality and economies of scale.

It is not known whether the higher levels of organizational remedy-seeking indicated by litigation rates hold across all fora or in other legal processes. Indeed, it may be that those levels of participation are a simple function of the frequency with which organizations are involved in disputes. There is some evidence that particular types of organizations will go to considerable effort to avoid the escalation of problems into the kinds of disputes that require the mobilization of law (Ross and Littlefield 1978). Given the high costs of most legal processes, organizations, especially commercial enterprises, have taken steps to encourage the development of extrajudicial, nonlegal techniques for dealing with disputes that do arise (Bonn 1972; Stern 1968). Little is known about the behavior of different kinds of organizations when they encounter potential legal problems. This fact highlights the need to examine the behavior of organizations in terms of their relative involvement with legal problems and to disaggregate the category of organizations to provide for more appropriate comparative units.

In the case of individuals, income and skill are consistently associated with higher levels of citizen participation in remedy-seeking behavior. Whether the particular form of participation is litigation (Hunting and Neuwirth 1962; Rockwell 1968), recourse to lawyers (Curran 1977; Griffiths 1977; Mayhew 1975; Sykes 1969), calling the police (Jacob 1971; Skogan 1976; Dodge et al. 1976), or registering complaints with administrative agencies (Crowe 1978; Steele 1975; Nader 1979; Best and Andreasen 1977; Lehnen 1975; Jowell 1975), participation is more frequent among those with higher incomes, higher education, and more extensive knowledge of the law (but see Miller and Sarat 1980–81).

Party capability is an important indicator of the fit between legal processes and systems of social stratification. The institutions of liberal legality are organized and established to regulate and serve private property—or, more accurately, wealth in the form of private property. Ownership of, or connection to, property facilitates access more readily than mere disposable income. Property provides the occasion for contact with the legal system, which in turn contributes to the development of skill and expertise in remedy-seeking (Mayhew and Reiss 1969). With the exception of domestic relations, individuals are most likely to have dealings with lawyers in making arrangements for the acquisition or transfer of real property (Curran 1977).

> [T]he association between income and legal contacts is in part an organizational effect. The legal profession is organized to service business and property interests. The social organization of business and property is highly legalized. Out of this convergence emerges a pattern of citizen contact with attorneys that is heavily oriented to property. [Mayhew and Reiss 1969, p. 313; see also Silberman 1979]

Research on participation has, to this point, paid too little attention to such relationships. The embeddedness of patterns of participation in the fit between legality and particular, dominant social groups may be important, perhaps more important than any other single factor, in explaining why and how legal institutions are used in society (Bumiller 1984; Abel 1979b, 1982).

Capability to participate also includes an ideological or normative dimension, which may operate to inhibit participation for those otherwise seemingly capable of participating. Whether and how people participate and use legal processes results, in large measure, from the way law is represented in and through cultural systems in which citizens are

embedded. By recognizing the fit between legal organization and the interests of particular groups or classes we can begin to understand why subordinate social groups display an ideology of avoidance or pragmatic and skeptical involvement (Doo 1973; Merry 1979, 1985; Bumiller 1984). Moreover, despite the widespread perception of litigiousness (Barton 1975; for a contrary view, see Galanter 1983), there are significant cultural and ideological barriers built into liberalism and liberal legalism that act to discourage remedy-seeking participation (see Katz 1973).

Bringing problems to law, no matter what its outcome, may create greater problems than would be the case if private troubles were kept private. To enter a legal claim for redress involves a social declaration of trouble, a declaration that, in many ways, results in considerable social disorganization and disruption. One need only consider the situation of the employee who begins to perceive herself to be the victim of gender discrimination. For her the declaration of trouble, the making of a claim, is trouble itself.

Even in less complex situations, seeking remedies through law entails numerous risks, from breaching public presumptions of order to indicating and acknowledging in a public way that one's life is troubled, risks that may deter potential claims. Notions of civility encourage people to ignore trouble. Given these notions, alleging trouble almost always brings some trouble on the self, making it uncomfortable work to be avoided (see Katz 1973).

In addition to the risks associated with breaching public presumptions of civility and decorum, one who alleges that another has caused trouble may confront problems from admitting his or her own involvement. To publicly acknowledge that there is trouble in one's life, as participation in legal institutions requires, is to run the risk of being stigmatized, gossiped about, or ostracized, because claimants may be held causally or morally responsible for not having done something to prevent or avoid the trouble in the first place. Blaming the victim is, indeed, a common cultural preoccupation.

A known trouble may be less troubling than what results when the lid is off. The revelation of additional grievances, of counterclaims, or of long-suffering that may come to light in the wake of socially acknowledged trouble gives but one indication of the value of the effort to endure without complaint (see Katz 1973; Bumiller 1984). While the social declaration of trouble always has the potential to restore order and harmony, such declarations almost inevitably open the floodgates for recrimination and retribution. The burden of raising a claim and invoking the law is the fear of opening a Pandora's box of retribution.

At the level of explaining individual participation these cultural and ideological barriers result in a set of attitudes, norms, and dispositions referred to as "legal competence" (Carlin et al. 1967). To engage in remedy-seeking through legal processes, an individual must

> see the law as a resource for developing, furthering and protecting his interests. This is partly a matter of knowledge. The competent subject will be aware of the relation between the realization of his interests and the machinery of law-making and administration. He will know how to use this machinery and when to use it. Moreover, he will see assertion of his interests through legal channels as desirable and appropriate. . . . The legally competent person has a sense of himself as a possessor of rights and he sees the legal system as a resource for vindication of those rights. He knows when and how to seek vindication. [Carlin et al. 1967, pp. 62–63]

This description specifies both "rights consciousness" and a belief that it is appropriate and effective to assert rights through legal processes as the crucial ideological requisites to citizen participation.

Participant Goals A second major factor emphasized in studies of citizen participation involves the goals of the participants. The literature suggests that individuals consider the nature of their problems, their precise needs, and the fit between problem and available procedures. Where legal institutions seem inappropriate to their specific problem, citizens seek out private alternatives or simply endure the problem (Merry 1979; Engel 1983).

The range of participant goals identified as relevant covers both monetary and nonmonetary, direct and indirect objectives (Trubek 1979; Sarat and Grossman 1975). Direct goals pertain to the specific injury or problem that engenders remedy-seeking. Indirect goals pertain to the parties themselves or to their social situation rather than to the injury or problem. Thus individuals mobilize the law to try to harass or intimidate (Merry 1979; Sarat 1976), to obtain revenge, or simply to be spiteful (Leff 1970). They invoke legal processes to try to structure relations with other parties or establish conditions favorable to their long-term interests (Ross 1970). Alternatively, participation in legal processes is avoided when citizens are involved in long-term or multiplex relationships which they desire to maintain. Adversarial processes typically focus narrowly on the specific instance of trouble they are called upon to resolve; they treat relationships as if they had no context beyond the problem itself. They escalate trouble in ongoing relationships by dealing with only one aspect of the social interaction from which it arises.

Relatively little empirical research has assessed the structure of participant goals and their impact on access to justice. What research there is has focused almost exclusively on the maintenance of relationships as a goal. Studies of litigation (Merry 1979; Sarat 1976) as well as studies of police–citizen contact (Black 1971; Gottfredson and Hindelang 1979) support the hypothesis that those with continuing relations will, in general, seek to avoid the legal process to remedy their problems. While a substantial proportion of the cases that make their way into lower criminal courts arise out of ongoing relations (Vera Institute of Justice 1977), given a choice of alternatives, those seeking to maintain relationships seem inclined to avoid remedy-seeking through legal processes (for contrary evidence from another culture, see Kidder 1974; Morrison 1974). Individuals who have known each other for a long time prior to their disputes and who anticipate continuing their relationship are much more likely to seek remedies through informal procedures than are those without such a past or anticipated future. "Of the cases involving parties who had known each other a long time prior to the dispute and who expected to continue their relationship, approximately 7 percent were decided by adjudication as opposed to 58.8 percent of those in which the parties had no prior or anticipated future relationship" (Sarat 1976, p. 358). While long, involved, ongoing relationships cause difficulties for effective resolution of grievances, it is the future of relationships that most strongly influences participant behavior.

> A relationship with a long past has little binding power if the participants expect that they will never see each other again. Conversely, even a relationship of relatively short duration may have considerable force if the participants realize that they will have to deal with one another for a long period of time in the

> future. A limited future changes the calculation of costs and gains, making confrontation cheaper. [Merry 1979, p. 920]

The impact of relational goals on remedy-seeking has also been talked about in terms of the nature of the transactions in which problems emerge (Williamson 1979). Two major types, routine and idiosyncratic, have been identified. Routine transactions involve goods or values readily available in the community. Should the transactions between two parties cease, neither would have great difficulty replacing the goods or the value that would be lost. In a market context, there are enough sellers and buyers to match any buyer with any seller without creating much difficulty or loss. In such a situation, continuing relationships have little value and are unlikely to exert much influence on remedy-seeking behavior (Williamson 1979).

Idiosyncratic transactions involve goods or values that are specialized or rare—or, to use market terms, for which there are relatively few sellers and buyers. The rarity of the good or value involved in a relationship imposes a high cost for substituting a comparable good or value. When relationships involve such goods or values, remedy-seeking behavior will be structured to minimize the chance of disruption (Williamson et al. 1975). Such reconceptualization of party relationships avoids the simplifying assumptions that the past or future governs participation. Instead, it focuses attention on the specifics of situations out of which such participation and remedy-seeking arise.

Even if participant goals are thus reconceptualized, little is known about the relative importance of maintaining a relationship as against other goals. One study compared the explanatory power of relational history with that of participant dispositions, prior remedy-seeking behavior, and the presence of lawyers in explaining remedy-seeking behavior in a small claims context, and found that relational history was most useful in explaining such behavior (Sarat 1976). Other studies of participation in other contexts (Gottfredson and Hindelang 1979) argue that the goal of preserving relationships is a less important factor. Calling the police, for example, is more often a function of the seriousness of the victimization individuals experience than of their relation with the offender (see also Bercal 1970).

In the end, here as elsewhere, the nature of the problem seems to structure remedy-seeking (Gottfredson and Hindelang 1979, p. 16; Silbey and Merry 1984). Remedy-seeking behavior thus appears influenced by the particular characteristics of individual problems as much as by the general goals or identity of participants (Curran 1977; Marks 1971). Studies of legal participation and access to justice, therefore, may have to become more problem-specific than they have been in the past. Remedy-seeking is structured by the availability of remedies and the forms of procedures tailored to particular problems. Generalization is hindered because remedy-seeking is reactive; what initiates such activity is as important as the characteristics of those engaging in it.

Perceived Characteristics of Legal Processes Since remedies can be pursued in many ways, individuals assess the expected value of participation against the characteristics of the institutions and procedures open to them. Explanations of patterns of participation must take account of participants' perceptions. Sociologists of law have catalogued a wide range of dimensions along which it is possible to characterize dispute-processing institutions (Nader and Todd 1978; Abel 1973; Felstiner 1974). There has, however,

been little or no empirical assessment of the attractiveness of particular elements, either generally or in the context of specific problems.

Several elements may be important in structuring remedy-seeking. First is time—both the participant's time and the length of time from the initiation of a process to its termination. While considerable attention has been devoted to the problem of "delay" in explaining the operation of courts (Zeisel et al. 1959; Levin 1975; Church 1978), little comparative study has assessed case-processing time among legal institutions (for an exception, see Institute for Social Analysis 1979; see also Trubek et al. 1984). Almost no empirical attention has been given to the question of how delay affects the behavior of individuals as participants in the legal system. While it has been generally assumed that litigants, for example, want rapid determination of their claims, such a desire is far from universal (Sarat 1978). Individuals who use legal processes to harass or intimidate others involved in disputes have no incentive to desire rapid disposition of their claims. Moreover, those seeking to advance or promote private negotiations may find delay positively desirable (Mnookin and Kornhauser 1979; Eisenberg 1976), to say nothing about the incentive of defendants who choose to prolong or exploit delay in legal processes.

Other important institutional characteristics of the legal process are the degree of "expertise" in the particular matters of concern for potential participants and the ability to produce desired outcomes. Perceptions of the inability of the police, for example, to solve many common types of crime is an important explanation for the rarity with which some types of victimization are reported (Ennis 1967). The visibility or publicity of remedial processes also influences rates of participation for particular classes of people with particular kinds of problems (Sarat 1976). The extent to which such processes are adversarial is also significant, especially concerning problems in ongoing relationships. A final determinant is the extent to which different processes lead to decisions on the basis of preexisting norms and to precedents that can be used to structure future transactions. The fit between the characteristics of institutions and the goals of participants governs the form of remedy-seeking behavior in particular situations (Zemans 1983). The precise relationship depends, however, on the information individuals have or can obtain. Limited information may lead to decisions that are inappropriate to particular goals. Most often, the advice of lawyers both structures the way in which institutional characteristics are perceived and shapes the modes of citizen participation (Lempert 1976; Macaulay 1979; Sarat and Felstiner 1986).

Lawyers as Intermediaries The discussion thus far has assumed that participation in remedy-seeking involves individual citizens interacting with each other and acting directly in the legal system. But, in much remedy-seeking behavior, one, or both, of the parties has a lawyer and acts through the lawyer as an intermediary and agent. Participation is indirect, and the lawyer's skill and advice determine how citizens participate and how effective that participation will be. The lawyer plays an important role in structuring the information upon which decisions about remedy-seeking are based. His or her estimates become the basis for the expected value calculus that forms the core of those decisions (Rosenthal 1974; Macaulay 1979). Whether legal services actually improve the quality of access and participation cannot, of course, be known. But, given current procedures, legal representation is thought to be a minimum prerequisite for access to justice.

The first wave of the movement for access began, as I noted above, with the assumption that legal representation was unavailable to poor people, that is, that its maldistribution reinforced the social effects of poverty (Cahn and Cahn 1964). It was assumed that the poor suffered from a variety of needs and problems for which law could provide effective remedies (Carlin et al. 1967). Empirical research has been undertaken to ascertain the extent of these needs and problems and the extent to which poor people were able to obtain legal services. This tradition of research dates back to the mid-1930s when Charles Clark and Emma Corstvet undertook a small survey in New Haven, Connecticut. They presented respondents with a series of thirty-eight problems and asked whether each had been encountered in the previous year and, if so, whether the respondent had consulted a lawyer. About one half of those interviewed had encountered one or another of the problems, but over three-quarters of these were handled without lawyers (Clark and Corstvet 1938, p. 1276). The authors concluded that a substantial amount of "undone legal business" was found among people of low or moderate income. Other surveys document the limited role played by lawyers in dealing with the problems of such people (Missouri Bar 1963; Rockwell 1968; Levine and Preston 1970; Curran and Clarke 1970).

> Notwithstanding what appears to be a highly active and varied problem-solving style, when it comes to relating problems and problem solution to the legal process the view of the legal process held by the poor is narrow and rigid. What the poor call legal problems are only those problems . . . for which remedies have been previously demanded and secured. The poor do not view the law as relating to their unique life problems. . . . This view necessarily means that the poor understate their legal needs and, further, that they under-utilize the legal system. The consequences have been brought on by the past failure of the legal system to allocate sufficient legal services to the poor and by the past pattern of allocating all available services only to those needs articulated by the poor. [Marks 1971, pp. 10–11]

In all, approximately two-thirds of the adult population has, at one time or another, had contact with lawyers (Curran 1977; see also Mayhew and Reiss 1969; Stolz 1968). While the precise meaning of "contact" is uncertain, it is clear that recourse to a lawyer is usually concentrated on a rather narrow range of matters involving the acquisition or transfer of property or problems arising in domestic relations. Indeed, if the data are correct, with the exception of buying and selling property, middle-income individuals are not much more likely to seek legal assistance than are people with lower incomes (Mayhew and Reiss 1969). In part this situation reflects the fact that, on the whole, people do not encounter most of the types of problems lawyers are equipped to handle (Miller and Sarat 1980–81). Outside of property and family problems, consumer problems—many of which are of little monetary consequence—appear to be the most common problems encountered in the population (Curran 1977, p. 35).

Given the apparent reluctance or inability of people to bring most problems to lawyers, it is not to be expected that remedy-seeking behavior will frequently lead individuals into deeper kinds of legal participation. One of the things that prevent or inhibit movement toward lawyers and the legal system is the absence of a structure of intermediaries and referral sources that might direct them there (Ladinsky 1976; Frank 1976; Lochner 1975). Legal services are provided through an "imperfect market," in which information

is highly skewed and not easily available (Ladinsky 1976). Sources of information tend either to be informal and unstructured or to have difficulty penetrating the social networks that govern decisions about remedy-seeking. More and better information about the operation of those social networks and the way they work in different cultural settings and for different types of potential legal problems is needed (see Ladinsky and Susmilch 1983).

From Clark and Corstvet to Curran, the measurement of the use of legal services began with the idea that there are unmet legal needs for which such services could or should be provided. Despite some empirical evidence of a rising demand for legal services throughout the population (Avichai 1978) and the widespread sense that law is ever more implicated in the lives of citizens, the legal profession seems anxious to increase its share of the social business that, given the range of legal remedies, might be brought to it. Surveys of legal needs, which are little more than sophisticated forms of market research, have recently been subjected to important criticism, concerning both the validity of the data they generate (Marks 1976) and the political biases their approach reveals (Griffiths 1977).

Measuring the breadth of legal needs and their translation into demands for services is indeed quite complex. Empirically, it is difficult to know what to count. If access to justice is seen to require the use of a lawyer, for example, there is the question of what using a lawyer means. And even if the concept of access to justice can be operationalized with respect to specific legal institutions, it is still problematic to ask individuals about their participation. Are questions directed to all instances of participation, or is the focus problem-specific? Even if most problems can be overcome, what would remain is the comparison of individuals in their private lives and as members of organizations in a business or professional capacity. It is fair to say that the sociology of law has been less successful than one might expect in accounting for citizen participation, at least in part because of an inability to overcome these substantial problems of measurement (for suggested new techniques, see Felstiner, Abel, and Sarat 1980–81).

Measurement problems are compounded when "need" is examined against some preconceived, static list of problems defined as eligible for legal remedies. Such an approach "has elements of a legal intelligence test when taken to its logical conclusion. . . . It carries with it the possibility that those who did not take problems to lawyers will not admit to having had the problem" (Marks 1976, p. 195). The list of static problems fails to incorporate the dynamic elements of legal participation, assuming that legal needs exist and can be identified when, in fact, much of the work of law and the thrust of remedy-seeking behavior is creative (Mather and Yngvesson 1980–81). Interpretations previously ignored or remedies previously unused become themselves the subject of participation and debate. Thus, "the static list approach is likely to miss problems that require creative legal services or the application of emerging legal doctrines" (Lempert 1976, p. 177). The legal-needs approach implies or assumes that legal participation ought to be a normal response to the occurrence of problems for which law provides a remedy. Yet, the legal system could not meet all the demands that would be put upon it if such were indeed the case, nor would such a society be worth living in.

The substitution of other concepts or units for legal need, although obviously desirable in studying the use of lawyers, may prove equally problematic. Are grievances or disputes the appropriate concept against which to measure legal participation? Is there anything

comparable to the idea of criminal victimization that can be used in exploring civil justice? In the area of crime, the correspondence between what the law recognizes as criminal behavior and what people, in fact, experience as criminal victimization is much closer. Furthermore, the dynamic element of law creation, which is very much part of remedy-seeking behavior in civil matters, is largely absent on the criminal side. Problems analogous to those in studies of legal need can themselves be found in research on criminal victimization (Sparks et al. 1977), but the essential difficulties of developing a measure against which citizen participation can be indexed seem particularly acute in studies of "lawyer-seeking" behavior (Ladinsky 1976).

Once individuals engage lawyers, the extent and nature of their active involvement and participation are highly varied. Although little empirical work on the extent of client participation has been carried out (for exceptions, see Cain 1979; Rosenthal 1974; Hosticka 1979), two general tendencies have been noted. In the first, participation stops in the lawyer's office. Clients trust the independent professional judgment of their lawyers, whom they engage precisely because they are unable, on their own, to deal with their problems or to obtain redress from legal institutions. The price of obtaining effective access to justice is clients' abandonment of their directive role. Lawyers assume, generally uncritically, the interests of the client or substitute their own; thus, "the passive client's delegation of responsibility and control detaches him from the problem-solving process. . . . The competent professional is able to see what is in the best interests of his client—and to make those interests his own" (Rosenthal 1974, pp. 15, 22).

In contrast to the traditional model stands the "participatory" model. Within this framework the lawyer never takes the problem away from the client but encourages the client to be active and informed, cautioning against delegating decision-making and insisting that the client retain rights of consultation and final authority. Law and legal problems are understood to be flexible, open, and defined by the individuals experiencing them. The lawyer is consultant, general and technical adviser, and, within the limits of professional ethics, implementer of the client's wishes. The participatory model assumes no conflict between effective access to justice and client participation (Appel and Van Atta 1969; Brill 1973; Cain 1979).

Under the traditional model, citizen participation is vicarious at best. Under the participatory model, an effort is made to ensure that the client's legal citizenship is realized in all its dimensions. While Rosenthal (1974) developed his models in the context of traditional, individualistic, remedial participation, they seem no less applicable in determining who is, in fact, participating in the legal process when what is at stake is reform rather than remedy (see Burke 1979). The potential for conflict between lawyer and client is as great, if not greater, in such cases. Clients may desire individualized remedies, and lawyers may have a personal or ideological interest in broad-based reform. The ability of clients to participate meaningfully may be less apparent, since they frequently come from disadvantaged backgrounds. The ability of the client to control the lawyer is removed when legal services are paid for through government subsidy or the contributions of private groups. But the issue remains the same: who participates—lawyer or client—who gains access to justice, and at what price.

Moreover, once individuals engage lawyers, the advice and information they obtain are critical in determining if or how they will participate in legal processes. Relatively few empirical studies of lawyer–client interaction describe or analyze lawyers' performance in

this shaping function (Rosenthal 1974; Macaulay 1979; Cain 1979). The ethics of legal practice make such research extremely difficult (see Danet et al. 1981; but see Sarat and Felstiner 1986). What is known indicates that the lawyer is very much in charge (Rosenthal 1974; Hunting and Neuwirth 1962) in even the most straightforward and traditional legal matters. The more complex the problem, the more the client is passive (Burke 1979; Laumann and Heinz 1977). In fact, lawyers tend to become the effective participant in matters involving any representational activity. Presumably, variation in client participation in and control over lawyers' decision-making generally follows the outlines of variation for other kinds of participation, except that the importance of such personality factors as self-confidence and assertiveness is increased. But these are, at best, untested hypotheses.

The uncontrolled lawyer is able to substitute his own interest and his desire to maintain his professional reputation, or some refined perception of the client's interest for the client's clearly expressed interest. The uncontrolled lawyer may develop his own sense of the case, redirecting remedy-seeking behavior to suit it. Such is clearly the case with lawyers who handle product-quality complaints (Macaulay 1979). Most often, they act to "cool out" individuals who come to them seeking an aggressive confrontation with the seller of the defective goods. The lawyer channels remedy-seeking away from legal processes and often tries to convince the client that no remedy is either possible or justifiable. Indeed, clients who remain active participants often pursue different strategies, with better results (Rosenthal 1974). Three-quarters of such clients receive what they call satisfactory outcomes from their remedy-seeking behavior in personal injury cases, as compared with only 40 percent of those who effectively turn their claims over to an attorney. Citizen participation through lawyers defines legal participation. Its quality and results depend upon the interaction of lawyers and clients and the skills and dispositions each brings to that interaction.

Each of the factors discussed above plays an important role in structuring remedy-seeking behavior. Each captures part of the process through which individuals perceive and respond to needs, problems, grievances, and disputes. Each helps to explain when and why legal institutions are employed. Yet, any analytic scheme at least partly falsifies the social aspects as well as the personal dynamics controlling choices and decisions. Empirical studies of remedy-seeking are relatively rare, and the state of the art is relatively primitive. Moreover, there is a tendency in such empirical work to isolate and treat separately characteristics of individuals, of problems, and of the operation of the legal institutions. Research on participation and remedy-seeking behavior needs both greater theoretical sophistication and integration of individual, social, and institutional perspectives.

Effects of Remedial Participation

Citizens go to law not merely to take part in a ritual or to identify themselves with particular symbols of authority but also to achieve particular outcomes. At the most basic level, they participate in legal processes to obtain some benefit for themselves and for others or to avoid some undesirable event or occurrence in their lives. In many instances, however, it is not possible to assess the outcome of any single act of participation for the person involved. Complex chains of causality, as well as the passage of time, blur the

relationship of participation and decision. There are, nevertheless, instances in which that relation is fairly direct. Most of these occur when citizens seek to use the legal process to obtain specific redress or vindicate a particular claim. Participation can then be assessed in terms of the success of the participants in accomplishing their goals (Kritzer et al. 1985).

Discussion can also focus on the effect of participation on citizens' attitudes toward law and the legal system. Do those who take part feel more or less respect for and confidence in the legal process? Do they have higher or lower opinions of legal efficacy? Are they more or less likely to equate law and justice (Walker et al. 1972; Richardson et al. 1972; Mahoney et al. 1978; Sarat 1977; Sarat and Felstiner 1985)? To the uninitiated citizen, legal processes may seem distant and formal. When, and if, that distance and that formality are penetrated, citizens may come to appreciate the real genius of the law or may, on the other hand, become cynical about its procedures (Casey 1974). Does participation stimulate a desire to participate? Obviously, there are those who become "repeat players" by necessity if not choice; but there are occasions on which access to justice and participation in the legal process may be but one available alternative. In such situations, the real impact of participation becomes visible.

There is at least one other level on which to examine the effect of participation—private citizenship. As Fuller (1971a, 1978) suggests, the legal order seeks, at least in theory, to establish reason and judgment as the optimum method for carrying out the affairs of society.[10] In the ideology of liberal legalism law seeks to establish that men and women can transcend the world of interests simply understood; that they can govern their affairs in terms of articulated and articulable principles, norms, and rules; and that they can dispassionately judge the affairs of others. Citizenship thus is said to offer a moral opportunity as well as a moral duty (Tussman 1970). Tocqueville (1863), for example, spoke about that opportunity in the context of citizen participation on civil juries. While the participation about which he spoke is anomalous, his argument is that jury service has a transforming influence on the people involved and an uplifting impact on the community.

> The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed the love of independence becomes a merely destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he himself would be judged . . . the jury teaches every man not to recoil before the responsibility of his own actions and impresses upon him with that . . . confidence without which no political virtue can exist. It invests each citizen with a kind of majesty; it makes them all feel the duties which they are bound to discharge toward society. . . . By obliging men to turn their attention to other affairs than their own it rubs off that private selfishness which is the rust of society. [p. 364]

In addition, the threat of seeking access to legal justice is explicit or implicit in almost all private bargaining and negotiation, inevitably producing a new incentive and provid-

[10] This model is, of course, rarely upheld by the law itself. Studies of lower criminal courts, for example, hardly portray them as places of reason and dispassionate judgment (Feeley 1979).

ing private interaction with a normative cast (Eisenberg 1976). In its social context, access rarely takes the form of access to legal justice (Miller and Sarat 1980–81). Nevertheless, that potential serves to set the style of access to other kinds of justice. Law establishes a model for society; the due process of law becomes an important force in the due process of private life (Selznick 1969; Kirp 1976). A last resort when private justice proves unsatisfactory, access to legal justice is a vehicle for establishing the context in which private justice is carried out (Mnookin and Kornhauser 1979; see also Zemans 1983). In some circumstances, access to legal justice is socially intolerable, even when the law—or such legal forms as contracts—is used initially to structure a private transaction (Macaulay 1963). The numerous and complex effects of legal participation or the threat of legal participation on private affairs have yet to be charted. Yet recent theoretical work in the sociology of law has acknowledged the primacy of the private impact of public justice (Galanter 1979; Jacob 1969).

> [C]ourts function as a potential sanction by intimidating one's opponent. . . . Courts are used extralegally, not as a form for adjudicating disputes according to shared legal principles, but as a weapon marshaled by disputants to enhance their power and influence. Disputes taken to court are not adjudicated, but are in Gulliver's terms, "negotiated." . . . The disputant's ability to appeal to court and the probability of success in that arena influence his or her relative power to "negotiate" a settlement. [Merry 1979, p. 919]

The interaction between private and public ordering is the centerpiece in the study of civil justice. The significance of citizen participation in the legal order cannot be fully understood without acknowledgment of that interaction. At least from the point of view of individual citizens, the success of law might be said to vary inversely with its utilization.

And, what about the effect of participation on citizen attitudes toward the legal system itself? Here substantial evidence indicates that participation does not breed confidence in or respect for legal institutions. Instead, it seems associated with disillusionment and diminished respect (Rhunka and Weller 1978; Yankelovich, Skelly, and White 1978; Jacob 1971; McIntyre 1967; Richardson et al. 1972; Sarat 1975). The more people know about legal processes, the less they like and respect them. Participation turns citizens into critics. Citizens' myths about law and the wisdom and fairness of legal institutions (Tapp 1974) are almost inevitably disappointed in the face of overcrowded, less than majestic, courts and administrative agencies (Tyler 1984).

Furthermore, citizen involvement with the legal system is frequently traumatic, arising in response to difficult, often injurious, events. Often the law can neither repair nor resolve the injury (Bureau of Social Science Research 1967; Ennis 1967; Skogan 1976; Gellhorn 1972; Rosenblum 1974; Nader 1979). Participation may discourage further involvement in the legal process or may encourage utilization of private means for dealing with problems that might otherwise have found their way to the legal system. For example, victims of automobile accidents involving significant property damage or personal injury are significantly less likely to litigate if they have previously been party to litigation (Hunting and Neuwirth 1962).

Some believe that the most important effect of remedy-seeking behavior is that it transforms and alters the problems or disputes for which legal remedies are sought

(Mather and Yngvesson 1980–81). In this process conflicts are narrowed and depoliticized; grievants are led to see their grievances as individual and idiosyncratic remedy-seeking. Participation in liberal legal institutions, thus, is said to produce a form of self- and social alienation (Abel 1982). However, other forms of participation attempt to break out of the individual, remedial mode. They are both more collective and more explicitly political. It is these forms which, because they challenge the usual legal form, may pose the greatest challenges to liberal legalism.

Participation as Reform

To talk about these other types of participation is to talk in two different ways. First, what I call reform-oriented participation is oriented toward using the administrative and/or judicial processes for the purpose of trying to change/reform the law itself. In this sense reform-oriented participation indicates the weakness of the law/politics (implementation versus policy-making) distinction which is at the heart of liberal legalism. Indeed, reform-oriented participation shows the extent to which instrumentalism is an accepted and appropriate view of the legal process. By such participation, courts and other legal institutions are subject to the same "logic of purpose" that governs lawmaking institutions. Purposiveness

> calls for inquiry into (1) substantive outcome and (2) what is factually needed for effective discharge of institutional responsibilities. In other words, purposive law is result oriented, thus departing sharply from the classic image of justice blind to consequence. . . . The concern is with legislative rather than adjudicative facts, with factual patterns and with the systematic effect of alternative policies, rather than with particular outcomes. [Nonet and Selznick 1978, p. 84]

The second way of talking about reform-oriented participation focuses on litigation or administrative action as a way of changing social relationships. It is here that the legal process may become an arena for struggle in which the disadvantaged mobilize legal norms as a political tool.[11]

While both uses of reform-oriented participation are undoubtedly always a part of liberal legalism, it has only been since the late 1950s that groups interested in social reform have consistently and regularly turned their energies to the processes of administration and adjudication (see, for example, Kluger 1976). Such interest was, to some extent, stimulated by tendencies toward judicial activism, yet it also reinforced them

[11] While there seems little doubt that reform-oriented participation has extended the range of issues on which citizens or citizen groups have a right to participate, there is little evidence about the quality or frequency of reform-oriented participation (Williams 1972). Formal rights are no guarantee of actual participation. Some data, however, document reform-oriented participation in the area of environmental protection.

In the first five-and-a-half years of its existence, the Michigan Environmental Protection Act was the subject of 117 lawsuits or administrative hearings (Haynes 1976); interestingly, ad hoc rather than established environmental groups were most active (DiMento 1977; Sax and DiMento 1974). Citizen suits brought under the National Environmental Protection Act are much more prevalent than their state counterparts. In the first three years following its enactment, approximately 250 NEPA suits were filed in federal courts (Crampton and Boyer 1972). The number of citizen suits or the amount of public intervention in the administrative processes cannot be compared meaningfully with data on the various forms of remedy-seeking. Given the nature of such reform-oriented participation, one would expect it to be more limited, but perhaps no less significant in its impact.

(Glazer 1975). The receptivity of the courts invited social reform litigation which, in turn, encouraged innovativeness in judicial decision-making. It was to some extent encouraged by legislative action creating new rights or providing new responsibilities for administrative agencies (Rodgers and Bullock 1972; Dienes 1970). Yet, activity for social reform, in and through courts and administrative agencies, was also prompted by the failure of legislatures to extend such rights or to respond adequately to impulses for social change (Scheingold 1974).

At the same time, over the last three decades a strikingly greater number of lawyers and lawyers' organizations have been interested in using courts as administrative agencies to change law and to reform society. Beginning about 1970, the public-interest law movement became an important ally of and tool for social reform groups (see James 1973; Weisbrod 1978; Handler et al. 1978). Finally, the last three decades have witnessed a proliferation of client groups turning to lawyers and to courts to carry out their political activities.

The key impetus in this recent upsurge of reform-oriented participation was, of course, the movement for black civil rights. Its "success" in winning concessions and establishing new rights interested others, such as environmentalists, women, consumers, who had a broad range of concerns. Participation in and through courts and administrative agencies, aimed at securing social reform through law reform, grew by imitation. Often the same leaders and lawyers moved from one issue to another, bringing enthusiasm and knowledge of techniques to newly emerging groups or movements (Handler 1979).

The first element that distinguishes participation as a vehicle for reform from remedy-seeking behavior is its group base. Reform-oriented groups generally represent collections of individuals united by interests not involving production or work-related activities, and typically focus on ideological rather than material concerns (Jaffe 1968). Furthermore, while in remedy-seeking behavior participants usually seek to mobilize the law in order to protect or vindicate their own rights with little concern for the effect or impact on others, reform participation is designed to produce legal decisions as statements of policy affecting the conditions of whole classes or groups of people (Scheingold 1974).

The distinction between remedy-seeking and reform-oriented participation is, in practice, rarely clear. What looks like remedy-seeking may be the first move in a social-reform strategy; an activist court or judge may use a narrow legal action to make a decision with consequences well beyond those understood or intended by the original participants. The legal action may begin as remedial but may be "taken over" by participants with reform goals (Sorauf 1976; Vose 1972; Epstein 1985). Yet, the extent and scope of reform-oriented participation is itself significant in indicating the range of responsiveness of legal institutions and the dilemmas of liberal legalism.

Reform-oriented participation is most often directed against the policies of the state. It aims to shape and reshape those policies by subjecting them to the scrutiny of new ideas and to the discipline of new interpretations of old values. Yet, at the same time, reform-oriented participation allows expansion of the competence and capacity of courts and administrative agencies, as well as a broadening legal impact. By letting groups, or advocates for groups, register claims on behalf of the public or of particular classes of interested citizens, the legal system expands its intelligence-gathering abilities and the range of individuals formally subject to its decisions. Again, the duality of participation and institutional capacity must be noted. Reform-oriented participation subjects the legal

system to increased pressure to produce substantive justice, to enter the domain of policy implementation, and to find innovative ways to respond to modern mass injuries (Hazard 1976; Handler 1976).

From Remedy to Reform Such participation frequently begins in the remedial mode. Particular individuals suffer real injuries, which are similar to those suffered by others by virtue of common identification or membership in a social group (Kluger 1976). However, because the legal system treats injuries on a case-by-case basis, it is difficult to establish patterns and connections between injuries and group membership. The first wave of the modern era's reform-oriented participation sought, as an overriding goal, to force legal institutions to recognize and come to terms with such patterns, acknowledging widely dispersed inequalities associated with racial differences.

The model for such participation is provided by the activities of the NAACP Legal Defense Fund. This organization, originally established as an adjunct to the NAACP, began in the 1930s to use litigation as an affirmative tool in the quest for black civil rights. Prior to that time, the NAACP had engaged in constitutional litigation on an ad hoc basis (Greenberg 1974). Until relatively recently, the Legal Defense Fund received support from the parent organization and other private sources. From its beginnings it maintained a modest professional staff and a network of cooperating attorneys. Its major focus has been both the defense of individuals engaged in civil rights activities and the establishment of litigation strategy for marshaling major challenges to existing laws. Furthermore, its efforts and strategy have been consistently and singularly given over to the goal of equality through law.

Reform-oriented participation often proceeds through the litigation of "test cases," to which the constitutional principle rather than the individual grievance is crucial (Casper 1972). In order to pursue a test-case approach, a group must choose carefully the cases it promotes. The right configuration of facts must be found to provide the maximum opportunity for a favorable, precedent-setting decision; "priorities are established that emphasize taking cases with the broadest potential impact" (Rabin 1976, p. 223). In this sense, the litigating group is "proactive" in its strategy, seeking to use the lawsuit as a vehicle for the recognition of new rights and the reshaping of public policy.

> The process of constitutional litigation has become intensely political. Most of the cases come not as individual suits for remedy but as well-organized pursuits of favorable constitutional rulings. . . . And in varying degrees most of the actors and institutions in the judicial process recognized them as cases that not only raised important constitutional questions but that also were bound to affect bitterly opposed issues of public policy. [Sorauf 1976, pp. 342–45]

The use of test cases focuses reform-oriented participation on the courts. While judicial rulings are assumed to provide both direction and leverage for political and social change, the object of such participation is essentially negative. Reform is achieved when past practices of discrimination, for example, are halted. In addition, test-case reform activity has usually been carried out within the context of recognized legal principles rather than trying to forge new ones. It is used by groups identified with discrete and identifiable classes of individuals who experience relatively clear-cut injuries and grievances (see Olson 1984).

Mass Injury, Diffuse Interests, and the Premises of Pluralism Much contemporary reform-oriented participation begins not as part of the ongoing activity of identifiable groups; it is initiated instead in response to broad and intangible injuries and is carried on in the name of a diffuse class of individuals without perceived common identity (Trubek 1978a). Such participation has, over time, become increasingly focused on administrative processes (Stewart 1975). Court decisions and litigation have been used as vehicles to open up that process to participation by groups and interests previously unable to secure access. Court decisions and the threat of litigation provide the leverage to induce administrative agencies to take seriously the interests of consumers, environmentalists, and others seeking to identify themselves with the public interest (Sax 1971). The courts require that administrative agencies allow such groups to take part in agency policy, rule-making, and adjudication. One form of participation in the legal process, litigation, is used to open up new avenues of participation in other parts of the legal process (Jaffe 1968). Litigation and participation before administrative agencies are thus reciprocal and interactive strategies of reform (Handler 1979). When agencies refuse to recognize the interests of diffuse groups, courts will often require them to do so.

Two conditions encourage the growth of reform-oriented participation aimed at the administrative process. First, the complexity and interdependence characteristic of advanced industrialism ensure that when injuries occur they will be felt by large segments of the society. Threats to the quality of the environment on a mass scale affect everyone but no single individual standing alone; "more and more frequently the complexity of modern societies generates situations in which a single human action can be beneficial or prejudicial to large numbers of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair" (Cappelletti 1978b, p. 519).

Second, administration and regulation grow as responses to modern imperfections in the economic market, which prevent private remedies from adequately compensating for mass injuries. Much has been written about the reasons for the growth of public regulation and its function (see, for example, Kolko 1963; Bernstein 1953), and it is now commonplace to acknowledge the immense power and scope of regulatory processes. Critics, arguing that regulation has failed to protect the public from mass injuries or to respond adequately to those that occur (Trubek 1978a; Lowi 1979), suggest that agencies typically succumb to the pressures of the regulated; because of their dependence for information and expertise on those whom they regulate, they are relatively easily captured and become, in effect, defenders.

The twin phenomena of mass injury and the extension of the administrative state emphasize the importance of groups as participatory units. Agencies respond to organization. Yet, since the injuries which may give rise to reform-oriented participation are widely shared, it is difficult for diffuse interests to act collectively and effectively.

> A diffuse group . . . refers to a large number of individuals who share a common interest in a specific public policy. If government effectively controls the prices charged by an industry . . . any benefits accruing to consumers of the industry's product will be enjoyed by all those who purchase its goods or services. So these consumers are a "group" in this very general sense. But this group is diffuse because it is not an organized entity. . . . [T]hey lack a mechanism by which they can pool their resources to provide sustained advocacy for such policies. [Trubek 1978b, p. 460]

The dilemmas and difficulties of organizing diffuse interests into effective participant groups provide a continuing theme in the literature on reform-oriented participation (Stewart 1975; Handler 1979; Rhode 1982). The costs of organizing such interests are immense. They are neither geographically nor socially contiguous, nor does the shared interest occupy a substantial part of their lives (Trubek 1978b). Moreover, since the products of any participation on behalf of diffuse interests are quite clearly "public goods" (Olson 1971), individuals have no incentive to either register a claim or support a group acting on their behalf (Cappelletti 1978a).

Despite these difficulties the participation of diffuse interests has increased. This has been helped by a loosening of rules of standing and other access-regulating devices. This loosening indicates a willingness of the legal order to respond to claims in behalf of social as well as individual rights. It also acknowledges the imperfections, imbalances, or biases in the operation of interest representation in the administrative process.

In the traditional model of autonomous, expert, public-interested administrative decision-making (Stewart 1975), agencies were portrayed as having limited amounts of discretion, which they were to use in accordance with their authorizing legislation. They were believed to be dealing with complex technical questions of policy implementation rather than policy choice, and their decisions were assumed to be justifiable in terms of the need to protect the public interest. Agencies were thus understood to be subject to the governance of legislatures and the supervision of courts (Stewart 1975; Lazarus 1974). The traditional model breaks down under the weight of evidence that agencies use their discretion for the benefit of the groups and interests they are intended to regulate. The abuse of discretion and the capture of administrative agencies by private groups is a function of the relative weakness of those agencies vis-à-vis the interests with which they must deal. "Limited agency resources imply that agencies must depend on outside sources of information, policy development and political support. This outside input comes primarily from organized interests, such as regulated firms, that have a substantial stake in the substance of agency policy and the resources to provide such input" (Stewart 1975, pp. 1685–86). Rules limiting agency discretion do little to address this tendency, and it, in turn, seems to threaten the claims of administrative agencies to legitimacy (J. Freedman 1978).

Those claims are based in large part on the theory of normative pluralism (Trubek 1978b), which has gained increasing acceptance. According to this theory, all affected interests can and should participate in the decision-making of administrative agencies and, through their participation, influence the implementation of legal rules (Dahl 1956).

> Normative pluralists contend that if citizens are free to organize groups to represent their collective interests, if all such groups are able to participate in policy debates, and if decision-makers are constrained to take into account the interests of various groups in their own deliberations, the political system will give equal weight to each individual's interest, and the views of the majority of citizens, as expressed by their organized representatives, will ultimately prevail. [Trubek 1978b, p. 462]

The absence of equal access and equal consideration of interests is a bias in pluralism generated from flaws in the dynamics of group development and representation (Con-

nolly 1969; Kariel 1961)—a bias those concerned with access to justice and participation seek to correct (Bonfield 1969; Lazarus and Onek 1971).

Arguments in favor of expanding opportunities for reform-oriented participation diagnose the bias of pluralism and the failures of regulation to operate to protect the public interest as a problem of access, thus reinforcing the tendency of liberal legalism to portray law as self-correcting as well as autonomous. Accepting the premise of normative pluralism that access breeds influence, they seek to correct the imperfections of the pluralist model by recognizing new interests and devising forms of representation to articulate them. The critique of normative pluralism, which is a foundation for much of the push for reform-oriented participation, accepts that pluralism is or can be a reasonably accurate description of the processes through which legal rules are implemented and that responsive, participatory administrative processes are a useful vehicle for social reform.

Acceptance of the premises of pluralism can be seen in three interrelated doctrinal developments responsive to and reflective of the growth of reform-oriented participation (Stewart 1975, p. 1716). The first is the expansion of due process rights and a recognition of new interests in liberty and property, seen in several Supreme Court cases (*Goldberg* v. *Kelly* 1970; *Bell* v. *Burson* 1971, and *Goss* v. *Lopez* 1975) in which the Court required administrative agencies or public schools to provide notice and hearing before the termination of benefits or the deprivation of rights. These cases have developed new concepts of property and liberty, which accord rights of participation in agency proceedings to welfare recipients, occupants of public housing, and students (O'Neil 1970). While the expansion of due process seems more clearly to provide new opportunities for remedy-seeking, the abandonment of traditional concepts of liberty and property it has brought is rooted "in the decline of legal formalism based on a close-knit structure of discrete rights and counterpart official duties, and in the struggle to adapt legal controls to expanded government authority" (Stewart 1975, p. 722).

The second development is the growth in the types of interests entitled to judicial review of administrative agency decisions. This doctrinal development in the law of standing has opened up access to courts and provided greater openness in the administrative process. Most of the "new standing" allows diffuse interests and their representatives the right to challenge decisions when agencies have failed to allow them to participate in formal proceedings or when agencies fail to pay serious attention to their expression of interest (*University of Pennsylvania Law Review* 1972; Albert 1974; Trubek 1978b; Homburger 1973). Rights of participation have been accorded to groups seeking to represent themselves and their members as well as to groups seeking to vindicate the public interest. As a result, "the number of persons with a legally protected stake in any agency decision has multiplied, and standing has been liberally granted to allow judicial enforcement of the requirement that agencies consider all such effected interests" (Stewart 1975, p. 1723).

Finally, there has been expansion of opportunities to intervene in proceedings initiated by others and to require agencies to initiate and employ formal proceedings in arriving at their decisions (D. Shapiro 1968; Crampton 1972; Gellhorn 1972). Rights to intervene have become coextensive with standing rights (see *Office of Communication of the United Church of Christ* v. *F.C.C.* 1966). The courts have also recognized the rights of parties affected by agency decisions to demand that those decisions be made in and through formal proceedings, in which that party and others with an interest in the decision may participate (see *Environmental Defense Fund, Inc.* v. *Ruckelshaus* 1971).

Representation and Reform-Oriented Participation Doctrinal developments embody a judicial recognition of the demise of the traditional model of autonomy in the enforcement and implementation of law and a formal recognition of the need for expanded representation of interests. Reform-oriented participation, however, continues to face the dilemma of who is to represent diffuse interests and how they are to be represented (Crampton 1974; Rhode 1982). The question remains of who is participating when groups seek to use the legal system for purposes of social reform. Who is, in fact, gaining access to justice when groups sponsor or act for individuals (see Wilson 1973; Gronemeier 1974; Sabatier 1975)?

A study of church–state litigation suggests that group sponsorship often comes at the price of group takeover (Sorauf 1976). Individuals are rarely able to afford participation beyond, or indeed up to, trial in such cases. In order to press their claims on appeal—or, in some cases, to persist to the trial phase—they need the expertise and assistance of groups with a continuing interest in church–state issues. Such groups are not, however, willing or able to provide aid to all who desire it. As a result, they must decide which clients and cases they will support. Typically, that decision and the involvement of particular groups and their attorneys tend to refine and redefine cases they accept. Issues that may have been of direct interest to the individual initiating the case may be dropped; new dimensions of the claim, which may or may not be important to the main party, are developed. Group sponsorship may be necessary in order to afford individuals realistic and reasonable chances of winning particular kinds of cases, but the case that is won often bears little resemblance to the issue that originally motivated it (Felstiner, Abel, and Sarat 1981; Mather and Yngvesson 1980–81). Group participation does not necessarily make individual participation more meaningful.

> Most individual members of the class of interests assertedly represented will probably be completely unaware of the participation on their behalf. Alternatively, such individuals may see no tangible connection between their interests and the litigation. . . . Whatever vicarious participation they may enjoy is a far remove from the model of Athenian democracy which underlies much of the rhetoric of public interest representation. [Stewart 1975, p. 1767]

The dilemmas of representation have led courts to impose rather strict requirements of prior notice on class actions (see *Eisen* v. *Carlisle and Jacquelin* 1974). Groups seeking to participate on behalf of or for others have been required to demonstrate some direct and concrete stake in the subject of their participation (*Sierra Club* v. *Morton* 1972). How much private advocacy has been hindered or limited by such restrictions is unknown. Nevertheless, class actions and public interest litigation remain important vehicles through which reform-oriented participation may be carried out (Homburger 1973; Cappelletti 1978b; Aaronson 1975).

Another, comparable concern with the question of who is being represented and who is participating arises in discussions of public-interest lawyers (Cahn and Cahn 1970; Bell 1975; Riley 1970; Burke 1979). Supported largely by private foundations, these lawyers direct their activities to law reform (Handler 1976). The practice of public-interest law has many variants, ranging from individual pro bono work to full-time practice in group law offices (Handler 1978).

While concerns of public-interest law have been as broad as its organizational forms,

several themes are common to all its expressions. First, the practice of public-interest law is largely concerned with ensuring access to governmental decisions for interests previously unrepresented (Rabin 1976; see also Leone 1972). Public-interest lawyers seek to bring into the judicial and administrative processes the interests of environmentalists, consumers, and other diffuse interests. In addition, "underlying the currency of 'public interest law' is a newly emergent and valid understanding of the need to protect all members of society and in their relatively passive capacity as citizens who consume not only material goods and services but also government policies and programs" (Cahn and Cahn 1970, p. 1006). Second, in contrast to the activities of the Legal Defense Fund and other "traditional" law reform groups, public-interest lawyers have focused on the procedural adequacy and substantive justice of administrative procedures rather than on the interpretation and application of recognized constitutional principles through litigation. They have sought "effective access in a broad range of fora rather than pursuing implementation of identifiable constitutional values" (Rabin 1976, p. 241). Third, public-interest lawyers have been proactive in identifying necessary reforms and then finding clients to represent in an action to effect such reform (Cahn and Cahn 1970). Some public-interest law firms have been closely tied to particular reform groups, which have helped to establish their agendas, but more typically they have been independent and have ranged over a wide spectrum of issues. Taking it upon themselves to ensure the responsiveness of legal processes, they employ advocacy skills for avowedly political purposes.

Because of that independence and their proactive orientation toward reform, public-interest lawyers have threatened the traditional model of client service and client control, as well as traditional conceptions of the relation of law and politics (Mazor 1968).

> The public-interest lawyer is a man with commitments which precede and define the client; and the nature of his client, his activities and his source of funds often allows him the freedom to assert personal values in his professional work. . . . In terms of the traditional theory of legal representation the involvements of a lawyer's personal values in a particular cause threaten the paramount concern of the lawyer–client relationship, the idea of total devotion to the client's interests as the client sees them. [*Yale Law Journal* 1970, pp. 1120–22]

Many public-interest lawyers see themselves as representing constituencies rather than clients, even when that stance requires some sacrifice of the advantages of the main client (Casper 1972); indeed, some public-interest lawyers are "clientless lawyers."

Even when there is a relatively discrete and identifiable client, the public-interest lawyer is likely to be in a position of control and authority greater than that permitted under the theory of "lawyer as agent" (Burke 1979). Choices of strategy and goals may provide as much conflict between client and lawyer in social reform activities as they do in remedy-seeking (Bell 1975). Clients are generally in a weak position to assert their interests against public-interest lawyers. Often, the client interest begins only after the lawyer has defined the problem. The client, who is frequently drawn from the socially disadvantaged or legally unsophisticated (Harrison and Jaffe 1972), can easily be replaced. Since the lawyer's source of support comes from foundations, the client is also deprived of monetary controls over the lawyer's behavior (Brill 1973). Nevertheless, since it is as often the case that clients and public-interest lawyers share ideological

commitments and motivations, they avoid the tension between the desire for specific and individual remedies and the drive to achieve precedent-setting decisions (Burke 1979, p. 11).

Absent the usual mechanisms for or guarantee of accountability, the issue becomes the compatibility of public-interest law and the ideals of participation and access it advocates (Cahn and Cahn 1970). Critics are suspicious of upper-middle-class professionals defining and protecting the public interest. While there is some evidence that the new populism represented by public-interest law extends participation and makes participation and access to justice more meaningful and real (Lazarus 1974), the pattern is highly varied. Some see public-interest lawyers as taking the heart out of reform-oriented participation and creating dependency on a new class (Hunt 1979). Others believe that public-interest law adds force to reform-oriented participation (Cappelletti 1978b; Trubek 1978b; McLachlan 1971). It is, however, hard to deny that questions of representation remain unanswered. Public-interest makes participation meaningful by transforming the locus from individuals to groups. It seeks to redefine legal representation to encompass political advocacy and to legitimize that redefinition in terms of the unique skills and perspectives of legal professionals in a liberal legal order (Lazarus and Onek 1971). The price of democratizing the legal process and opening access to diffuse interests is greater power for the legal profession and, perhaps, greater passivity for individual citizens as well as renewed strength for the "myth of rights" (Scheingold 1974).

The Effectiveness of Participation as a Vehicle for Reform The first, and perhaps most important, effect of reform-oriented participation is to diminish the distinction between law and politics; such participation represents, reflects, or produces a movement away from autonomy in the implementation and administration of legal norms. The activities of social-reform groups and public-interest lawyers are themselves political, whether they are addressed to legislatures, courts, or administrative agencies. The Supreme Court has explicitly accepted the legitimacy of the politicization of litigation and administrative processes. "In the context of NAACP objectives, litigation is not a technique for resolving private differences: it is a means for achieving the lawful objectives of equality of treatment by all government . . . for members of the Negro community in this country. It is thus a form of political expression" (*NAACP* v. *Button* 1963). The recognition of the political nature of group-sponsored litigation and other types of reform-oriented participation alters the basis on which legal institutions justify their actions. The burdens of justification become ever more difficult to discharge and the conflict engendered by legal decisions becomes ever more intense (Nonet and Selznick 1978).

The object of reform-oriented participation is, in the first instance, to secure rights of participation and to formalize the procedures through which administrative decisions are made. When this process is successful, formality replaces informality; rules replace discretion. Formality, however, brings added costs, both to participant groups and to law-enforcement agencies (Manning 1977). Formal procedures are expensive and time-consuming. Requiring skills and expertise in advocacy and legal rules, they are ill-suited to flexible fact-finding and problem-solving. Rather, they narrow and limit the scope of inquiry and view social problems in the context of ritualized procedures. Formality breeds passivity in those charged with making decisions and focuses decision-making on particular cases. "The complex scientific, technological, social and economic issues presented in

so much of current administration are often ill-suited for resolution by adjudicatory procedures that produce gargantuan records whose size varies inversely with [their] usefulness" (Stewart 1975, p. 1773; see also Boyer 1972; Jowell 1969). Formality, however, also counters imbalances in power and puts greater accountability on decision-makers (Abel 1982). To this extent, reform-oriented participation seeks to justify the exercise of power in accordance with preexisting legal norms.

Perhaps most important, new rights in administrative processes and new opportunities for judicial review of decisions provide citizen groups with an important resource in their efforts to obtain recognition of their interests in informal agency procedures. Potential lawsuits that will delay and complicate administrative action provide these groups with a kind of influence not provided by their expertise or organizational ability (Stewart 1975, p. 1771). Furthermore, regular participation may allow such groups to derive the bargaining advantages that normally accrue to repeat players (Galanter 1974). As with remedy-seeking, the real importance of access for reform-oriented citizen groups is not revealed by actual rates of participation. The accessibility of judicial processes and the threat of involving them transform the structure of pluralist relationships within which agencies operate—another example of the often neglected relationship between legal rights and political power (Trubek 1974).

Of all the questions about reform-oriented participation, the most obvious concerns its effectiveness in securing changes in legal rules and translating those changes into meaningful reform. In one view, the attempt to achieve social reform in and through participation in the legal system is seldom successful and often dysfunctional, participation being a tribute to the strength of "the myth of rights"—the ideology of liberal legalism that stresses the accessibility of law, its responsiveness, and the efficacy of legal rules as resources for social change. Legal rules are but one available tool, whose real significance depends on the political power of those seeking reform.

> [D]irect deployment of legal rights in the implementation of public policy will not work very well given any significant opposition. . . . Using courts to make things happen in the real world ultimately pits the victorious litigant with a court order against those who are inclined to resist. . . . [T]he impact is restricted by post-judgment power relations. [Scheingold 1974, pp. 13, 117; see also Dolbeare and Hammond 1971; Rodgers and Bullock 1972]

The real significance of reform-oriented participation in the legal system may be that it helps to activate and stimulate political action. The recognition of rights legitimizes group grievances; it may give a sense of shared identity to otherwise amorphous groups (Piven and Cloward 1972). Reform-oriented participation alters the configuration of forces concerned with and able to exert influence on reform issues (Trubek 1974). Whether it transforms that configuration enough to secure genuine reform, however, ultimately depends on a variety of factors beyond the control of legal officials.

Handler (1979) has examined the conditions under which reform-oriented participation would be effective in the areas of environmental litigation, consumer and civil rights, and social welfare. He identified five factors: characteristics of the participating groups, the relationship of costs and expected benefits, the nature of the implementation process required to enforce legal rights, the nature of the remedies available, and the structure of the law-reform community. His case studies suggest that the key to effective

reform-oriented participation is found in the interaction of group characteristics and the nature of the implementation process. Participation fails to achieve meaningful reform when the implementation of new legal rights is decentralized and lengthy and when reform groups lack the "staying power" to monitor implementation and keep pressure on the implementers (Handler 1979, chap. 6). The lack of staying power is, in turn, a function of the free-rider problem, the financial and resource constraints on reform groups, and their lack of significant political resources.

Law-reform efforts fail because of the difficulty of translating rights or policies into new patterns of behavior by public officials and private opponents. While the call for "public advocacy" (Trubek 1978b; Murphy and Hoffman 1976) may alleviate some of the resource constraints that limit reform, there is no evidence that even publicly supported advocates are able to translate rights into social reform. In the final analysis, however, reform-oriented participation contributes to changing legal processes by forcing legal officials to attend to interests they would otherwise ignore and by opening up new avenues and providing encouragement to remedy-seeking by individuals who might otherwise lack recourse.

This democratization of the legal process is not without its enemies, who believe that we have gone too far in the name of equality and responsiveness (see Hunt 1979). The 1980s have brought a broad-scale attack on those who demanded or facilitated reform-oriented participation. This attack came at a time when it appeared that that type of participation was becoming institutionalized and widely accepted (see Lewis 1981). Although the attack's final outcome is by no means certain, much can be learned about access to justice and reform-oriented participation by attending to it.

Liberal legalism is caught in an unresolvable tension (Shklar 1964). It encourages the belief in law as a vehicle for social change, and in so doing strengthens its claims to legitimacy; it tolerates and supports modes of participation that use legal means in innovative ways; it advertises the significance of rights and remedies. Yet, when participation promises to become generally effective—to work out the logic of democratization in liberal societies—support is withdrawn. At the point when the precarious balance of legitimation benefits and instrumental costs tilts too heavily toward the latter, the state itself is enlisted in the effort to withdraw or limit the forms and frequency of reform-oriented participation.

The sociological study of that form of participation has barely begun. Few empirical studies of it exist. For the most part, work in this area has been doctrinal or normative, largely ignoring motivations, strategies, and impacts. Moreover, the interaction of remedy-seeking and reform-oriented participation, on the one hand, and that participation and the structure of bargaining inside and outside legal processes, on the other, require greater attention than either has received. Ultimately, however, work in this sector must take seriously the politics of participation and must contribute to an understanding of the dynamics of that participation and the liberal legal order in which it occurs.

CONCLUSION

How much is known about citizen participation in the legal system? Does it constitute a coherent subject or simply a loosely bounded area of concern? It is important to

recognize that the empirical study of access to justice and citizen participation is a relatively new enterprise. Yet there is little doubt that over the past twenty years empirical work in the sociology of law has made a substantial contribution to our knowledge about and understanding of citizen participation in the legal system. Nevertheless, there are important areas of incompleteness and bias which need to be addressed.

The most important area of incompleteness is seen in the study of what I have called reform-oriented participation. In comparison to work that focuses on remedy-seeking, the study of reform-oriented participation seems sorely lacking. We know relatively little about its causes, about the conditions under which it emerges, about its patterns or its impact. There has been much speculation about the transforming impact of group participation, but little is actually known about the relationship of participation and the process of social reform through legal institutions. The relationship of reform-oriented participation in the administrative process and similar participation in courts and legislatures needs to be charted. In the end, however, it is the relative play of private power that determines the efficacy of political or legal reform, and therefore the impact of private power on reform-oriented participation must be described and analyzed.

These gaps in knowledge are explicable when one considers the very great difficulty of identifying and charting reform-oriented participation. But more is at issue here than an operational problem. The neglect of reform-oriented participation indicates the extent to which legal sociologists themselves are at home with, and accept, the law/politics distinction, the extent to which legal sociologists consign reform-oriented participation to political scientists or others whose normal subject is power or pressure. Legal sociology does not make available theoretical categories or research traditions into which reform-oriented participation can be fit. Thus the great bulk of research on participation focuses on its remedy-seeking, dispute-resolving variety.

The study of remedy-seeking participation fits quite well into a long-standing and well-intended tradition in anthropology. There the focus is on the troubled case and its resolution. Critics (see Kidder 1980–81; Cain and Kulscar 1981–82) contend that the influence of the anthropological tradition supports, in the study of remedy-seeking, strong presumptions of "equality, case discreteness and individualism" (Kidder 1980–81, p. 719). These presumptions, according to this view, go very nicely with the assumptions of liberal legalism and have led researchers to ignore the possibility that remedy-seeking may arise not out of discrete injustices but in response to "systematic inequities, [and] institutionalized asymmetrical developments in society's relationships" (Kidder 1980–81, p. 719).

The treatment of participation as remedy-seeking behavior tends, according to this argument, also to participate in the liberal tradition of individualism. The dominant paradigm looks at participation as a species of individual cost/benefit calculations in which particular persons choose among a variety of means for managing their problems. Social context is treated not as itself an object of dispute or trouble but merely as an influence on individual choices. Participation as remedy-seeking is seldom seen "as an element in shifting relationships between groups, as battlegrounds in strategic maneuvering to reorder power relationships and upset disadvantageous 'balances'" (Kidder 1980–81, p. 700). The problem is not simply that individuals may not be the right units of analysis but that researchers have accepted that the subject of the participation as it is presented according to the requirements of legal institutions, for example, *Smith/tenant* v.

Brown/landlord, is the real subject. This tendency reflects an embrace of the assumptions of liberal legalism itself, an embrace, albeit implicitly, of a pluralist conception of social and political organization and the absence of a theory that might connect particular instances of participation with broader, more systematic social injustices (Cain and Kulscar 1981–82).

The study of participation as remedy-seeking has to this point been almost completely ahistorical (for an exception, see Abel 1979b). As a result, participation is treated not as a conditioned response to particular social conditions but as a species of relatively unconstrained individual choices. Historical work would serve to show how participation changes in response to changing configurations of power and practice within social and legal systems. The absence of historical research means that we do not know how patterns of participation or nonparticipation get established and how they change. It means that we have no baselines against which to determine whether current patterns indicate a growth or decline in the involvement of legal institutions in social life, that we do not know how existing norms concerning citizen participation evolve from previous norms and behaviors and how those norms serve to establish, maintain, or challenge social advantages. Finally, the ahistorical quality of the study of participation hinders our ability to know whether complaints about the lack of access to justice reflect a chronic state necessitated by the internal logic of liberal legalism or whether they respond to conditions developed and maintained by particular groups who benefit from limited citizen participation (Kidder 1980–81, p. 724).

Finally, critics contend that studies of participation in general, and remedy-seeking participation in particular, treat inequalities in opportunity, willingness, and ability to participate as noncumulative and unidimensional (Cain and Kulscar 1981–82). Differences in wealth, knowledge, culture, and ideology, each of which may be correlated with differences in participation, are rarely correlated with each other. Thus, as Cain and Kulscar argue, research on participation fits in

> directly . . . [with] pluralist conflict theory, according to which participants may differ in power or in strategic skills . . . but only along a single dimension. . . . The differences in power are capable of being equalized: more money, more knowledge, more organization, even more experience, may be given to the weaker party, and then the difference would disappear. [Cain and Kulscar 1981–82, p. 380]

The assumption that differences are noncumulative and can be remedied is itself one way in which studies of participation support liberal legal theory even as they illuminate its tensions and contradictions.

But the state of research on citizen participation is not all incompleteness and bias. That research reminds us that participation, even in a flawed and imperfect legal order, serves to advance important values. As described in an argument for expanding opportunities for litigation, these values are several.

> *Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if deprived of an opportunity to litigate. *Participation values*

> reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted" in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs. [Michelman 1973, pp. 1172–73]

These values, the argument continues, can and should be used to recognize the importance of litigation and other forms of participation even where its outcomes and consequences for the legal system are uncertain.

Recognition of the inherently contradictory qualities of citizen participation in liberal legal orders provides a beginning point for future inquiry. That inquiry should treat citizen participation as an important indicator of the responsiveness, or at least the openness, of legal processes. As participation varies, it shapes the way those processes are perceived and the way they in fact function. Yet, that variation is itself manipulatable by the legal order. Thus, the subject of access to justice and citizen participation brings together micro-perspectives and macro-perspectives in the sociology of law. With few exceptions (see, for example, Nonet and Selznick 1978), research and analysis have avoided the linkage issues raised by citizen participation. It is now appropriate to attend to them, so that an assessment of access to justice and participation can become an assessment of the nature and health of the legal order itself.

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11

SOCIAL SCIENCE IN LEGAL DECISION-MAKING

Phoebe C. Ellsworth
Stanford University

Julius G. Getman
Yale University

The ways in which social science data are used in legal decision-making have rarely been systematically studied. We do not know how frequently courts refer to social science research or how often it is used by legislatures. When social science data are cited, it is extremely difficult to determine whether they helped to shape the outcome or whether they were used to provide a scholarly justification for decisions reached on other grounds. When social science has influenced the law, it is often impossible to say whether it has served to make rules more just or procedures more efficient.

The literature on the application of social science research in the legal process has focused on the role of research in shaping legal rules—particularly in important constitutional cases—and in forming major social policies. In thus restricting their attention to a few pinnacles, most analysts have necessarily ignored the vast terrain that spreads out below. This is understandable, as the terrain is largely uncharted, and not even the boundaries are well delineated. Faced with this indefinite territory, we hope to suggest the range of settings in which social scientists are consulted by legal actors or social science research is used to inform their decisions.[1]

[1] There are a number of important areas that we shall *not* cover. The use of social science in policy-making has been reviewed and assessed elsewhere, as has the burgeoning use of social science in evaluation research (see, for example, Struening and Guttentag 1975), and in many cases these do not involve decision-making that is specifically legal. The uses of specific data from specific disciplines within the social sciences, particularly economics, which we know little about, are addressed in other chapters of this volume. Although the legislatures of the larger states and the United States frequently call upon social scientists to testify at hearings, those who have analyzed the process have generally concluded that an honest desire for information is not a major motive, and that intracommittee negotiations and ideological predispositions play a more important role in the outcome (cf. Lochner 1973). The use of social science data by administrative agencies is an important topic and deserves better treatment than it has received, here or elsewhere.

The first section of this chapter will describe the use of social science data at various levels of decision-making, ranging from the assessment of the legal status of individuals to the delineation of major general principles. First, we will examine the ways in which social scientists and their tools directly affect the fate of particular individuals who become embroiled in the legal system, either at the trial-court level or outside of formal litigation. Then we will move to a recent development in individual assessment that has raised particularly difficult and controversial issues—the situation when social scientists do not examine the participants in the specific case at all but contribute their general expertise, based on aggregate data, to the decision of a particular individual's fate. We will then move from the assessment of individuals to the assessment of groups or organizations and to one of the apparent triumphs of social science—the evaluation of representativeness or equality of treatment. This successful application of social science methods will be compared with the inconsistent success of the application of social science concepts in the definition of general legal standards. From there we will move to a consideration of the use of general social science data and theory in the trial court, and only then will we move on to the level where substantial bodies of data are brought to bear on large abstract legal decisions, typically in the appellate courts and the legislatures.

The second section examines two specific branches of law—labor law and criminal law—in an attempt to understand why the use of social science data in the first is so slight and in the second so common. In labor law, the use of social science data is infrequent and unsophisticated; decision-makers seem reluctant to employ available data. In criminal law, decision-makers are frequently willing, and sometimes eager, to use available data, but the value of this endeavor has turned out to be highly controversial.

Finally, the third section discusses some general epistemological issues that may underlie the difficulties of fruitful collaboration and the pessimism of previous writers—in particular, the advantages and disadvantages of the adversary system as a method for determining scientific truth.

VARIETIES OF SOCIAL SCIENCE INFORMATION

In focusing on high-level interactions, such as the use of social science research in establishing constitutional doctrine, the existing literature about law and social science tends to neglect the significant interactions that take place through the testimony of social scientists (or others who deal professionally with social science concepts or methods) concerning the decisions of particular cases. It is important to recognize that social science information may enter the legal system in many different guises. The image of empirical data riding up through the courts in full panoply, to achieve their own footnote in *Brown* v. *Board of Education*, though dear to the hearts of social scientists, is memorable in part because it was, and still is, unusual. Infinitely more common are the routine day-to-day assessments of obscure individuals with problems by obscure individuals with power over them: of prisoners by parole officers, of suspects by lie-detection experts, of unfortunate children by social workers, and so on. No general principle is enunciated, no aspect of the legal system is changed; only an individual person or family is affected. Between these extremes, social scientists may participate at all levels—as evaluators of particular reforms or programs, as expert witnesses providing assessments of particular instances or general states of affairs, as lobbyists or authors of amicus briefs.

Least susceptible to analysis, but perhaps most important, is the influence of social science theory and research on the intellectual climate of the general culture.

Although we will examine these various influences of social science separately, they are clearly not independent. The social worker and the prison psychologist use tests developed by basic researchers and theoreticians and, in turn, their dissatisfaction with these tests may lead, directly or indirectly, to changes in both the theories that generated them and the laws that ratified their use. The testimony of an expert witness is more likely to be accepted, and more likely to be influential, when the underlying theory has already diffused into the general consciousness of the intellectual community, so that it strikes the audience as a slightly more scientific version of common sense.

Individual Case Assessments

One of the most common uses of social science information in the legal system is the evaluation of particular people, usually by means of psychological tests and clinical interviews. Many judgments that were formerly based on the intuitions of lay persons (judges and jurors)—especially in criminal law, family law, and juvenile law—have been redefined as matters requiring scientific expertise.

Theories of individual adjustment and development are largely the domain of psychology and psychiatry, and although some may argue that psychiatry is not a social science, it would make no sense for our purposes to discuss the one without the other. Theories of normal and abnormal child development, for example, have been generated within both disciplines and have traveled so quickly across the boundaries between the disciplines that it would be fruitless and artificial to try to disentangle them. Likewise, members of both disciplines have developed methods of clinical assessment. The Rorschach test, invented by a psychiatrist, and the Thematic Apperception Test (TAT), devised by a psychologist, are both based on the theoretical notion that responses to ambiguous stimuli may reveal underlying personality dynamics, and in practice the two instruments are often used interchangeably. Sociologists and anthropologists may also be called upon to play a role in individual assessments—the former, for example, in delinquency cases, and the latter in cases involving members of special subcultures, such as Native American groups. But the field has been dominated by the research and theories of psychologists and psychiatrists, and in relation to their participation in the legal system distinctions between them have largely been drawn along lines of status rather than of substance.

In addition to our choice of a definition of social science broad enough to include psychiatry, for the purposes of this section, we would like to extend our definition of the term "social scientist" or "social science expert" to include people who have some training in social science and who routinely use the products of social science in making or influencing decisions that have legal consequences, but who do not participate in advancing the science itself. Individual assessments, particularly in nonlitigated cases, are rarely made by people who conduct basic research or develop social science theory. Rather, they are made by parole board members, social workers, and other practitioners who apply the tools and theories developed by social scientists. Often, these applications become widespread and firmly established without the scrutiny, and sometimes even without the knowledge, of the original scholars or their successors. While it may be unfair to blame social scientists for the uses and misuses of their ideas in these contexts, it would be foolish to ignore an influence that is so pervasive and consequential.

Assessments Made by Experts and Ratified by Courts — COMMITMENT — The involuntary civil commitment of individuals to mental hospitals is probably the area in which nonlegal experts first created an indispensable role for themselves. Up until the mid-nineteenth century, civil commitment took place without any formal procedures or legislative restraints whatsoever; friends, relatives, courts, police, or people charged with managing the poor could commit a troublesome individual to a mental hospital or, if the person was indigent, to a poorhouse (Deutsch 1949). Beginning about mid-century, however, some knowledge of the abuses of this system began to seep into the public consciousness, partly as a manifestation of the increasing reform ethos of the time and partly in response to a number of dramatic real and fictional accounts of normal people wrongfully locked away in asylums by dastardly relatives or colleagues. According to Deutsch, "the plight of the perfectly sane individual 'railroaded' to a 'madhouse' by relatives, friends, or business associates scheming to separate him from his fortune or his sweetheart" (p. 418) became a popular theme in the press and literature of the period.

Courts and legislatures moved with the times by articulating both medical and legal standards designed to prevent the indiscriminate incarceration of the unfortunate. In 1845, the Massachusetts Supreme Court laid down the first rule requiring medical justification for involuntary commitment, stating that a patient could be restrained in an institution only as long as such "restraint is necessary for his restoration, or will be conducive thereto" (*Matter of Josiah Oakes*, 1845), thereby requiring an explicitly therapeutic justification for civil commitment. As this kind of justification became more widespread, the opportunity for physicians to assume an important regulatory role expanded.

In the meantime, during the 1860s and 1870s, legal restrictions on civil commitment developed rapidly. Rights to notice and to some form of hearing were extended in many jurisdictions, and some states even instituted mandatory jury trials. However, the court's responsibility for the actual scrutiny of the civil commitment process was short-lived. Prominent members of the medical profession's progressive association of neurologists argued that the formal legal procedures were likely to confound therapeutic objectives. Their own response to the public clamor was to advocate, and eventually to achieve, permanent state commissions on lunacy. Initially founded in the 1870s, these commissions—which were frequently dominated by physicians—increased in number, and their power expanded markedly over the next quarter-century.

The medical view began to dominate the legal view. By the late 1890s, many of the formal procedures designed to protect the rights of those committed to mental hospitals had been relaxed, a relaxation considerably facilitated by the creation of the categories of "voluntary" and "temporary" commitments involving a minimum of judicial process (Deutsch 1949).

By the turn of the century, physicians had gained substantial control over the civil commitment process, and throughout the first half of the twentieth century, they continued to press for easier and more informal "humane" civil commitment procedures, occasionally achieving their goals through statutory changes, more frequently through failure of the courts to enforce laws that remained on the books (such as the right to jury trial). Physicians were considered uniquely qualified to diagnose and treat the mentally ill, and for years they continued to do so unhampered and generally unexamined by the law. Research psychologists performed an important ancillary role in

developing test instruments for the measurement of various types of mental disorders, but when it came to actually deciding whether or not to confine a particular person, an M.D. degree was the main criterion for expertise. Until quite recently, the diagnosis of mental disorder for the purposes of civil commitment was the prerogative of physicians, regardless of their training in psychology or psychiatry, and the medical profession exercised almost complete discretion over the freedom of persons suspected of mental illness. In many jurisdictions, a surgeon or dermatologist was allowed to commit a person to a mental hospital, while a psychologist was not.

The situation was such that mistakes and abuses were nearly invisible: neither the physicians nor the family members who committed a person were likely to raise questions about the discretion involved in civil commitment proceedings. Any patient's claim that the commitment decision was erroneous or malicious would tend to be taken as a predictable delusional symptom—in the rare cases where it was heard at all beyond the walls of the asylum. The law ratified the discretionary powers of the experts and allowed the system to develop without substantial intervention; few cases were brought for consideration, largely because the patient was too weak an adversary to make use of the adversary system. Not until the 1960s did members of the legal profession resume significant efforts to alter this approach, advocating and in many jurisdictions eventually achieving the right to a judicial hearing for persons involuntarily committed to mental hospitals, for example.

ADOPTION — The development of adoption standards involving enormous discretionary powers in the hands of experts parallels the example of civil commitment in many respects. In this instance, however, the experts were social workers, a far less prestigious guild than the physicians.

Homeless children had long been recognized as an important problem by crusading amateurs, in line with the ethos of general social reform of the late nineteenth century. In fact, these amateurs exercised considerable power before they were successfully challenged in the 1920s. Through intensive lobbying, social workers managed to achieve discretion over these children as great as that exercised by physicians over civil commitment cases. The social workers successfully promoted legislation requiring a decisive role for their expert opinion in the adoption process (Macaulay and Macaulay 1978). By the mid-1930s, most states had laws requiring a recommendation by a recognized child-placement agency; some required that the agency specifically approve the adopting family, but even when the recommendation was not binding, judges almost invariably accepted an agency-approved home (Gallagher 1936; Doss and Doss 1957). In several states it became a criminal violation for any intermediary not working for such an agency to place a child for adoption (Doss and Doss 1957), despite the total lack of evidence that independent, nonprofessional placements were any more harmful to children than were agency placements (Macaulay and Macaulay 1978).

Thus, as with civil commitment, there was little legal scrutiny of adoption decisions; the law simply handed over the power to the social workers and remained ignorant of the consequences. Again, there was no strong adversary to challenge the system. Those who suffered were either children or would-be parents who had been judged unsuitable by the adoption agencies. The courts, ignorant of child psychology themselves, would be unlikely to decide that a parental hopeful who was rejected on the basis of a clinical

interview with a trained social worker knew more than the expert about the best interests of children.

That social science experts have exercised enormous power at this level is indisputable. Some may argue that this power is not an example of a "use of social science by the legal system" because the social scientists are operating quite independently of the legal system. It is true that, until recently, these issues have not been raised in court and the law has not addressed them. But the fact that the law has not exercised significant independent discretion in these areas, while it has in conceptually similar areas (such as juvenile status offenses and cases of child deprivation and neglect), is the best evidence of the power of the social scientists. Furthermore, the power wielded by the social scientists in these areas has not been independent of the legal system: it has been explicitly handed over and sanctioned by the law. The law has delegated to physicians (for example, members of mental health commissions, which evolved from the early commissions on lunacy) the power to set standards and decide on legal issues of confinement and deprivation of civil liberties for people who are believed to be mentally ill. Similarly, adoption agencies were given temporary legal custody of certain children and explicitly granted the power to designate their "legal guardians." That these issues seem somehow less "legal" than those that are regularly or spectacularly contested in the courts should be taken as a demonstration of the success of social science.

Another argument, more basic and more telling, is that these issues are not germane because, in fact, social science research and data are not used by the practitioners. While the power of the experts in these areas may demonstrate the success of social scientists, it is not clear that it says anything about the power of social science theory and research. When an expert's discretion is unlimited, his power is the power of person, of status, and his decisions are only weakened by documentation. The data probably affect the expert's judgment, and thus influence legal decisions, but the connection cannot be traced with a clear, straight line.

Nonetheless, the disdain that eminent social scientists may feel for the practices of social workers and of admitting physicians at mental hospitals does not erase the power these individuals exercise in the name of social science. Classifying these practices as "not social science" may assuage wounded vanity, but it leaves the real problems untouched. It seems inevitable that the major impact of social science research and theory on decisions about particular individuals will be made by people whose knowledge is dated and haphazard. In assessing the impact of social science, it is important to take account of the distortions introduced as the information passes from its origins to its practical applications.

Social Scientists in Court Much more visibly, individual assessments by social scientists have become common at the level of the trial court in certain kinds of cases. Cases involving children who are mistreated or who mistreat other people and cases involving the mentally ill are rarely tried without making use of the opinions of nonlegal experts, and criminal cases make frequent use of the reports of probation officers. Psychiatric or psychological testimony is essential when the issue of competency to stand trial is raised. The role of the social scientist—usually, but not exclusively, a psychiatrist, psychologist, or social worker—has expanded during this century as the rehabilitative

ideal came to encompass new categories of people. Throughout most of the nineteenth century, decisions about the relative fitness of parents in child-custody cases, the moral promise of juvenile offenders, and perhaps even the sanity of criminal defendants were made by judges (or juries, where an insanity defense was presented) on the basis of experience, the arguments of counsel, and observation of the courtroom proceedings. When the focus of the law in certain areas changed from past criminal behavior to the future potential of the individual, the courts did not immediately feel a corresponding need for expert assessment of individual potential. Most people, and perhaps an even greater proportion of judges, regard themselves as fairly good judges of character.

The medical expert testifying about mental disorders was an early exception to this rule. The prestige of physicians, coupled with the mysteriousness of mental disease, removed assessments of insanity from the realm of unaided lay or judicial judgment rather early. By 1875, mental illness was clearly defined as a medical problem, and although relatives, acquaintances, and clergymen still commonly testified about the mental condition of criminal defendants, the testimony of medical doctors was regarded as considerably more competent and credible. The trial of President Garfield's assassin in 1881, for example, included not only a parade of highly credentialed superintendents of asylums, neurologists, and "alienists," but also a gynecologist, a few general practitioners, and (for the defense) nonmedical acquaintances who had concluded that the defendant was deranged (Rosenberg 1968). Gradually, the psychiatrist, and to a lesser extent the psychologist (*Jenkins* v. *U.S.*, 1962), came to exercise almost exclusive domain over these assessments.

It took longer for the law to come to believe that special expertise might also be required for evaluating individuals in situations where severe mental pathology was not an issue. Two interrelated factors that probably contributed to the transition from lay to professional "expertise" were the expansion of the classes of cases requiring individual assessment and the expansion of the social sciences, and consequently of the class of experts. Juvenile crime became a growing social problem, and sociologists and psychologists offered a growing number of explanations. Likewise, the number of contested child-custody decisions grew rapidly as the divorce rate climbed. Eventually, expert assessments became a common, if not necessarily influential, feature of these cases.

Although the role—and the power—of the expert in a trial court varies considerably, it ordinarily follows one of two patterns: that of adversarial witness or that of court technician. The adversarial-witness arrangement typically involves two experts, one enlisted by each of the parties; the court-technician arrangement generally relies on one expert, employed in a branch of the legal system (for example, a probation department) or some other government agency (such as a welfare office).

The performance of social scientists as adversarial witnesses in the assessment of individual cases has not heaped honors upon their heads. Rather, it is generally regarded as lamentable or ridiculous, depending on the perceiver's own professional identification. The example of opposing psychiatrists in a case involving an insanity defense is the most notorious: the image of the psychiatrist who will make any diagnosis if the price is right was as commonplace in the newspaper coverage of the trial of Garfield's assassin as it is today, and as worrisome to the medical establishment (Rosenberg 1968).

This attitude of skepticism has had negative effects that extend far beyond any particular pair of contradictory experts to a general mistrust of psychiatric expertise (see Bazelon

1974) and of the legitimacy of the insanity defense. In several recent polls, a majority of respondents have agreed with the statement that "the insanity defense is a loophole allowing too many guilty people to go free" (Louis Harris 1971; see also Fitzgerald and Ellsworth 1984). The level of credibility gradually built up by physicians in defining mental disorders as a problem requiring medical expertise is largely dissipated in the courtroom by the apparent ease with which qualified experts are able to reach opposite conclusions about the same person, and it is highly likely that jurors often revert to their own common sense in assessing a defendant's mental state. Only in cases of organic mental disorders—such as psychomotor epilepsy, severe retardation, or traumatic brain injury—are psychiatric experts still held in the same high esteem as other medical experts (Ellsworth et al. 1984), probably because people believe that in cases of this sort psychiatrists are like "real doctors"—able to make determinations approximating the kind of either/or judgments the law requires.

The same sort of "battle of the experts" occurs in contested child-custody cases, where each embittered parent enlists a psychiatrist to show that the other parent is hopelessly unfit or irrevocably estranged from the affection of the child. The difficulties and the problems of credibility in court are quite similar. That conflicting testimony by experts in custody cases has not become a matter of common knowledge and contempt may be because the parties involved rarely achieve the fame of an insane homicidal recidivist or a Patricia Hearst.

Movement from Individual Assessment to the Use of Aggregate Data

We have argued that one of the most pervasive (and least visible) uses of social science expertise is in the assessment of the fitness, dangerousness, sanity, truthfulness, or emotional well-being of individuals. In many areas, social scientists (especially psychologists) and social science technicians have become indispensable cogs in the machinery of routine legal procedures. But recently, perhaps in part because of a conscientious realization of their own influence, theorists, clinicians, and basic researchers in psychology have begun to reevaluate their own ability to make accurate individual assessments. In one area after another, they have arrived at the same gloomy conclusions: there is very little reason to believe that their predictions are more accurate than chance and very good reason to believe that they are worse than predictions based on purely actuarial considerations, or even than predictions based on a combination of actuarial data and clinical assessment (Meehl 1973; Dawes 1971; Shah 1969). Contrary to their earlier confident claims, psychologists are now loudly denying their power to make valid individual predictions about the dangerousness of parolees or mental patients (Monahan 1978; Wexler 1976); the fitness of parents (Ellsworth and Levy 1969; Goldstein, Freud, and Solnit 1973); the likelihood that a particular individual will benefit from psychotherapy or any particular treatment program (Wexler 1976; Ennis and Litwack 1974); or success on a job, on parole, or even in graduate school (Dawes 1971; Meehl 1973; Mischel 1968).

Had the social scientists simply come forward with a humble admission that their earlier claims were false, that their ability to perform their allotted task in the legal decision-making process was severely limited, the issue probably would not have occasioned a major controversy. It would have been possible simply to reply that, despite weaknesses and flaws, their evaluations were still the best available means of arriving at

essential legal judgments; they should work to improve their techniques, of course, but in the meantime, they should continue as they had been. But the social scientists now claim that their clinical evaluations are not the best available means of arriving at such judgments—that, in fact, there is a more accurate technique: the prediction of the individual's behavior from aggregate statistical data on others in the same position.

In areas like these, where the social science technician has become essential to the working of some part of the legal system, and then more esteemed and renowned social scientists deny the validity of the techniques, the social scientists are in a particularly good position to push through reforms based on more general social science data and theory. Having made their contribution necessary, they are able to command attention when they want to restructure the nature of that contribution. Two of the areas in which social science has had the greatest influence in recent years provide examples of just this sort of foot-in-the-door phenomenon: parole decision-making and child custody.

Clinical Flexibility versus Standardized Criteria — PAROLE DECISIONS — By the mid-1960s, it had become clear that the individualized evaluations that supposedly characterized decisions about eligibility for parole led to large and irrational disparities in the treatment of similar cases. At the same time, social science was discovering that individualized clinical judgments were highly unreliable in a variety of contexts and less accurate than predictions made on the basis of actuarial tables (Meehl 1973; Dawes 1971). Even when the factors entering into the actuarial tables are derived solely on the basis of the factors used by groups of people making individualized judgments, the tables outperform the people (Dawes 1971, 1979).

In this intellectual context, a large-scale study of parole decision-making was launched in 1972. Funded by the Law Enforcement Assistance Administration, it was conducted by the Research Center of the National Council on Crime and Delinquency in collaboration with the Federal Parole Board and a group of advisers from the social sciences. The goal of the project was to "provide objective, relevant information for individual case decisions; to summarize experience with parole, as an aid to improved policy decisions; and to aid paroling authorities in more rational decision-making for increased effectiveness of prison release procedures" (Gottfredson et al. 1973). The study resulted in a set of guidelines consisting of a scale of offense severity and a "salient factor score" designed to predict success during parole and based largely on the individual's prior record of crime and parole violations. Using base-rate actuarial expectancies, the guidelines indicate a range of months to be served for each combination of offense and offender characteristics.

The parole guidelines represent the single most important instance of a system designed by social scientists with a particular legal context in mind and adopted for use in a routine administrative way by a branch of the criminal-justice system. They are also important in that they epitomize the controversy generated over actuarial predictors in deciding the fate of individuals.

The guidelines (1977 revision) are diagrammed in Table 1. The categories of offense severity are ranged along the vertical axis. Parole boards are given detailed lists of examples of the offenses falling into each category—for example, possession of stolen property valued at less than $1,000 is a "low severity" offense, possession of less than $20,000 in counterfeit currency is a "moderate severity" offense, theft of a motor vehicle

TABLE 1

Guidelines for Parole Decision-Making, Customary Total Time (in Months) to Be Served Before Release (Including Jail Time)

Offense Characteristics: Severity of Offense	Offender Characteristics: Parole Prognosis (Salient Factor Score)			
	Very Good (11 to 9)	Good (8 to 5)	Fair (5 to 4)	Poor (3 to 0)
Greatest II	Greater than below, specific ranges not given			
Greatest I	40–55 mos.	55–70 mos.	70–85 mos.	85–110 mos.
Very High	26–36	36–48	48–60	60–72
High	16–20	20–26	26–34	34–44
Moderate	12–16	16–20	20–24	24–32
Low moderate	8–12	12–16	16–20	20–28
Low	6–10	8–12	10–14	12–18

for resale is a "high severity" offense, and rape is a "greatest severity" offense (Level I). The categories of salient factor score ratings appear on the horizontal axis. Of the eleven possible salient factor points, nine are related to the inmate's prior record; points are given for a career free of prior convictions, incarcerations, parole violations, car thefts, and forgeries, and for having reached the age of 18 (1 point) or 26 (2 points) by the time of the first commitment. The other two points are for prior history of opiate or heroin dependence (loss of 1 point) and employment or school attendance for at least six months out of the last two years prior to conviction (gain of 1 point) (Gottfredson, Wilkins, and Hoffman 1978).

The data-based parole guidelines have been quite influential. During the period from October 1974 to September 1975, the Parole Commission stated that 84 percent of the decisions were within the guidelines (Hoffman and Stone-Meierhoefer 1977). There is no way to tell whether this high percentage represents a slavish adherence to the guidelines, since no one knows how many of the 84 percent would have been decided differently without them. The guidelines were formally adopted for use in federal parole decisions, and there is some evidence that the use of the salient factor scoring system is also becoming common at the sentencing stage (Coffee 1978).

In some ways, the impact of the parole guidelines is greater and in some ways less than its architects might have hoped. It is greater in that the very existence of an apparently easy method for assessing risk may invite its use in situations for which it was not designed. The use of the salient factor score as a means of evaluating offenders at the sentencing stage is a good example, since there has been no research on the validity of this instrument in predicting the behavior of a noninmate population (Coffee 1978). On the other hand, the effectiveness of the guidelines is limited, in that some of the better

predictors of parole success—such as age, education, and family ties—were ultimately dropped from the salient factor scoring system because they are not in the control of the individual (see Underwood 1979), and thus their use might constitute a denial of equal protection. The remaining socioeconomic factor—recent employment or school attendance—has also been criticized as resulting in "punishment based on status" (Coffee 1978). In some cases, compromise predictors, such as whether the crime was a car theft—highly correlated with age but presumably involving a free decision on the part of the individual—could be substituted; in other cases, some of the better predictors simply had to be discarded without replacement. Thus, the social science influence is limited in that the law has chosen to sacrifice predictive power for other considerations, explicitly choosing a set of guidelines known to be less accurate than the best available.

In addition, the influence of social science in this area may be temporary in that, even though the recommended reforms were adopted (with modifications), early enthusiasm has diminished and has been replaced by a great deal of controversy. The reform itself may not survive or may not spread very far beyond the federal system; with the recent resurgence of retribution as an acceptable goal of punishment, some states have reinstated determinate sentencing, and in some jurisdictions there is strong pressure to abolish parole altogether. The liberals' traditional protests against determinate sentencing have been muted by their discomfort at the use of status-sensitive variables (Coffee 1978).

Because the Federal Parole Guidelines were based on careful research and several validation studies, because they have been adopted for routine use by a major federal criminal-justice agency, and because their history has been so well documented, they have had an important influence in making explicit the moral and epistemological issues surrounding the use of aggregate data. The dilemma raised by the consideration of data averaged over many individuals in determining the fate of a particular person is a real one, and one on which it will be very difficult for legal and scientific thinkers to reach agreement. Some legal thinkers have argued that the most accurate method of prediction may be unfair because it is "inconsistent with respect for the autonomous individual" (Underwood 1979, p. 1409; see also Coffee 1978). More utilitarian legal theoreticians and many social scientists find it difficult to understand how a predictive method that makes more mistakes can be fairer. They contend that this fairness is only apparent, that it is a veneer masking the injustice done to those who are misclassified as "bad risks" on the basis of inaccurate clinical judgment or a compromise formula.

The critics' focus on the unfairness of specific factors beyond the control of the individual may actually represent a more general concern about any sort of categorical, aggregate data-based system of prediction. It has been argued, for example, that educational history should not be used, since it overlaps with race and is thus a "status-sensitive" variable (Coffee 1978). But, of course, the "prior convictions" variable overlaps with race as well. Neither Coffee nor the researchers for the Federal Parole Commission report which of these is more highly correlated with race, nor do they present any empirical evidence as to the relative autonomy of individuals who drop out of school in the tenth grade as compared with those who get arrested, charged, and convicted of an offense. The assumption that a prior conviction is the result of a free decision on the part of the individual, while school nonattendance is the result of social status, is highly questionable, to say the least. In addition, both John Coffee and Barbara Underwood feel that one danger of such predictive methods as the parole guidelines is that they

tend to minimize the importance of nonquantifiable, "soft" variables related to the mental state of the offender. Thus, the issue comes full circle: it was the very unreliability and potential for nonquantifiable unfairness and racial overlap in these inexplicit clinical variables that motivated the guideline system in the first place. It seems to be the idea of deciding the fate of individuals on the basis of data drawn from large samples of other people that most fundamentally disturbs the critics.

And this concern is a legitimate one; even staying within the bounds of their traditional realm of accuracy, the social scientist must admit that, in fact, aggregate statistics can only predict aggregate behavior. They cannot predict the individual case. As Sherlock Holmes put it:

> While the individual man is an insoluble puzzle, in the aggregate he becomes a mathematical certainty. You can, for example, never foretell what any one man will be up to, but you can say with precision what an average number will be up to. Individuals vary, but percentages remain constant. [Doyle 1974, p. 91]

This is true in principle, and it is also true in practice; methods similar to the Federal Parole Guidelines have been shown to be quite inaccurate—like other methods, they tend to overpredict violence (Monahan 1978; Rector 1973; Resnick 1979). The social scientist can safely claim only that actuarial methods are better than clinical intuition: better because they are more accurate, and better because the factors are explicit, allowing less room for such clearly illegitimate factors as racial prejudice to operate systematically and in secret.

The issue is not one of the permissibility of probabilistic judgments in prediction. All prediction involves probabilistic judgments, as do assessments of the likelihood of uncertain past events, such as the guilt of a defendant. The social scientists have not introduced probabilistic thinking into the legal system but have made the probabilities explicit. The law shows extreme fastidiousness about open discussion of quantified probabilities. An expert witness who conducts three tests, describes their construction and reliability in detail, and makes a quantified judgment may fare less well in court than one who uses the same three tests—or only two, or one, or none—and makes a confident, unquantified judgment based on his or her general expertise.

Probability judgments are not the issue, if we accept that the goal is prediction. Prediction itself is the issue. To what extent *is* the goal prediction? Judgments about deterrence and judgments about rehabilitation seem necessarily to involve prediction, whereas judgments about retribution or "justice" do not, although the factors that are used may have predictive power and may even overlap considerably with those used for prediction. Uncertainty about the role of prediction may well underlie many of the issues that are so hotly contested. If prediction is the goal, then it seems self-evident that the best and most accurate method should be used. The problem is that, typically, prediction is only one of several goals or values and that it does not coexist very comfortably with other values such as autonomy and the appearance of fairness. The usual solution of satisfying these other values by using an inferior method of prediction strikes no one as a very happy compromise.

CHILD CUSTODY DECISIONS — Similar issues involving the merits of moving from individualized assessment to more efficient general guidelines for decision-making have

also surfaced in relation to child custody, although the controversy in the literature has been less heated and more sporadic. The arguments against individualized assessment and for alternative, less subjective standards (see Ellsworth and Levy 1969; Goldstein, Freud, and Solnit 1973) resemble the arguments involved in the case of parole, with the additional problem that the time taken to make such assessments may cause greater damage to the child than will a "wrong" decision. Assuming no flagrant abuse or neglect, recommended guidelines are based on parental agreement and continuity, an arbitrary choice being dictated in contested cases in which the two parents have equally continuous contact.

The transition from individual assessment to the application of guidelines based on aggregate data appears to have been smoother and less controversial in the case of child custody than in the case of parole. There are several possible reasons that this might be so. It may be that in child-custody decisions, no real transition has taken place. Judges and family-relations officers can find authority in the literature (Goldstein, Freud, and Solnit 1973) for exercising exactly the same kind of intuitive individualized clinical judgment they exercised before. These authors' controversial and rather amorphous concept of the "psychological parent," to designate a parent with whom the child has a continuous trusting relationship, may not place any real constraints on the choice of caretaker. The decision-makers may simply have replaced the term "fit parent" with the term "psychological parent" without otherwise changing their behavior. Or it may be that the behavior of decision-makers has, in fact, become more standardized but that they complain less because they feel as though they are still making individually tailored judgments.

Since the mid-1970s, more than 25 states have enacted laws providing for joint custody, in which legal and often physical custody of the children after divorce is shared by both parents. In some states there is even a presumption in favor of joint custody. This rapid proliferation of a new form of custody is not based on new empirical research. The old empirical arguments in favor of continuity, formerly used to justify the swift and permanent assignment of the child to the parent who had had more pre-divorce continuity of contact with the child, are now being used to justify joint custody, which presumably permits continuity of the relationship to both parents. What little research there was on joint custody per se was methodologically so weak that no conclusions could be drawn about whether joint custody promoted or undermined the best interests of the child. Yet the best interests standard remains, and joint custody decisions become more common every year—not because of any new empirical knowledge, but probably because they please the parents and seem to give the judge a compromise way out of an agonizing decision (Reppucci 1984).

CAPITAL SENTENCING DECISIONS — The difficulty in finding an acceptable compromise between standardized criteria and clinical flexibility is nowhere more obvious than in the Supreme Court's recent series of decisions on discretion in capital sentencing, in which the Court has attempted to arrive at a standard that would permit individualized consideration without permitting unjustifiable discrimination. In 1972, basing their decision in part on empirical evidence of the bias and unreliability of standardless jury decision-making, the Court overturned existing death-penalty laws on the grounds that the unbridled discretion allowed to juries by current practice resulted in life-or-death

decisions that were arbitrary and capricious, and possibly severely discriminatory (*Furman* v. *Georgia,* 1972). In 1976, the Court rejected mandatory death sentences on the grounds that they did not allow individualized consideration (*Woodson* v. *North Carolina,* 1976) and permitted what was essentially a guideline system of aggravating and mitigating factors to allow discretion properly bridled (*Gregg* v. *Georgia,* 1976). There was disagreement on the Court on how binding the guidelines were, but certainly there was no requirement that they be empirically based. For example, the Court found acceptable the Texas requirement that the jury estimate whether the defendant would probably be a continuing threat to society (*Jurek* v. *Texas,* 1976; *Barefoot* v. *Estelle,* 1983)—a type of estimate that has an unmitigated record of failure among professionals (Monahan 1978). In 1978, the Court astonishingly attempted to distinguish acceptable discretion from unacceptable discretion by requiring unbridled discretion for mitigating factors but not for aggravating factors (*Lockett* v. *Ohio,* 1978). Since discretionary mitigating factors include all those that are logically the opposites of the impermissibly discretionary aggravating factors (defendant is white, middle-class, charming, handsome, and so on), it is hard to see what is gained by this formulation.

"Exact" Probability Estimates Lawyers and statisticians are generally agreed that the use of combinatorial statistical methods to estimate the probability that a defendant committed a particular act is impermissible in a criminal trial (see, for example, Finkelstein and Fairley 1970; Tribe 1971), but their reasons differ. The statisticians believe that correct application of statistical methods is extremely difficult, if not impossible. First, estimates of the population frequency of the individual attributes to be combined (for example, the percentage of men with beards, of green-and-gold T-shirts) are likely to be quite inaccurate. Second, the assumption of statistical independence is almost certain to be violated, and assessments of the degree of nonindependence are also likely to be inaccurate (how much more or less likely is a bearded man to wear a green-and-gold T-shirt than anyone else?). Finally, even when they are based on adequate measures, statistics can only permit the conclusion that an event is extremely unlikely; they cannot guarantee that it is unique. That is, they cannot tell whether the defendant in question is the only person who fits the damning description or whether there is one other such person. And, of course, if there could easily be one other person, then (in the absence of other evidence linking the defendant to the crime) the statistical identification of the defendant drops toward a 50 percent probability—in theory, nowhere near certainty beyond a reasonable doubt.

Some lawyers, on the other hand, seem more concerned with the persuasive power of the numbers. They fear, for example, that the numbers will carry the day (Tribe 1971), so that jurors will be unable to give the nonquantifiable factors their due. This is, of course, an empirical question, and the scanty data that exist indicate that, if anything, people *underestimate* the relevance of base-rate statistical data (Kahneman and Tversky 1973).

The lines of this debate have not yet been clearly drawn, nor have the underlying concerns been explicitly stated. Blood typing and even fingerprint identification, which involve probabilistic, statistical judgments, do not—or at least not any longer—arouse the same uneasiness. Thus, it is possible that the social scientists' and lawyers' concerns are the same simple doubts about the accuracy of statistical methods of identification on

the basis of combined probability estimates. But there may also be more fundamental, ill-specified moral and emotional issues, vaguely embarrassing because they seem predicated on the desirability of ignorance. However, at this time, the statistical methods are so ill-equipped for the task that the essential epistemological confrontation is not likely to come about in the near future.

Finally, it should be remembered that a probability estimate is always derived and interpreted by a person with values. A number may seem inordinately high or comfortably low, depending on the decision-maker's perception of the consequences of a wrong decision. For example, W. B. Fairley (1977), in an excellent article on the difficulties of estimating low-probability events, using as his example the prediction of a catastrophic accident from the marine transportation of natural gas, develops a series of analytical guidelines, which if properly applied, would generally indicate that the probabilities are not nearly as tiny as they appear to be. Two examples of these guidelines are that "estimates of 'the' probability of an accident must include contributions from all the possible sources of the accident" (p. 349); and that "the widest related base of potential accident experience . . . should be surveyed" (p. 350), with particular attention to those factors that might increase the danger of an accident. The underlying value in applying these guidelines is the belief that such an accident would be so disastrous that it is imperative to make sure that the statistics are not manipulated to create a false sense of security. But if these same guidelines were used for the prediction of dangerousness in mental patients or parolees, the problem of overprediction would be even further exaggerated, resulting in the confinement of even larger numbers of harmless people. Here the competing value of the rights of those confined is salient, and guidelines that seem neutral, sensible, and valuable in one context seem paranoid and illegitimate in the other. In the end, the meaning of a probability estimate is in the eye of the beholder, and it is likely that the vision is far more influential than the number viewed.

Assessment of Groups and Organizations: Representativeness and Equality of Treatment

In addition to the assessment of particular individuals, social scientists and social science methods may be used to assess discrimination in particular collectivities or organizations. Social scientists tend to consider this kind of application of their skills more creditable and exciting than the assessment of individuals; it is also far less frequent. Tests of representativeness and tests of equality of treatment are fundamentally questions of fairness and equal protection, and in both cases the legal question seems to be formally very similar to the kinds of question basic statistical tests were designed to answer: Is this sample representative of the larger population? Does the apparent difference between these two groups reflect systematic differences in the treatment they are receiving, or could a difference of this size occur by chance, given equal treatment?

The Role of Social Scientists in Assessing Jury-Pool Representativeness Perhaps the simplest example of the use of social science in testing representativeness involves the jury. More than a century ago, the Supreme Court, holding that a statute limiting the venire to white males violated the equal protection clause of the Fourteenth Amendment, enunciated the more general principle that the exclusion of any identifiable demo-

graphic group "having the same legal status in society as that which [the defendant] holds" would threaten the essential nature of the jury as a tribunal embodying a broad democratic ideal (*Strauder* v. *West Virginia*, 1880, p. 308). Although the consistency with which the Supreme Court Justices endorsed this general proposition over the next half-century considerably exceeded the consistency with which they applied it, since 1940 they have become increasingly firm and articulate in insisting that venire lists be made up of a representative cross-section of the community (among others, *Smith* v. *Texas*, 1940; *Taylor* v. *Louisiana*, 1975).

Initially the Court was concerned with intentional exclusion, and the cases involved efforts to establish illegitimate motives or intentions. Attempts to define unfair selection procedures on these bases have largely been replaced by definitions based on consequences: if the composition of the pool of jurors differs substantially from that of the community, it is by definition unrepresentative, regardless of the motives of the jury commissioner (*Duren* v. *Missouri*, 1979).

At first, judges used intuitive, subjective judgments to decide whether a difference between the composition of the venire and that of the population from which it should have been drawn was large enough to conclude that the venire was unrepresentative; many may still do so. But because simple statistical tests allow calculation of the exact probability that such a discrepancy could occur with a fair (random) method of drawing the venire, social scientists versed in statistics are increasingly called upon to make such assessments. This development undoubtedly makes challenges to the composition of jury panels much easier; given passable census data on the community, the comparison between the community and the venire is both extremely simple and perfectly precise. As a consequence, challenges to the representativeness of the venire, although still not common, have become more frequent (Kairys, Schulman, and Harring 1975). In addition, the very knowledge that a workable criterion for assessing representativeness exists undoubtedly inspires self-correction and reform even in jurisdictions where jury-selection procedures have not yet been challenged; the impact of the social science contribution is therefore far wider than the actual use of the technique in court.

Estimating the impact of the statistical definition of representativeness on the legal concept of discrimination is more difficult, and necessarily inconclusive. On the one hand, it can be argued that the use of statistical methods in determining representativeness is simply that—the use of a method. No new social science data or theories have influenced the definition of the issues or the procedures for selecting jury panels. Rather, the criminal-justice system has simply adopted a tool that allows more precise measurement of something it had always considered important to measure. One scholar argues that in racial-exclusion cases decided between 1935 and 1960, the Supreme Court Justices' unformulated, nonquantitative criterion for a substantial discrepancy corresponded quite closely to the .05 probability level conventionally accepted by social scientists as the definition of a "significant difference" (Ulmer 1962). According to this pessimistic argument, no new general principles have emerged from the use of statistical methods. For example, the Court has not declared any general method of jury panel selection—such as the use of voter-registration lists—unconstitutional per se because it implicitly excludes certain segments of the population. Instead, a new challenge and a new statistical analysis must be carried out for each questionable venire. Like the assessment of individuals, the assessment of the representativeness of jury pools is ad hoc.

On the other hand, the fact that the ideals of jury representativeness and fair selection procedures were defined by the law with little explicit reference to social science should not obscure the importance of the social science contribution. In the first place, a vague abstract standard is much less valuable than a standard that allows for precise measurement of the degree to which it is matched or approximated in the situations it was designed to test. Statistical methods have turned an ideal into a criterion that is precise and easily workable.

Second, despite the Court's long history of endorsement of the principle of representativeness, in practice the Justices' reliance on representativeness as the central issue in jury composition has increased substantially, and their definition of representativeness has also changed and sharpened over the last century. (It should also be noted that because some of these developments have occurred in nonracial cases and in cases decided since 1960, they are not reflected in Ulmer's 1962 analysis.) In *Strauder,* the Court's decision was based primarily on its view of the Fourteenth Amendment as a vehicle for extending basic civil rights to black citizens, and the issue of representativeness was a secondary one. Over the years, the Court gradually narrowed in on a concept of representativeness more closely approximating the statistical concept. The Justices dropped the requirement that the defendant be a member of the excluded class (see *Yale Law Journal* 1965, p. 920, n. 10; *Taylor* v. *Louisiana,* 1975). They moved from a focus on cases involving de jure exclusion (such as *Strauder*) through cases involving almost complete de facto exclusion (for example, *Norris* v. *Alabama,* 1935) to cases in which groups were included but underrepresented relative to their numbers in the community (*Taylor* v. *Louisiana,* 1975; *Duren* v. *Missouri,* 1979; see also *Ballew* v. *Georgia,* 1978). They also moved from a focus on discriminatory intent to a focus on discriminatory consequences (*Taylor* v. *Louisiana,* 1975; *Duren* v. *Missouri,* 1979).

Although the relationship is difficult to document, it seems quite likely that the Court's changing perspective was affected by its awareness of the technology for assessing and assuring representativeness and by the increasingly accepted sociological and psychological argument that prejudice and discrimination can manifest themselves in a variety of subtle and insidious ways in situations where the perpetrators deny any discriminatory intent. A truly random sampling procedure, of course, would eliminate all biases, intentional and unintentional; in *Duren,* the Court explicitly defined bias as the product of a nonrandom system of jury selection.

Even less easy to specify empirically is the Court's gradual move toward a definition of an illegitimately excluded group as one with a distinctive attitudinal perspective. In *Ballard* v. *U.S.* (1946), the Court stated for the first time that it was not necessary to show that an excluded class of jurors would actually behave differently from those included, only that they would bring a distinctive outlook to the jury. In *Ballew* v. *Georgia* (1978), this time relying on social science data on group decision-making, the Court concluded that a particularly important reason for guaranteeing jury representativeness is that "the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case" (p. 234).

Finally, the reliance on statistical methods for decisions about the constitutionality of jury selection procedures may have a more general symbolic significance. The acceptance of such methods in one context means that ultimately legal scholars and practitioners will have to consider explicitly the uses for which such methods are and are not appropriate,

and develop criteria. The fact that statistical assessment of venire representativeness has drawn no substantial criticism from legal or social-scientific sources (as compared, for example, with the application of social science techniques during voir dire) makes such assessments a useful baseline against which to measure other uses of statistics, so that lawyers and social scientists may intelligently ask, "Is this usage different from that one, and if so, why?"

The Role of Social Scientists in Employment-Discrimination Cases Another task for which the help of social scientists is frequently solicited is the assessment of fair hiring practices. It is useful to examine the similarities and differences between the employment situation and the simpler task of assessing venire representativeness. In litigating whether or not a firm or institution has been guilty of discrimination in hiring, promotions, or rates of pay, it is common to ask social scientists to carry out a statistical analysis of the existing situation, comparing it with what might be expected to result from a color-blind or sex-blind procedure, and to estimate the possibility that any apparent difference resulted by chance.

The process by which the courts and the litigants have come to rely so heavily on social scientists is an interesting one—not guided or shaped by any major systematic effort by social scientists. As in the case of jury representativeness, it developed out of the limitations of traditional legal methods of proof to establish patterns of discrimination and through the courts' realization that racial discrimination was a systematic problem. The development of the law under Title VII of the 1964 Civil Rights Act has increasingly recognized and encouraged the use of statistical analysis of employment data as the result of a significant conceptual change in the definition of discrimination. Title VII made it unlawful for an employer:

> 1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual because of such individual's race, color, religion, sex or national origin. [Civil Rights Act of 1964, §703(2)]

This language suggests that illegality requires the intentional application of different standards to employees or job applicants on the basis of race, sex, or religion. This standard, which was generally assumed to have been the one enacted, implies an investigation into the motive of an alleged offender (see Fiss 1971). But as the law developed, the courts came to define discrimination to include the use of hiring or employment standards that have a disparate negative impact on protected groups, regardless of the employer's state of mind, unless such standards can be justified on the basis of business necessity.

The leading decision was *Griggs* v. *Duke Power and Light Company* (1971), in which the Court held that the use of employment tests and the requirement of a high-school diploma were both discriminatory practices because they operated "to disqualify Negroes at a substantially higher rate than white applicants" where "neither standard is shown to be significantly related to successful job performance." Rejecting the employer's argument that it was not guilty of violating the law because it did not adopt these standards with a view to their racial impact, the Court stated, "Absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." The standard

thus enunciated suggested the necessity for two different but related empirical investigations. The plaintiff must show that the employment practice in fact "operated as a built in headwind"—that is, that it disqualified minority candidates at a disproportionate rate—while in response the employer could seek to justify the practice on the ground that it was "significantly related to successful job performance." Social scientists were routinely employed by both sides to carry out the investigations (Copeis 1977).

Although the question of intentionally different treatment did not easily lend itself to proof through statistical analysis, statistical analysis is the obvious way to establish disparate impact. It has turned out to be virtually the only acceptable way to establish the validity of claimed justification.

In developing the Court's definition of discrimination, it is not easy to trace the impact of social science data or analysis. Social scientists' criticism of the reliability of employment tests and other criteria helped to convince the courts that important business purposes were not necessarily served through their use and that such tests were biased against minorities (see Brief for Petitioner in *Griggs* v. *Duke Power*, 1971). It seems likely, however, that the same conclusions would have been reached even without the help of social scientists. The scope of employment discrimination was and is common knowledge, and testimony about the hiring record of those institutions involved in the early cases provided obvious proof of racial discrimination, even to the most unsophisticated observer. Moreover, the Court was not presented with scientific testimony about the scope of discrimination nor about the need for generalized remedies, and the Court's rejection of employment testing was similar to its rejection of other hiring standards; it was based on the Court's broad reading of the statute. As the Court stated in *Griggs*, "the objective of Congress . . . was to achieve equality of employment opportunities and to remove barriers which have appeared in the past to favor . . . white employees" (*Griggs*, 1971). The Court was, in part, influenced by the guidelines on employment set out by the Equal Employment Opportunities Commission (EEOC). The EEOC's determination that tests and other hiring standards violated Title VII seems to have been based on data demonstrating that such standards tend to eliminate a higher percentage of blacks than whites. The standards the EEOC developed to determine when a prima facie case of discrimination was made and the documentation necessary to establish a business-necessity standard were developed with the aid of social scientists. In general, the standards made it easy to establish a prima facie case and extremely difficult to refute one (EEOC Guidelines on Employer Selection Procedure 1970).

In sum, social science has played an important role in developing and enforcing standards in the area of employment discrimination, but here, too, the impact has been achieved piecemeal, through individual contributions aimed at establishing specific points about the reliability of individual tests rather than through work aimed at defining the dimensions and nature of discrimination. The situation in employment discrimination is more complicated than that of the jury pool, because employers were told that they could continue to employ a test that disqualified a disproportionate number of blacks and women if they could establish its correlation with job performance. Although *Duren* explicitly leaves open the possibility that a jury may be chosen from a panel that systematically departs from a fair cross-section if "there is adequate justification for this infringement [of the defendant's interest in a fair jury]" (1979, p. 368), in fact there has been no successful attempt to demonstrate adequate justification. Establishing a correlation

between test scores and job performance raised the difficulty that such a correlation could only be demonstrated by measuring the performance of minorities and comparing it with test results, but since the agency assumed differential validity—so that tests might be valid for whites but not for blacks—overall validity could normally be demonstrated only after substantial numbers of women or minority employees were hired. Employers also faced a heavy burden in seeking to establish that the number of blacks or women in the hiring pool was significantly smaller than their proportion in the population. The ease with which a prima facie case of discrimination could be made out was, and is, in sharp contrast to the enormous statistical hurdles involved in demonstrating that disparities are in fact legitimate.

Social science method was employed as a weapon in the fight against discrimination, and in that capacity it certainly appeared powerful to most observers. Whether this state of affairs will long continue is not clear. The increasing use of statistical analysis in Title VII cases has revealed certain weaknesses, which are probably inherent in the attempt to use scientific measurement to determine whether a legal standard has been met. The statistical issues have become more and more complex as plaintiffs have developed new theories and defendants have hired economists and mathematicians to demonstrate that disparities in hiring or pay can be explained on the basis of such nonracial criteria as education, experience, or job performance. Complexity has inevitable consequences. It creates delays; it favors the more affluent institutional plaintiff and the wealthy defendant, who can enlist the aid of experts; and it lessens predictability, with the result that courts will be confused and the effective decisional criteria will be hidden, blurring the moral principle allegedly vindicated through the process. These developments are likely to lead to pressure for change, so that the standard of decision becomes one more easily applied by courts.

For example, in a case arbitrated by one of the authors, a claim was made that a community college in California discriminated against blacks in hiring faculty. The university had an affirmative-action office and offered a program of courses in Black Studies. The plaintiff was a black woman who was a few credits short of her master's degree.

The case presented a series of extremely complex questions. In accepting the master's degree criterion, the size of the applicant pool had to be considered. This meant defining arbitrarily the geographic area from which it was reasonable to assume that people were available and estimating how many blacks with master's degrees were in that area. In determining the validity of the master's degree requirement, it had to be made clear whether it was business-related and whether it served to disqualify blacks at a higher rate than whites. A determination had to be made whether the appropriate ratio was the number of minority applicants hired to the number of openings or the number of blacks in the work force to the number of whites. Further, should the Black Studies program be treated separately from other hiring for these purposes? If one looked separately at the general hiring program, would a one- or a two-tailed test be a more appropriate measure of significance? Was it permissible to vest final discretionary authority in the provost, a white male?

None of these are questions that regular legal processes are likely to deal with very well. The factual issues are extremely difficult to resolve without considerable research, the legal questions cannot be addressed without knowing a great deal about how academic

institutions operate, and the moral implications are complicated. Considerable pressure might therefore be expected for standards that are more easily justified and applied. The issues involved in such cases represent a clash of legitimate values rather than the vindication of a clear moral principle. Thus, the sense of outrage that fueled the earlier decisions has been replaced by the sort of calculation about precedent and meaning characteristic of most areas of the law.

Over time, the Supreme Court grew less receptive to EEOC standards (see *Teamsters* v. *U.S.*, 1977), employer representatives became increasingly sophisticated in the use of statistical method to demonstrate that factors other than race or sex can explain apparent differences in promotional or hiring policies, and some concern was expressed that the focus on systemic questions has tended to bypass potential plaintiffs with a particularized claim of invidious treatment. Nevertheless, despite its weaknesses, the use of social science techniques in the area has permitted a field of law originally described as a "poor imperfected thing" to have a major impact on hiring practices across the country.

As is the case with venire representativeness, challenges to employment practices are relatively easy to prepare, and the very existence of the method has greatly increased the frequency with which jury commissioners and employers can expect to be challenged. Social science has given real meaning to what were formerly vague standards, permitting their general application. In addition, in both areas the challenges have, on the whole, been successful, and the perception of the likelihood of a successful challenge may well lead more and more jury officials and companies to change their practices before they are questioned.

Two Examples of the Explicit Use of Social Science to Define General Standards: Treatment and Insanity

Venire representativeness and employment discrimination are examples of the use of social science methods to decide legal issues. We have argued, however, that concepts are affected by the methods available for measuring them. The use of statistical methods is not simply the adoption of a superior instrument for estimating a quantity the legal system has always considered important; like many measuring instruments, its use has helped to shape conceptual changes in the legal meaning of representativeness.

This contribution has been implicit, not formally acknowledged by courts or legislatures. However, in other situations, social science expertise, if not social science research and methodology, has had an explicit role in provoking the enunciation of new legal standards that apply to whole classes of cases. A good example of this kind of participation is evaluation of institutions for the mentally ill or retarded.

The Definition of Adequate Treatment In *Wyatt* v. *Stickney* (1971, 1974) and *Heiderman* v. *Pennhurst State School and Hospital* (1979), psychiatrists and psychologists testified to the adequacy of the hospital facilities to achieve their goals. In *Wyatt* v. *Stickney*, the question involved the ability of the hospital to discharge its duty to provide treatment for mental patients; in the *Pennhurst* case, similar issues were raised specifically with respect to mentally retarded patients. The influence of current psychological thinking in these and related decisions (for example, *O'Connor* v. *Donaldson*, 1975) was twofold: first, an informal, implicit influence contributed to the elevation of the idea of

"treatment" to a criterion for permissible long-term civil commitment; second, the criteria for adequate treatment were formally defined. Since the late 1950s, criticism from both legal activists and psychologists has led to the perception of the mental hospital as a "restrictive" or "drastic" alternative, jeopardizing not only the patients' civil rights, but often their mental health as well (Wexler 1976). The legal formulations shifted and came, at least tentatively, to accept the proposition that, since the purpose of segregating the nondangerous mentally ill was to provide rehabilitative treatment, under the equal protection clause, the justification for their incarceration depended on the treatment (Ennis and Emery 1978; Wexler 1976). If the "treatment" failed to measure up to minimally adequate standards, the justification for confinement would vanish, and the patients should be released. Given this formulation, the decision in any particular case required an expert evaluation of the quality of care in the institution.

Obviously, the social scientists' role in answering a question like this is much less constrained than it is in the application of a statistical test to the venire. In *Wyatt* v. *Stickney* and in *Pennhurst*, psychologists and psychiatrists testified on a wide range of questions related to treatment, including education, rehabilitation, training, staffing, facilities, restraints, abuse, the therapeutic value of various drugs, and the availability and suitability of alternative types of care. In deciding whether the particular institutions met the minimum requirements, it was inevitable that the social scientists should make an effort to specify what the minimum requirements were and not surprising that in accepting the social scientists' decision on the adequacy of the particular institution, the legal system would also accept their general definition of adequacy. In cases such as these, therefore, the assessment of a particular organization may have fairly direct and immediate general implications.

Although it may be too early to evaluate the success of social science in drafting a workable definition of adequate treatment, the attempt so far seems promising. But early promise has not always been fulfilled when lawyers and mental-health professionals have collaborated in constructing definitions. The attempt to use social-scientific and medical expertise to draft a formal legal standard of insanity was famously promising at the start, but later became a notorious disappointment.

The Definition of Insanity For years, both the psychiatric and legal literatures criticized the legal standard for insanity because it made no sense in psychiatric terms. The charge was frequently made that the legal definition of insanity based on the defendant's inability to distinguish between right and wrong required the law to differentiate among people whose mental states were medically indistinguishable. A great deal of concern was expressed about this unfortunate and nonscientific standard, and various efforts were made to amend the legal definition of insanity to lend it greater psychiatric validity, a goal which turned out to be difficult to achieve. Finally, in what was initially hailed as a major breakthrough, the District of Columbia Court of Appeals adopted the Durham rule (*Durham* v. *U.S.*, 1954), which held that the hallmark of insanity was the diagnosis of a mental disease as that concept is used by the psychiatric community. However, once promulgated, the Durham rule elicited even more criticism than the original M'Naghten "right and wrong" test.

Critics pointed out that the legal and medical definitions are directed to different issues. There is no reason for the question of punishment to turn on the desirability of

treatment. Moreover, many psychiatrists and psychologists began to question the basic concept of mental illness just at the time the courts adopted it. Courts and legal scholars have largely drawn back in disarray, with a general consensus that the effort to adopt the scientific standard was a major blunder. In short, the law turned out to be more resistant to change than many scholars assumed it would be, because the behavioral assumptions addressed by scientific research turned out, in retrospect, not to have been crucial to the existing rule.

It should be noted that, for all the controversy it generated, there is little evidence that the change to the Durham rule had much effect on the behavior of juries. Rita Simon's research (1967) suggests that juries given the M'Naghten instructions were slightly less likely to acquit by reason of insanity than juries given either the Durham rule or no instructions on the legal definition of insanity, the latter two groups not differing from each other. The differences she found may have been attenuated by the fact that individual jurors often enunciated a right-wrong standard when it was not included in the instructions, presumably on the basis of their previous experience or reading, and they may have persuaded other jurors to adopt it. In general, remarkably little research was devoted to the actual consequences of the use of different definitions of insanity; the controversy was mainly spurred by theoretical and conceptual differences between legal and psychological purposes and points of view.

One of the most fundamental assumptions of psychiatry, for example, is that mental illness is a continuous variable, permitting rational judgments of "more" or "less," but in many cases allowing only the most arbitrary judgments of "present" or "absent." The judgment of guilt or innocence requires that insanity be considered not as a continuous but as a dichotomous variable. Unless this basic difference can be resolved, there can be no mutually compatible definition at the higher levels, and since the dividing line is arbitrary, there will be plenty of room for contradictory expert testimony at trial court.

But surely it could be argued that adequacy of treatment is a continuous variable as well; the line between adequacy and inadequacy is as arbitrary as the line between sanity and insanity. Although, so far, the law's need for a dichotomous judgment has not raised problems in this area, it is possible that conflicts will arise in the future. It is notable that most of the cases that have been decided in favor of patients and against mental institutions resemble the early employment-discrimination cases in that the institutions fell so far short of minimal standards that a simple description of the conditions could well have persuaded a layman, without the addition of any social science theory about standards of adequate treatment.

Nevertheless, the task of defining adequacy of treatment is probably easier than the task of defining sanity (or insanity). The actual standards laid down involve minimal standards of adequacy, acknowledging both the continuous nature of the variable and the possibility of defining a consensually validated threshold. It would probably not be possible, from a medical point of view, to arrive at a set of minimal standards for sanity (in fact, it could be argued that M'Naghten attempted to do just that). Insanity is not only a continuum, it is many continua: it is multivariate. For any set of clear workable minimal standards that can be devised, it is possible to envision some subset of universally recognizable lunatics who could meet those standards. While it may be possible to define necessary standards for sanity, it is much more difficult—and probably impossible, at present—to define sufficient standards (or, alternatively, to define necessary conditions

for insanity). Most elements will be diagnostic only in combination with many other elements.

Further, given the articulation of minimally acceptable standards, the tribunal may be in a position to make more sensitive, differentiated judgments in the treatment case than in the insanity case. The law's dichotomous judgment may be less absolute in the former case, because it is possible to estimate the size of the discrepancy between acceptable practices and the actual practices of a given institution and to tailor the remedies accordingly. One institution may fall short because the number of doctors fails to reach the quota specified by the definition of an acceptable patient-staff ratio, while another falls short on ten other dimensions as well. Perceived blameworthiness is likely to be a function of such differences in size of discrepancy.

Judgments of insanity ordinarily do not permit such sensitive consideration of degrees of mental disturbance or of the range of possible remedies. The tribunal is given no opportunity to consider the whole range of mental states between normal and insane at the same time, to place the defendant at the appropriate place on this continuum, and to recommend remedies accordingly. For all intents and purposes, the insanity defense still requires a dichotomous judgment between guilty and innocent—a judgment of enormous symbolic significance.

The Use of General Social Science Data and Theory in the Trial Court

The use of general aggregate data at the level of the trial courts has expanded into many new areas since *Brown* v. *Board of Education* (1954). Social scientists have testified on such diverse areas as the effects of prison environments, the reliability of eyewitness identification, the effects of bilingualism on school children, community perceptions of obscenity, issues relating to jury composition (for example, motions for change of venue based on widespread community prejudice, the conviction-proneness of juries empowered to decide capital cases), and a host of factors believed to exert strong but subtle influences on juror perceptions, ranging from pretrial publicity to the clothing of the participants (prison or police uniforms, for instance).

The example of eyewitness identification will serve as a useful illustration. Although psychological testimony on factors that impair eyewitness accuracy dates from the turn of the century, such testimony was seldom attempted and still more seldom accepted until the 1970s; since then, its use has burgeoned. In most such cases, the expert testifies to basic, well-established research findings about individual and situational factors that impair a person's ability to remember events clearly; these factors include the passage of time, the complexity of the event, emotional arousal, social expectations and stereotypes, perceptual biases, events occurring between the original perception and the witness's report, and the form in which the question is asked (see Loftus 1979; Wells and Loftus 1984). In most of these cases, the expert does not examine the eyewitness but rather testifies to basic factors known to affect perception and memory. It is then up to the jury to decide which of these factors were present and important in the case before them and how much the jurors should modify their belief in the witness on the basis of their new general knowledge. The expert may also warn them that certain plausible factors are not useful in assessing the witness's credibility—for example, by referring to the frequently replicated finding that the confidence of the witness is not related to his or her accuracy (see, for example, Wells, Lindsay, and Ferguson 1979).

Until recently, the admissibility of such testimony was highly unsettled. In 1974, for example, when one of the authors testified on eyewitness accuracy in a trial court, the testimony was accepted subject to a motion to strike. As the result of a hung jury, however, the case was retried before a different judge, who accepted the motion to exclude the testimony as speculative and irrelevant. (In neither instance did the judge ask for an outline of the testimony before deciding whether to let the witness take the stand.) Although general testimony on eyewitness accuracy is increasingly accepted, its admissibility is still up to the discretion of the trial-court judge and varies from one jurisdiction to another. Quite recently, general legal recommendations designed to introduce a greater skepticism about the testimony of eyewitnesses have been made. For example, in a 1976 report to the House of Commons, Lord Devlin stated:

> We do however wish to insure that in ordinary cases prosecutions are not brought on eyewitness evidence only and that, if brought, they will fail. We think that they ought to fail, since in our opinion, it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt. [Devlin 1976]

And in the United States, lower-court judges' discretionary decisions to exclude expert testimony concerning the reliability of eyewitness identifications have been overturned in several recent appellate court cases (*State* v. *Chapple,* 1983; *People* v. *McDonald,* 1984; *U.S.* v. *Downing,* 1985). In this area, at least, the trend has been toward recognition of the relevance of *general* psychological theory and data to particular cases.

It is likely that social scientists' growing concern with the application of research on perception and memory to the courtroom setting helped to stimulate this development and that the law's prior and independent concern with the power of the eyewitness increased judicial and legislative receptivity to the social science data; the two are undoubtedly so organically and circularly connected that attempts to demonstrate a unidirectional influence, here as elsewhere in the relationship between social science data and legal thinking, must prove fruitless.

The Generalized Use of Social Science in Shaping the Law

In the legislatures and higher appellate courts, where the aim is to establish general rules and principles, the uneasiness and uncertainty about the application of aggregate-level data to the individual case largely disappears. Here, at last, the decision-makers and the data gatherers are dealing at the same level of abstraction: the decision-makers want to establish general laws and principles of justice that will apply not just to one situation, but to a defined universe of situations; and the social scientists can offer general principles of behavior and data based on the behavior of many individuals or groups. The decision-makers may, of course, decide that the data are not germane or not trustworthy, and, as has been shown in regard to the insanity defense, there may be numerous other obstacles to fruitful collaboration. But with the disappearance of the individual, the awful question of specific applicability and fairness is no longer an issue.

Whether it is this sort of epistemological compatibility that appeals to them or whether it is simply the perceived importance is an open question, but social scientists tend to focus primarily on these abstract upper levels in their discussions of "the uses of social science data in the legal system" (see Lindblom and Cohen 1979). It is a common fantasy of social scientists that the Congress or the Supreme Court make a major policy change,

explicitly giving the credit to their research. This almost never happens, of course, and there is a tendency among social scientists to underestimate the use of social science data because they define *use* as "exclusive reliance on social-science data in major decisions" (see Weiss 1979). Just as simplistically, there may be a tendency on the part of the social scientists, exhilarated by the unfamiliar atmosphere of the adversary system, to equate *use* with *victory*.

The Influence of Social Science Data in the Appellate Courts Gauging the degree of actual use of social science data since the first major attempt and symbolic victory in *Brown* v. *Board of Education* is not easy. In an examination of all United States Supreme Court cases in 1954, 1959, 1964, 1969, and 1974, Victor Rosenblum and his colleagues concluded that the frequency with which social-scientific works are cited is increasing, but that the same cannot be said for reliance on social science—that is, for the importance of the data to the point at issue, or the importance of the empirical point for the outcome of the case (Rosenblum et al. 1978). So far, the Court has used social science mainly for unimportant issues, although Rosenblum feels that there is some indication that this situation had begun to change by 1974.

Although the technique of examining all the cases in a sample of years is, in principle, the most accurate way of assessing trends in judicial reliance on a given form of evidence, in practice it is very risky when the sample is small. Many of the major examples of the use of social science data in the twenty-year period covered by Rosenblum's research—the cases concerning jury size and unanimity, those concerning the death penalty, the cases extending the rights of juvenile delinquents, and the eyewitness-identification cases, among others—happened to be decided in years that were not sampled.

Although the case study method used by Donald Horowitz (1977) cannot provide any reliable indication of such trends, it does, through salient counterexamples, suggest important qualifications to Rosenblum's general conclusion that social science, even when cited, is relatively uninfluential. Horowitz argues, for example, that in certain cases (such as *Hobson* v. *Hansen*, 1969, 1971, and *In re Gault*, 1967), the appellate courts gave too much weight to social science, handing down decisions that went far beyond the evidence cited.

It is difficult to reach any but the most tentative conclusions on the general use of social science data by the appellate courts because the phenomenon itself is so diverse. First, there is huge variability in the quality of available data across issues. High-quality, relevant empirical data exist for very few issues of the sort the courts consider. Depending on the particular issue, there may be important empirical questions with little or no relevant data, unrecognized empirical questions with a respectable body of data, empirical questions on which the data are mixed either in quality or in implications for the outcome, or both, and even fundamentally nonempirical issues to which a litigant will attempt to apply empirical data. Appellate-court judges are not in a very good position to distinguish among these possibilities.

The Ways in Which Social Science Data Reach the Appellate Courts Even when there is consensus on the empirical nature of the question, there seems to be little consistency in the ways in which social scientists become involved in studying empirical issues potentially related to major legislation or test cases, in the degree of their collabora-

tion on the case itself, or in the ways in which the data come to the attention of the legislatures or the Supreme Court. The long-term adversarial method, foreshadowed by *Brown* v. *Board of Education,* involving years of planning and collaboration between lawyers and social scientists in the definition of the empirical propositions and the collection of new data or organization of old data, all with the same degree of care as is lavished on the legal preparation, is exceedingly rare and likely to be feasible only for institutional litigants. The capital-punishment cases of the 1970s brought, like *Brown* v. *Board of Education,* by the NAACP Legal Defense and Educational Fund were of this type, as were certain children's rights cases (for example, *Parham* v. *J.R.*, 1979). In these cases, the briefs presented by the parties or by amici curiae contained comprehensive summaries of the available data, compiled or overseen by social scientists. (In both instances, the Court seems to have decided that nonempirical issues were more important than empirical ones.)

Quite a different model is represented by the Court's use of increasingly sophisticated social science data in the series of cases on jury size and unanimity. In these, the social scientists were not involved in the preparation of the arguments, and, in fact, very little social science research was presented in the briefs. And yet, in *Williams* v. *Florida* (1970), the Supreme Court held that six-member juries were constitutional, concluding that there was "no discernible difference in the performance of six and twelve member juries" in accuracy of verdicts, ratios of convictions to acquittals, representativeness, or the minority's ability to resist majority pressure. The Court cited "experiments" in support of some of these contentions and relied on intuition for others. Sometimes the "experiments" consisted of rather flimsy anecdotal reports; at other times the Court apparently based its opinion on studies that could only support the opposite conclusion. For example, they argued that a 5-to-1 split and a 10-to-2 split would put identical pressure on the minority, whereas the classic, well-replicated finding in the study they cited (Asch 1952) is that a minority of two is much less likely to conform than a lone dissenter, regardless of the size of the majority.

Later, in *Colgrove* v. *Battin* (1973) the Court cited more recent studies as having established the correctness of its earlier conclusion. Their use in the Court opinion appeared to give to the studies cited both decisiveness and permanence, which their hopelessly flawed designs did not merit (Zeisel and Diamond 1974; Saks 1977). In the unanimity decisions (*Apodaca* v. *Oregon,* 1972; *Johnson* v. *Louisiana,* 1972), as with the issue of representativeness in *Williams,* the majority rejected the empirical data mentioned by the dissenters and simply relied on intuition, deciding that juries would behave in the same thorough, conscientious manner whether or not a unanimous decision was required.

Many social scientists were disturbed by these decisions: those whose data were not used, those whose data were used (or misused, as they saw it), and several who simply felt that, if the question was to be phrased empirically, the best available empirical data should be used in the most careful way possible. Leading experts on jury research challenged the Court's conclusion and pointed out that the early research studies cited by the Court were not experiments and that the later studies were designed so poorly that their results were uninterpretable.

The number of studies on jury size and unanimity grew enormously during the 1970s. But for most purposes, of course, the timing was wrong. One of the problems with the use

of social science data by the courts is that a court may have to (or may choose to) decide an issue before adequate data exist, and typically the decision cannot easily be changed should the data cast it into question. Despite the power of the argument against its position on six- and twelve-person juries, it would be difficult for the Supreme Court to change now. Constitutional principles cannot be changed back and forth with the ebb and flow of scholarly debate about the reliability and validity of various studies without doing damage to the sense of stability inherent in the idea of a rule of law. Thus, it appeared that the wealth of research on the relative risks and disadvantages of six-member juries would simply sit there, mute and embarrassing.

Much of this research was used, however, in *Ballew* v. *Georgia* (1978), when the Court reviewed all or most of the data on six- and twelve-member juries and used it to decide that five-person juries were unconstitutional. Again, social scientists did not collaborate in writing the briefs, and in fact the briefs do not include many references to empirical research on juries. Nonetheless, the Court made *Ballew* a major test case on jury size, and it may well represent the most extensive and sophisticated use of social science research to date in a majority opinion, the one real difficulty being that all the data pertain to the differences between six- and twelve-person juries and do not speak to the differences between the unconstitutional five-member jury and the constitutional six-member jury. Finally, in *Burch* v. *Louisiana* (1979), the Court, citing the *Ballew* opinion, held that unanimity was required in six-person juries. No social science research was mentioned in this opinion.

The cases concerning jury size and unanimity, like some of those discussed by Horowitz (1977), illustrate the dangers of the introduction of empirical social science issues at the appellate-court level: the search for relevant data is often incomplete and haphazard, and the time available to reach a binding decision is short. In almost all cases, the Court does reach a decision, sometimes basing it on the limited empirical evidence that happens to have come to its attention, sometimes rejecting the evidence as inconclusive and deciding the case on other grounds. Although this state of affairs has been widely criticized (see Horowitz 1977), it has generally been accepted as inevitable. A social scientist, it is argued, faced with inadequate evidence, has the luxury of postponing a final decision until better evidence has been collected; this option is not available to appellate-court judges.

"Temporary" versus "Permanent" Empirical Decisions That the courts' decisions are constrained by the requirement of finality is largely a matter of faith, however; no one has really systematically considered the presumed evils that would follow from the Court's reaching a decision based on the evidence before it but explicitly raising the possibility that new empirical evidence would compel a different decision. Thus, the decision in *Williams*, rather than concluding that six-person juries were definitely no different from twelve-person juries, might have held that, since the available evidence was insufficient to demonstrate a difference, for the time being none would be assumed; six-person juries would be permissible, but this decision might be changed if a substantial and convincing body of new evidence were to be produced.

There is at least one precedent for such a decision. In *Witherspoon* v. *Illinois* (1968), the petitioner presented sketchy evidence based on three unpublished studies indicating that because juries that were empowered to decide capital cases were "death qualified" by

excluding opponents of capital punishment such juries were more likely to convict than other juries. Witherspoon contended that he had therefore been tried by a tribunal that was "less than neutral" on the question of guilt or innocence. The Court rejected the empirical data as "too tentative and fragmentary" to demonstrate a bias toward conviction, and it held that a modified form of death qualification, excluding only the most adamant opponents of the death penalty, was still permissible. However, it also acknowledged that the question was an empirical one, and that although present data were insufficient to answer it, future data might demonstrate that Witherspoon's claims were correct.

Social scientists eventually responded to this encouragement by conducting a variety of methodologically superior studies of the effects of death qualification. Unlike most social science research considered by the courts, many of these studies were designed with the specific, legally relevant empirical questions in mind, in direct response to the *Witherspoon* opinion. As recommended by Thomas Pettigrew in another context, the social scientists were "in on the case from the beginning to shape its form towards issues that social science can address competently" (1979, p. 26). Along with the previous research, their studies were introduced in an evidentiary hearing at the trial-court level, and later in appellate-court litigation in the California Supreme Court. The testimony at the hearing included extensive discussion of all the old and new research, as well as general testimony on such methodological issues as statistical significance, procedures for controlling extraneous variables, and the types of generalization that can be made on the basis of different types of study.

The California Supreme Court's decision in *Hovey* v. *Superior Court* (1980) analyzes this record in detail and shows an unusually strong grasp of the empirical and methodological issues. The decision goes far beyond *Witherspoon,* accepting the social science data on every point raised. But, like *Witherspoon,* it concludes that there is at least one unanswered empirical question that must still be dealt with before a final decision can be reached.

The *Hovey* decision is notable not only for the fact that it drew the "social scientific" conclusion of "not proven," rather than going on to make a binding conclusion of "not true"; it is also an excellent example of the analysis of social science evidence by an appellate court.

> The opinion contains a discussion of empirical social scientific data that is far more extensive and knowledgeable than any that has ever appeared in a published opinion by an American court. All of the objections that are commonly raised to the use of social science in litigation are addressed and overruled. Indeed, the factual issue that is reserved as unresolved is carefully defined as an empirical issue on which further scientific research is needed. [Gross 1980, p. 22]

The unresolved factual issue involved the possible counterbalancing effect of excluding jurors who would *always* vote for the death penalty; subsequent research demonstrated that this group is far too small to outweigh the effects of the *Witherspoon* exclusion (Kadane 1984). In 1985, the Eighth Circuit, on the basis of the entire empirical record including the new evidence, held that the practice of death qualification is unconstitutional because it biases capital juries against the defendant in determining guilt and innocence and because it impairs the representativeness of the jury (*Grigsby* v. *Mabry,*

1985). However, the Fourth Circuit, on the basis of the same record, held that the practice is constitutional, and that empirical social science evidence should not be considered in deciding the constitutional question (*Keeten* v. *Garrison,* 1984). The U.S. Supreme Court largely followed *Keeten.* It criticized the studies in ways that indicated an unfamiliarity with scientific method as well as with the research in the record, but then held that a bias toward quality verdicts in capital cases was constitutionally permissible in any case (*Lockhart* v. *McCree,* 1986).

The plan of research and litigation on death qualification, like that leading up to *Brown* v. *Board of Education,* represents a carefully planned effort in which lawyers and social scientists educated each other so that the research would be relevant to the legal issues and its presentation to the courts would be comprehensive and accurate. The cases on jury size and unanimity embody the opposite extreme—the reliance on social science data in the Supreme Court opinions, especially *Ballew,* coming as a complete surprise, not only to the social science community, but to the litigants themselves. Between these two extremes there is room for a wide range of major and minor roles for social scientists and social science. Perhaps the most frequent influence is the one least susceptible to documentation—the absorption of social science thinking through the general intellectual climate, so that judgments that would have required authority thirty or fifty years ago now seem to be based on common sense. When social-scientific and legal views coincide, progress is likely to be rapid. The move toward deinstitutionalization, for example, was spurred on the one hand by legal activists' increasing concern about depriving innocent people of their liberty and, on the other, by social scientists' increasingly well-documented belief in the harmful effects of institutionalization (Wexler 1976).

RECEPTIVITY TO SOCIAL SCIENCE DATA IN DIFFERENT AREAS OF LAW

Although similar problems of design and use arise whenever efforts are made to influence the law by means of evidence from the social sciences, certain legal realms seem to have been more receptive to social science data than others. Many of our examples have been drawn from criminal law, family law, and mental-health law. In part, this is a consequence of our own familiarity with the literature (economic data are regularly used in antitrust cases, for example), but in part the differences are real. The significant role social science has played in developing criminal-justice procedures, for example, is in sharp contrast to its limited role in discussions of the procedures used to settle disputes in labor relations. It has long been recognized that the procedures used to determine rights and resolve disputes and the remedies employed to correct misconduct will have a powerful effect on the fairness and efficiency of American labor law. A rich literature exists, dating back to Frankfurter and Green's significant and effective analysis of the labor injunction (1930). But influential empirical research is scarce. Only a few studies have attempted to measure the success of existing programs or to examine their operation. Changes in procedure have rarely, if ever, arisen in response to scientific data, although labor relations have furnished an area of considerable procedural development during the past few decades. We will examine labor law in an attempt to understand why social science is seldom used in this area. We will then briefly consider the use of social science in criminal law and examine the similarities and differences between the two fields.

Labor Law[2]

There are several reasons to expect labor relations to be in the vanguard of successful collaboration between law and social science. One of the first important cases in which the Supreme Court acknowledged the relevance of empirical data was *Muller* v. *Oregon* (1908), which involved the right of the state to limit hours of work for women. The brief in that case, filed by Louis Brandeis, became renowned for its effective marshaling of social facts to persuade the court that women were entitled to special legislative protection. To this day, the term "Brandeis brief" is sometimes used to describe a brief focusing on data rather than doctrinal analysis. The development of information about labor relations pursued by scholars in many fields is the primary focus of the entire discipline known as industrial relations. Scholars of industrial relations include economists, sociologists, organizational behaviorists, and lawyers. In passing the National Labor Relations Act, Congress further established a specialized agency, with the expectation that it would become familiar with the realities of labor relations through personal experience and scholarship. Serious legislative efforts to amend the labor law are frequently made, and scholars are often asked to testify.

Despite the rich potential collaboration, the law of labor relations has not been significantly shaped by what has been called professional social inquiry (Lindblom and Cohen 1979). This situation is not due to unwillingness by decision-makers to consider the views of academics. On the contrary, the development of labor law has been importantly influenced by the ideas of law professors—ideas frequently derived from their personal experiences. For example, in a highly significant series of decisions, the Supreme Court overruled earlier precedent to make encouragement of labor arbitration a major goal of national labor policy.[3] The leading opinions derive their picture of labor arbitration from a series of lectures by Harry Shulman, then dean of the Yale Law School. Shulman (1956) based the lectures on his own experience as Chief Umpire for the Ford Motor Company and the United Auto Workers. The Court ignored the few published efforts to systematically study the topic. Many labor-relations experts have since pointed out that Shulman's description of arbitration is idiosyncratic and not generally applicable. Similarly, the Supreme Court based its most important decision defining the duty to

[2] This section is primarily concerned with the use of social science in labor law adjudication, rather than in legislation. While social scientists are frequently asked to testify about the wisdom of proposed legislation, and social scientists have been advisers to legislators, social science research has not played a major role either in shaping labor-relations legislation or in setting the legislative agenda. The basic structure of United States labor-relations law represents a balance of powerful political forces. Any effort at change perceived to be favorable to either side creates enormous counterpressure. In the course of political battle, lines are drawn on the basis of commitments, ideology, and voter pressure. The implications of empirical research rarely surface among such powerful forces; nor does such research spur Congress to initiate legislation. Typically, labor legislation is initiated and managed by organized labor or by management groups on the basis of their own political agenda. The evidence also suggests that, at least for the present, empirical research does not play a major role in establishing the political agenda of the parties. Thus, despite studies indicating their lack of importance as a practical matter, both labor and management have committed considerable resources to the struggle over so-called right-to-work laws.

[3] In 1960, the Supreme Court decided three cases in a single day, establishing national policy concerning arbitration. The cases are known as "the Steelworkers Trilogy" or "the Trilogy." They are *United Steelworkers of America* v. *American Manufacturing Company, United Steelworkers of America* v. *Warrior and Gulf Navigation Company,* and *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation.*

bargain in good faith on writings by Professor Archibald Cox while overlooking systematic studies of bargaining.[4]

Despite its claim to specialized effective decisions, the National Labor Relations Board (NLRB) rarely shows familiarity with studies of industrial relations. When social science research is referred to, it is usually to confer authority. The overwhelming body of decisions is based on technical manipulation of doctrine rooted in statutory analysis and questionable behavioral assumptions; the Court's decisions sometimes show exasperation with the Board's processes, but judical decisions reflect the same difficulties.

To the extent that there is sporadic use of empirical research, it is naïve. Legislative debate—on the state, local, or federal level—is, if anything, less well informed, and rarely does enacted legislation contain anything even suggesting a meaningful impact of social science.

The limited role of social science in shaping policy can be explained by many factors, none of which is confined to labor law.

The Absence of Directly Relevant Research Problems in designing relevant research are pertinent to the situation. In general, all the following circumstances have contributed to the relative paucity of directly relevant research.

1. The complex nature of the legal rules as well as the fact that behavioral assumptions are rarely stated have made it difficult for social scientists to identify legally relevant research topics. By contrast, problems in the criminal-justice system are highly publicized and more likely to come to the attention of social scientists. Legal scholars seldom have the expertise or time to design social science research in either area. Even scholars who are capable of identifying behavioral assumptions are rarely capable of designing research projects to test them.

2. The sensitive nature of labor relations has impeded field studies. It accounts for the absence of cooperation from necessary parties and the desire of the NLRB itself to protect its process.

3. The types of research questions presented by legal assumptions in labor law are rarely central to the concerns or questions that interest social scientists.

4. Social scientists do not readily appreciate the institutional constraints under which the legal system operates, so that proposals for change can rarely be easily implemented.

5. The complexity of the issues almost always precludes the possibility of resolving by research all the factual questions to which answers would be needed for intelligent guidance of public policy.

The Limited Use of Available Data Despite the paucity of field research geared to legal issues, a fair amount of data collected by social scientists could be utilized in establishing or changing legal rules. There are essentially three types of study: research directly aimed at testing the validity or desirability of legal or administrative rules; industrial relations research with implications for legal rules; and data collected in other areas with implications for labor relations, such as studies of conflict resolution, bargaining, and mediation in other contexts, and studies of group dynamics.

[4] See *National Labor Relations Board* v. *Insurance Agents International Union AFL-CIO* (1960), citing Cox (1958).

None of these has been utilized effectively or systematically, for reasons that are both general and particular to the type of research. The problems involved in using social-scientific research to change the basic direction of an area of law are suggested by the experience of one of the authors in investigating the wisdom of NLRB regulations of union organizing campaigns.

At the heart of the American system of industrial relations is the process by which employees vote for or against union representation in elections conducted and regulated by the NLRB. The stakes are high. If the majority of employees vote for representation, the union selected becomes the representative of all the employees in the voting unit, even though some might bitterly oppose it. The employer may not then deal with individual employees or with any other group, and he may not take unilateral action with regard to wages, hours, or working conditions before bargaining with the union. If a majority votes against representation, the union has no official standing and may not bargain, even for its members (*J. I. Case Co.* v. *National Labor Relations Board,* 1944; *National Labor Relations Board* v. *Katz,* 1962). Before the election, both union and employers typically conduct campaigns attempting to convince the employees to vote either for or against representation. On the authority of general statutory language forbidding employers to interfere with, or unions to use coercion against, the right to organize, the NLRB has developed an elaborate system of rules to govern campaign tactics. The Board has defined its regulatory purpose to be "to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible to determine the uninhibited desires of the employees. . . . Where, for any reason, the standard falls too low, the Board will set aside the elections and direct a new one" (*General Shoe Corporation,* 1948, pp. 124, 126).

The NLRB's scheme of regulation rests on certain assumptions about employees' voting behavior. It assumes that employees are attentive to the campaign, that free choice is fragile, and that employees' votes can easily be manipulated by nuances of retaliation coming from employers or through misrepresentations from unions. The Board assumes that employees will interpret employers' ambiguous statements as threats of reprisal and will be coerced thereby into voting against representation (Getman, Goldberg, and Herman 1975).

For some time, scholars had questioned the Board's assumptions. In particular, in a famous article, Derek Bok pointed out that many were inconsistent with the findings of voter studies in political elections (Bok 1970). A major study was undertaken to test the validity of the Board's assumptions (Getman, Goldberg, and Herman 1975).[5] For the six-year study, completed in 1975, the authors examined thirty-one elections, interviewing a panel of employee voters both before and after each election. An effort was made to contrast voter behavior in those elections in which the employer's campaign was thought to interfere with employee rights under the Act and those elections in which the employer's conduct was unobjectionable under the Board's standards. In each case, data were collected from the parties concerning the tactics they used, and the determination

[5]The Board refused to cooperate with the study until it was required by court order to turn over to the investigators the names and addresses of voters in its elections. The opinion by the Court of Appeals castigated the board for its refusal to cooperate and its hostility to a carefully designed, potentially valuable study.

as to legality was made by one of the NLRB's eminent administrative-law judges. In roughly two thirds of the studied elections, some illegal behavior took place, and roughly half of these involved illegality serious enough to warrant a substantial remedial order.

The study's basic finding was that conduct assumed by the Board to interfere with freedom of choice does not, in fact, affect employee voting behavior. The study also indicated that unions encounter significantly greater difficulty than do employers in communicating their message. The authors suggested massive changes in the NLRB's regulatory system, urging much greater freedom of speech for employees and greater access to employees for unions (Getman, Goldberg, and Herman 1976).

The study received considerable scholarly attention. Social scientists generally found its methodology careful and its findings compelling (Goetz and Wike 1977; Kochan 1977). Lawyers were more critical, and commentators raised questions from the perspective of labor and management (Miller 1976; Eames 1976). The vast majority of the comments were favorable, although many reviews challenged some aspect of the research designs, the findings, or the recommendations. The response from the Board itself in deciding whether to pay serious attention to the study was revealing.

In *Shopping Kart Food Market, Inc.* (1977), the majority of the Board relied in part on the study in deciding that it would no longer overturn elections based on campaign misrepresentation. The previous highly controversial doctrine had been under attack from within the Board for some time. The majority in *Shopping Kart* made clear, however, that it did not intend to adopt the study's suggested approach generally. "We shall, of course, continue our policy of overseeing other campaign conducts which interfere with employees free choice outside the area of misrepresentation." The minority sharply attacked the study and its conclusion. It accused the majority of preparing to drop the NLRB's traditional approach, and it rejected the study's general conclusion on the grounds that "forty-three years of conducting elections convinces us . . . that employees are influenced by certain union and employer campaign statements." The level of debate between the majority and minority was highly unsophisticated. As David Shapiro of the Harvard Law School pointed out, "On the one hand, the majority simply referred to the study without any consideration of its strengths and weaknesses. The dissenters, on the other hand, tried only to score debators' points against it without any pretense of objectivity" (1977, p. 1593).

Although the *Shopping Kart* decision was hailed as proof of the potential impact of social science on legal doctrine (Roomkin and Abrams 1977), the Board did not address itself to further changes on the basis of the study, and a short time later, with the change of a single Board member, it overturned the *Shopping Kart* decision. After criticizing the study's methodology, the Board majority commented:

> Even if this particular study was clearly supportive of all the author's conclusions, however, we would still not find it an adequate grounds for rejecting a rule which has been established for fifteen years. While we welcome research from the behavioral sciences, one study of only thirty-one elections in one area of the country is not sufficient to disprove the assumptions upon which the Board has regulated election conduct. . . . [*General Knit of California, Inc.*, 1978, p. 622]

Therefore, the Board continued to apply its traditional assumptions, almost totally ignoring the study.

Judicial response has been similarly limited. Even though a few courts have noted that the study casts doubts on the validity of the Board's assumption, the courts are bound by the statutory scheme to defer to the Board's officially proclaimed expertise.

The study was referred to extensively in the debate on the Labor Reform Act of 1977 (H.R. Report No. 95-637, 1977, pp. 24–35, 38–39; S. Report No. 411-22, 1977, pp. 144–261), but that act was not passed, and the study played only a minor role in a debate which was heavily political. Political currents in labor relations were far more influential than the findings of any scholarly work in shaping the bill's contours and its final fate. Nor has the study been followed by significant additional field work, although the desirability of such research has been noted many times.

Both the high cost of field work and the desire of research-funding agencies to commit their resources to path-breaking studies have militated against replication in this area. With regard to this study and other empirical work, the Board's willingness and ability to respond adequately have been limited by the fact that the NLRB and its staff are lawyers neither familiar with nor adept at dealing with social science data.

Where research supports intuitive assumptions, it may be referred to without critical consideration of the techniques by which it is gathered. Data that are counterintuitive are certain to be viewed suspiciously, little personal or institutional competence being available to evaluate their reliability. The suspicion is inevitable to the extent that the data suggest that the Board and its employees have devoted their effort to a meaningless or harmful process of regulation. Nor is the Board able to determine the extent to which it is safe to generalize on the basis of the limited data available. Because the field is a sensitive and adversarial one, and the issues are so complex that there has been no research, any research which concludes that significant change is desirable will inevitably be subject to hostile criticism.

Research in which the implications are spelled out and the researcher takes a forthright position on changes the Board should make becomes suspect as unduly adversarial. If the implications of research are not spelled out, they are likely to be misunderstood. Since in the field of labor relations the interest groups are extremely well organized, efforts to refute any significant research will be encouraged by whichever side feels aggrieved by it. To some considerable extent, both the law and its interpretation reflect the existing political balance between labor and management. Any potential effect of social science research on the law might disturb the balance and embroil the agency in bitter political controversy. This situation would obtain regardless of whether the data were favorable or opposed to union activity.

Moreover, almost by definition, significant change is likely to run counter to the ideological convictions of a majority of the Board. The existing system is shaped by legislative policy decisions reflected in statutory language and by a venerable line of decisions committing the agency to various points of view. A healthy sense of institutional modesty will mediate against substantial change in response to research findings when the implications and the generalizations which may be drawn from them are not easily determined.

Attitudes about the underlying realities of labor relations are frequently strongly held; they are based on a combination of political ideology, personal experience, and widely shared assumptions. Faced with a choice between such strong, widely shared beliefs and even carefully documented research findings, supported by regression analysis and

matrices and mathematical formulas which they do not understand, decision-makers will, not surprisingly, opt for the former, particularly when the latter have been challenged by opposing data or have been subjected to critical attacks by other social scientists. Thus, counterintuitive data have rarely been embraced in a direct fashion. Empirical work may, of course, help to change general attitudes, and thus to precipitate change, but such an effect is difficult to predict. It requires a wide range of complementary work tied together by a general theory or model that gains acceptance, such as the general notion that administrative regulation generally fails to achieve its objectives.

Thus, experience with labor law suggests that, in an area lacking a substantial amount of research resulting in fairly clear policy implications, counterintuitive or controversial social science research findings are unlikely to effect changes in the law. On the other hand, the notion that empirical research is effective only when consistent with the intuitive knowledge of decision-makers is disturbing, suggesting both that research is rarely likely to make a difference to the basic approach which the law takes in an area and that its primary function will be conservative, confirming the behavioral basis for existing approaches, and suggesting interstitial improvement.

General Limitations on the Use of Social Science in Labor Law A limited role for social science is likely to deter legal scholars or others concerned with reforming the system from undertaking complex empirical work. Such a situation requires that significant effort be expended to produce minor change. Traditional legal scholarship offers potentially greater impact for less effort. By discussing whether decisions are consistent with generally accepted doctrine, legislative history, or the researcher's own assumptions, traditional legal scholars have made a significant impact on the system of labor laws.[6] Nor does the prospect of a minor impact on legal rules appear to have much appeal to social scientists. Only a small fraction of industrial-relations research is therefore aimed at, or significantly shaped directly by, legal rules.

Thus, both the supply and the impact of social science research directly geared to legal rules are predictably limited. The use of other types of social science data offers some advantages but also introduces additional problems. Since other types of data are not explicitly designed to address issues arising in labor law, they have the advantage of appearing neither as prolabor nor as promanagement or even as having a scholarly ax to grind. Thus, the aura of scientific impartiality is more easily maintained, but the applicability of the data to specific labor-law relations is always questionable. For example, the dynamics of political elections, which have been widely studied, may or may not be applicable to NLRB elections, which have not been thoroughly studied. The Board has consistently ignored or depreciated the applicability of studies in contexts other than labor, on the assumption that the employees' economic dependence on the employer creates a unique situation. Similar studies of bargaining in other contexts have not been viewed as significant in shaping the employer's bargaining obligation under §8 (2) (5) of the NLRA, probably because they have not addressed the complex type of ongoing multifaceted relationships involved in collective bargaining.

[6]Thus, for example, Professor Archibald Cox has helped to shape the law dealing with the obligation to bargain in good faith (see text accompanying note 4, above) and the relationship between unions and members in the processing of grievances without any systematic investigation of the existing relations between grievants and stewards on how they would be affected by various possible approaches.

In addition, even if applicability was assumed, the implication of general studies on other contexts of labor-law rules is unlikely to be clear. Furthermore, the more general the data, the wider the field from which competing data may be selected, partly because the applicability, interrelations, and selection are involved in applying social science. The usefulness will, in part, turn on the sophistication of judges and of the lawyers who appear before them. Sophisticated use of empirical research by lawyers is hampered by the fact that only rarely will lawyers be tempted to deal with social science in a manner related to the likelihood of its utilization by courts. For most lawyers in routine cases, the start-up cost of investigating social science phenomena is not worth the effort. Studies are referred to in briefs only in important cases. The lack of familiarity increases the likelihood that when the lawyers and the courts do use social science data, they will do so badly.

The misuse of social science data is at least as old as *Muller* v. *Oregon,* the case that first sustained differentiation on the basis of gender. The brief in that case by Louis Brandeis reflects all the problems of adversarial nonscientific use of data and the result has created a myriad of obstacles for those seeking gender equality under the Constitution. Justice Brandeis is commonly recognized as one of the great legal minds of all time, but his brief is embarrassing in the way it links data of various types (Babcock et al. 1973, pp. 35–37). That it helped to lead the court to a questionable willingness to permit sexual differentiation has been noted several times. Given these considerations, it is not surprising that social science research is rarely used intelligently by courts or agencies to shape the law of labor relations. Moreover, none of the difficulties referred to are unique to labor relations.

However, the analysis does not exclude effective use of research in other cases or in other ways. Indeed, the balance of powerful political forces that tends to overwhelm social science data as a source is not always present. Several circumstances can be identified in which social science has played or is likely to play a significant role in the judicial process. When the law is uncertain or is in a state of flux and the behavioral assumptions upon which previous doctrine has rested become widely challenged, empirical data can play a role in either negating or reinforcing the assumptions on which previous doctrine rested. One explanation of the famous Footnote 11 in *Brown,* dealing with the findings of social scientists about the inherent inequality of "separate but equal" schools, is that it helped to complete the rejection of the behavioral assumptions underlying *Plessy* v. *Ferguson* (1896). Once social science comes to play a significant role in such areas, it is possible to assume that its use will increase because lawyers and judges in the field will become more familiar with it.

Reasons for Use and Nonuse The NLRB's failure to rely on empirical research is not typical of all administrative agencies. Since the use of empirical research by administrative agencies has not been systematically studied, however, it is impossible to obtain a precise picture of specific differences in various agencies. Such data as are available suggest that the Board is at one end of a very broad continuum, in that it does not conduct, authorize, or utilize social science research in formulating either rules or enforcement policies. Other agencies use social science research to a much greater extent (*Administrative Law Review* 1980). The Federal Trade Commission (FTC), for example, uses such materials in determining which cases to pursue in developing proof of the

impact of conduct thought to be misleading to consumers and in evaluating the economic consequences of mergers and other actions deemed to be unfair (see, for example, Stanton 1980; Federal Trade Commission 1980). Social-welfare agencies frequently employ social science to determine the size and composition of groups entitled to benefits. The Environmental Protection Agency (EPA) has used it to determine the best strategy to use in eliminating pollutants (Ackerman and Hassler 1981). The variety of reasons why the Board lags behind other agencies in the use of social science is instructive about the factors that promote or retard an agency's receptivity to more traditional materials.

The Board has developed its doctrines entirely through adjudication rather than by rule-making. It is probable that the adjudicatory format is less favorable than is rule-making to the presentation or evaluation of sophisticated social science materials (Shapiro 1977, p. 1543).

The Board's professional staff is heavily weighted with lawyers. Lawyer field examiners are likely to investigate charges. In dubious cases, the decision on whether the charge is meritorious is submitted to a panel of lawyers. The final decision is made by the regional attorney and the regional director, who is almost certain to be a lawyer. This decision is appealed to other lawyers. If the matter is litigated, it is heard by administrative-law judges, who are lawyers. It may be appealed to the Board, whose members are almost exclusively lawyers, themselves supported by sizable staffs composed of lawyers. Failure to comply with the Board's order will trigger enforcement action by another group of attorneys.

As the result of a historical quirk, the Board is not authorized "to appoint individuals for the purpose of conciliation or mediation or for economic analysis" [National Labor Relations Act, 1947, §4(2)]. The limitation against the use of economists has prevented the Board from developing sophisticated familiarity with the area of social science currently most often related to legal decision-making.

The Board has no authority to initiate proceedings—only the parties have that privilege. Probably as a consequence, the NLRB has never developed a strategy for allocating its resources in certain areas or industries. The need to allocate resources has motivated such agencies as the EEOC and the FTC to employ social science methodology to estimate the areas where need and/or opportunity are greatest. The Board's constituencies are politically powerful, and the Board can generally play the role of impartial adjudicator rather than that of advocate. Since the Board does not have responsibility for allocating resources, it does not need to have an accurate profile of the groups utilizing its resources.

The Board's failure to employ social science has not made it notably less able than other agencies—such as the FTC and EPA—to carry out its mission. Indeed, studies of the FTC have been sharply critical; its use of social science has not prevented knowledgeable commentators from criticizing its basic policies and its allocation of resources. Scholars have similarly criticized other agencies, such as the EPA, which utilize social scientists much more than does the NLRB.

Nor has the absence of guidance from social scientists prevented labor and management from developing innovative quasi-legal institutions. The establishment of labor arbitration as a private system of justice has been one of the few acknowledged successes in dispute resolution in our time. It arose as a complement to the bargaining process, with little participation by the government and almost none by social scientists interested in

labor relations specifically or dispute resolution generally. This process holds a significant cautionary message for social scientists, suggesting that complementary private interaction may be the key to attaining fair procedure, and when that occurs the system is likely to develop spontaneously.

Criminal Law

If problems of labor law exemplify the difficulties of stimulating pertinent research and persuading decision-makers to use it, the field of criminal law reveals that it is possible to develop considerable interaction, although neither lawyers nor social scientists view it as altogether successful. Social science has affected such questions as the standards for insanity, the constitutionality of the death penalty, the desirability of incarceration, and the proper strategy to be used in sentencing.

It is not easy to explain why the interaction is so much greater in criminal law. It is true that criminology has developed as a branch of research directly bearing on questions of public policy in criminal law; but there has been a great deal of field research in labor relations, which also exists as a special academic discipline.

Both as a result and as a cause of the interaction, criminological research is more frequently directed specifically to improving the legal system than is labor-relations research. When scholars know their work may have an impact, they are likely to address the legal questions. When courts and legislatures are aware that such research exists, and that it has been utilized in the past, they are more likely to take it into account.

The courts' willingness to consider social science research in dealing with criminal law probably reflects the general perception that the American system of criminal justice is a failure and that new ideas and approaches are called for. There is probably less willingness to be experimental about labor law because there is a general sense that the current approach is adequate and because the general public is much less aware of the issues, and therefore much less likely to complain. Moreover, suggestions for revision arise naturally from the interaction between political parties.

The existence of data and their use by courts and legislatures have not led to a general feeling of success. There may be more dissatisfaction about the role of social science in criminal law than in any other area, even including race relations. The sense of failure seems to derive from four major sources.

First, the proliferation of data has not answered the basic factual questions to which scholars have addressed themselves. Different studies point to different conclusions about such issues as the deterrent effect of punishment, whether imprisonment decreases crime, whether rehabilitation is possible, and the impact of shorter sentences. Second, there is a developing realization that policy issues are more complex than was once realized and that data collection and interpretation are at most only a first step toward their resolution. Third, even if the answers to substantive questions were known, they would not readily lead to the establishment of public policy because there is widespread disagreement about such fundamental issues as the goals of criminal laws and the criteria for characterizing conduct as criminal.

Finally, disappointment with the contribution of social science to criminal justice is almost surely related to general disappointment with the criminal-justice system. It has not stemmed the growth of crime. It is seen as having neither deterred nor rehabilitated and as failing to mete out appropriate punishment. The system is perceived to dispense

justice unequally, the poor and members of minority groups singled out for harsher treatment in a variety of ways.

Dissatisfaction with social science based on its inability to make the United States system of justice more effective may ultimately reflect a misconception about what the law can accomplish. If problems of crime and inequality are ever resolved, it will be through major changes in the way society is organized, not through changes in legal rules or procedures.

THE EVALUATION OF SOCIAL SCIENCE DATA

Along with many others, we have suggested that social science data are much more readily assimilated in legal decision-making when they agree with the decision-maker's intuition, with common sense, or with the prevalent intellectual culture. Often a general point of view is assimilated, rather than any specific data. The drawbacks of relying on common sense are that it may be false and that its sources, because implicit, are not easy to discredit. In theory, this represents a major difference between the use of particular bodies of social science research and the use of vague current notions originally inspired by social science. In practice, a social scientist may draw false conclusions from an empirical study, and the research itself may not be easy to discredit. Not all research is good research; some is worthless, and some is worthless for reasons not easily grasped by the layman (Campbell and Stanley 1966; Cook and Campbell 1979). Ideally, the law should rely on valuable, methodologically impeccable research and should reject studies that have fatal flaws; but how are legal decision-makers to know the difference?

For deciding other kinds of facts and ascertaining the validity of the statements of other kinds of witnesses, the law has relied on the adversary system; this process is also favored by many lawyers and appellate-court judges as the appropriate method for evaluating social science research. As Justice Lewis Powell stated in his concurring opinion in *Ballew* v. *Georgia:*

> I have reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology covered by the studies cited was subjected to the traditional testing mechanisms of the adversary process. The studies relied on merely represent unexamined findings of persons interested in the jury system. [p. 246]

There are several difficulties. Even at the appellate-court level, where the judges can study written arguments at their leisure, their competence may be insufficient to address or even comprehend the opposing arguments. This was undoubtedly the case when an econometric model of the deterrent efficacy of executions was presented in the United States' brief in the death-penalty case of *Fowler* v. *North Carolina* (1976) and was rebutted with alternative models by petitioner. How is the court to choose in an argument involving the adequacy of the data base, the significance of regression coefficients, and the choice of appropriate control analyses? In a situation like this, one party may, in fact, have the stronger arguments, but the court can only conclude—as apparently the Supreme Court did on the issue of deterrence—that experts disagree. But disagreement among experts should not be grounds for disregarding the empirical issues entirely.

Instances of complete unanimity among the social science community are extremely rare, and it would be unfortunate if the Court were to insist on a standard of absolute agreement before accepting social science data. To consider the weight of evidence evenly balanced whenever there is any disagreement is to ignore all the degrees of probability between a fifty-fifty chance and certainty.

In general, the series of death penalty cases that began in the 1960s provides a good example of the difficulties in presenting empirical data to be considered in the decision of a constitutional question and in assessing the impact of these data after the fact. The briefs in these cases contained exhaustive analyses of the discriminatory application of the laws, the deterrent impact of capital punishment, long-term trends in public opinion, and other empirical issues. The Supreme Court's response to these areas of research has been tentative. In each case the court initially emphasized the importance of research and then drew back. The reasons for the hesitation are complex. It reflects, in part, the difficulty of assessing the merits of sophisticated research; in part, the conflict between social science data and general community attitudes toward deterrence; and in part, the fact that values not directly addressed by the empirical research are also implicated in consideration of the death penalty.

With regard to the discriminatory impact of the death penalty, the Court's position may be explained not by doubts about the research, but by the difficulty of responding to it. Almost any scheme for the imposition of capital punishment is likely to have discriminatory implications. While this circumstance argues against capital punishment, its ramifications are wider. The criminal-justice system is so constructed that minority groups and the poor are most likely to be apprehended, most likely to be charged with serious crimes, least likely to be acquitted, and most likely to be given heavy sentences. Discriminatory impact is endemic and difficult to overcome. In the end, the argument turns on the empirically obvious but legally ambiguous proposition that "death is different." Thus, the existence of a great deal of research may force the appellate courts to consider social science, but the interaction has so far produced disappointing results in terms of developing new, more effective, or fairer legal standards.

Justice Powell argues that this confusion about the reliability of social science data is produced by their belated presentation at the appellate-court level, that the way to decide these issues is to introduce them in the trial courts, so that they will be subject to the traditional testing mechanisms, the adversary process (see also Rosenblum et al. 1978).

The "battle of the experts" in insanity cases and other cases involving individual assessment suggests that the traditional testing mechanisms may be flawed. In such cases expert testimony by opposing adversarial witnesses probably has a negligible influence on the outcome of the case. When an expert's statements are flatly denied by another expert, neither seems very credible. If two social scientists, under oath, contradict each other, the jury can only conclude that one or both are perjuring themselves; that the truth is so complex and so elusive, and the social science so crude and fumbling, that the honest best guesses of the experts are hardly better than anyone else's; or that one expert is right and the other is wrong. The third possibility is the one ideally assumed by the adversarial system: there is a knowable truth, witnesses are honest, and judges or jurors will decide which witnesses are more credible on the basis of the witnesses' real knowledge of the facts. Undoubtedly there are many cases in which one expert does appear to be much more credible than the other and in which the outcome is influenced by expert

testimony. But there is no reason to believe that the appearance of credibility has any relation to the actual expertise or honesty of the expert; the more persuasive social scientist may carry the day, but the more respectable social science theory, knowledge, and data may receive no particular favor.

Having listened to expert testimony, and having testified ourselves, we are by no means convinced that the trial court is an appropriate forum for evaluating scientific data. First, important information may be omitted. The questions other informed critical scientists would think of may simply never be asked; and if a question is not asked, the question-and-answer format of the courtroom makes it difficult, if not impossible, for the scientists to provide the information. The assumption is that one adversary or another is interested in every relevant piece of information, but it may be a very dubious assumption indeed, if the witness wants, for example, to explain the meaning of statistical significance to the court. The first problem with this assumption is that neither lawyer may know enough about social science research to know what information he or she should be interested in. The second is that, especially in a jury trial, both lawyers may have an interest in keeping the testimony simple, and many studies simply cannot be adequately evaluated if the record omits a detailed description of the research methods and statistical analyses.

Thus, one problem with the introduction of social science evidence at the trial-court level, in order to be sure that it has been subjected to the "traditional testing mechanisms" by the time it reaches the appellate courts, is that the functions of the two tribunals are not the same. The concerns of the trial-court judge and jury are local, sharply focused on the particulars of the individual case before them; the appellate courts are more interested in identifying and rectifying general patterns of injustice. The data the appellate courts need to assess general phenomena may often be considered too general, too unrelated to the specific case, to be presented in the trial court. In tailoring cases to the trial-court judge and jury, the most effective legal strategy may be to omit a substantial proportion of the general information that may be critical at the appellate-court level. An attorney who has his eye on the appellate courts and who is using the trial court primarily as a forum for introducing the data into the record may be willing to bring forward all the relevant social science information on a given topic, but his comprehensive and beautifully prepared case may still be stymied by the trial-court judge. The judge may decide that data collected in other jurisdictions or general methodological testimony are not germane to the case at hand and may reject the introduction of important and relevant social-scientific studies on the grounds that they are hearsay, common sense, or mere speculation. Thus, the record may include expert opinions by witnesses without including the research on which those opinions are based and by which they may be evaluated.

Some of the problems are illustrated by the school-desegregation cases, in which the NAACP Legal Defense and Educational Fund actively sought respected social scientists as experts on two major lines of argument. First, they were called to testify that, in fact, the black schools in a particular jurisdiction were inferior to white schools; second, and more basic, they were asked to use general, aggregate data and theory to testify that the separation itself inevitably created inequalities that discriminated against the blacks both educationally and psychologically. The use of such aggregate-level data was unusual at the time, and it is clear that the lawyers felt quite uncertain about its acceptability at the

trial-court level. Although some of their witnesses testified solely on the basis of general data on the negative effects of segregation, the lawyers felt that it was very important that at least one witness replicate his research by administering tests to a few children in the actual school districts involved in the controversy. It seems that this caution was justified; a frequent technique of the attorneys for the school boards was to demonstrate that the expert—often someone from a different part of the country—knew very little about the particular district and the particular litigants, to emphasize repeatedly that the findings were not based on tests of local children, and to argue that the testimony was thus inapplicable to the particular case at hand (see Kluger 1976).

Another problem with the introduction of social science evidence at the trial-court level is that there is no reason to believe that the skill of effective courtroom testimony is highly correlated with the skill of scientific expertise, and there is every reason to believe that a trial attorney, if forced to choose, will prefer the better witness to the better scientist. Even an excellent scientist is likely to be less than perfectly coherent, and perhaps less than perfectly honest, on the witness stand. Unable to anticipate questions, to prepare answers in advance, or to offer full explanations; threatened by contemptuous attacks with no opportunity for rebuttal; restricted by a good cross-examiner to yes and no answers—the scientists are not apt to appear at their best. A facile dogmatism may sound better—and read better in the record—than a more hesitant and more accurate response. The mode of presentation and the kinds of questions asked are often so foreign to the professional experience of most research scientists that it is difficult to believe that the answers given in this context could possibly be the best account of the research or that the interchange could provide a valid text for deciding what is scientifically true and what is not.

If opposing experts were given free rein to argue the issue between each other in the courtroom, without the lawyers or judges determining what to ask or what to criticize, the record would probably be a much better representation of the scientifically important issues. But of course one of the experts might admit to being persuaded, which would not be at all fair to his "side."

The use of competing experts is only one aspect of the problem of maintaining scientific neutrality in an adversary process. In many contexts, expert witnesses may experience various forms of pressure to shape their testimony or research to make it most favorable to the side employing them. The most obvious pressure is in the fact that the expert's fee will be determined by how much he is asked to do, and thus in turn will depend upon how potentially favorable his testimony and research appear to be. The expert is typically informed either directly or indirectly about what is desired, and payment at a per diem rate is offered. The number of days employed generally vary directly with the perceived usefulness of the testimony as that emerges from preliminary discussions and follow-up meetings. In short, to some extent the expert can control the fee by offering a maximum amount of support. Beyond such narrow self-interest there is the inevitable desire to return something of value for payment received, which may often be substantial.

Potential experts may also be flattered and told how valuable their testimony will be. Further, the case will be described from a partisan perspective, making it easy to believe that the lawyers who are seeking help have both fairness and legal precedent on their side. Even without contradicting professional beliefs, an expert witness motivated to be

helpful is often in a position to phrase the testimony in a way that will help the employing side. Similarly, expert witnesses who are asked to collect and/or to analyze data may construct their analyses in a way favorable to the side they are supporting.

In rare cases, some of the problems of the adversarial use of experts have been creatively circumvented by innovative methods of preparing the witnesses and introducing their testimony. For example, in a California school-desegregation case, a compromise between the use of adversarial and court-appointed experts was achieved. The judge appointed eight experts with various skills and perspectives to study and report on desegregation in Los Angeles. The experts were given questions in advance and asked to prepare written responses independently and at their leisure. Thus, they had the opportunity to be as comprehensive, accurate, and responsive as possible with regard to the specific issues raised and, if they felt it important, to raise additional issues. They were also allowed to consult with one another, so that they could resolve those differences that were more apparent than real, educate one another about relevant research, and divide up the task according to their separate competencies. Objections by the lawyers for the parties involved led to a decision that the experts would not communicate directly with the judge but would deal with the various parties and with the court-appointed referee (Pettigrew 1979). It may be that the introduction of such alternative mechanisms for presenting general social science evidence will help to avoid the demeaning and uninformative battles of the experts that often result from traditional procedures.

Questions about the adversarial use of social science have also been raised with regard to research sponsored by groups hoping to use the research to shape legal doctrine in a particular fashion. Presumably the sponsoring group—be it a religious organization, a group established to protect the interests of minorities or women, an industry, or a single-issue political lobby—is less interested in scientific discovery than it is in generating supportive evidence for conclusions already reached.

The problem can be broken into three issues: the choice of studies to be undertaken, the quality of the research itself, and the link between the empirical data and the legal conclusions. Sponsoring organizations clearly have an influence on the choice of research topics; to return to an earlier example, many foundations have had a special interest in criminal justice, few have been concerned with labor law. A more serious problem for judicial decision-makers is that the sponsoring organization will also look for research that is likely to produce results favorable to its point of view. Studies that appear risky or unpromising may not be attempted. Unless other parties or other researchers are interested in the same general topic, the available research may be an incomplete or biased sample of the universe of possible studies that might be done in an area. Of course, unsponsored investigators also choose to pursue some ideas and abandon others, but it is generally assumed that their goal is to satisfy curiosity rather than to muster support for a desirable conclusion. According to the adversary system, obvious gaps in the research program will be discovered and pointed out by opposing experts. This safeguard may not always work, however, particularly if the party introducing the research has energy, preparation, and surprise on its side. Even if the two adversaries are prepared for the contest, there is still the more basic problem of the adversary presentation of scientific research: the courts' inability in dealing with technical data to distinguish sound criticism from frivolous attacks.

The quality of sponsored research can range from excellent to laughable; its range is the same as that of any research. Protection against biased or inferior studies is slightly easier to achieve than protection against an incomplete research program. By requiring full disclosure of the research design, the measures, the sample, and the procedures, the courts can assure that they and the opposing experts will have all the information they need to assess the validity of the presented research. It is easier to judge the validity of a set of studies presented in evidence than it is to judge the outcome and impact of an unspecified set of studies that might have been done but were not. Although still a very difficult task, it is probably no more difficult in relation to sponsored research than to any other kind. If anything, adversaries are likely to be unusually thorough in their scrutiny of the methodology of sponsored research. Anticipation of this kind of painstaking examination by hostile parties may, in some cases, even improve the quality of sponsored research; a researcher who expects to be subjected to cross-examination may be more attentive to detail than one who does not.

The link between a body of research and a legal conclusion is often more obvious when the research is sponsored by an organization with legal goals, since the legal strategy and the research strategy may be developed together. Regardless of where the research funding comes from, collaboration between lawyers and social scientists is very helpful in assuring that the research addresses the legal issues. When the experts are on the witness stand, of course, the lawyers who recruited them may press them to go beyond the data to address more general legal issues, but the judges are much more capable of dealing with this kind of exaggeration than they are in assessing the research itself, and we have not noticed any instances where they have been swayed by an expert's legal conclusions.

In sum, the main problem with sponsored research is that only certain studies may be carried out, while other plausible studies are avoided. Once a study is performed, however, the research and the conclusions drawn from it can be judged on their merits, and the problems are no more or less formidable than those presented by any social science research.

The neutrality of any social science research—even when it is not sponsored—has also been questioned, on the grounds that the selection of research projects inevitably reflects the political and social biases of social scientists. Since social scientists tend to be political liberals, the argument goes, their research tends to be structured in such a way as to advance liberal causes and to bypass research thought and felt to have antiliberal implications. Even if this process does not take place, the questions chosen for investigation will reflect the liberal agenda. Questions such as the effect of poverty and social conditions on crime rates came to be investigated, but the relationship between crime rates and racial integration of neighborhoods did not.

It is difficult to evaluate the accuracy of this criticism, particularly in terms of its implications for the law. Currently, economics is the social science with greatest impact on the law, and it is simply not true that the field of law and economics is dominated by liberals. Conservative groups concerned with social issues are well organized and often well funded. On many questions, such as the effectiveness of regulation on the value of social programs, research has not reflected the supposed liberal bias. Thus, this criticism raises another of the many interesting but basically unexplored questions about the interaction between law and social science.

Some Tentative Generalizations

In preparing this chapter, we have been struck by the diversity and flexibility of the relationships between law and social science. Some areas of law have been powerfully affected by social science thinking, while others have been largely immune. It is difficult to explain these differences in terms of the importance of the legal issues or of the types of public policy being pursued. Indeed, as our discussion of labor law demonstrates, even the existence of a field of social research closely allied to the area of legal regulation does not assure legal decision-makers' receptivity to social science data and reasoning.

The willingness of courts and agencies to pay attention to social science is most affected by the types of determination they are asked to make prior to arriving at their decision. In resolving disputes, courts traditionally perform two functions. They make findings of fact about the behavior of the parties, and they determine which legal rules should be applied to the fact as found. Sometimes, when none of the existing rules seem appropriate, a new rule is established for the case at hand. This is the routine legal business of the courts. The rules themselves are based on legislation, precedents, generally accepted concepts of justice, and widely shared factual assumptions.

The law seems most receptive to social science when legal outcomes turn upon individual predictions or assessments, as is the case in such areas as parole, civil commitment, adoption, custody disputes, and application of laws regarding sexual deviance. In all these areas, in order to decide the case before it, the court must consider how to classify the individual in terms of preexisting legal categories or the likely impact of its decision on the behavior of the people it affects. Is the person who might be paroled likely to commit violent crimes? Will the person whose mental health is being adjudicated be able to live a self-sufficient life outside an institution? Is the alleged psychopath likely to commit crimes of a sexual nature? Which parent is likely to be better able to care for the needs of the child? Questions like these cannot be resolved by fact-finding of the traditional sort, nor does the outcome turn on the court's ability to find the proper legal standard to be applied. It is interesting to note that the use of social science experts became much more widespread in custody disputes as the law moved from judging past behavior and relying on a general standard (favoring maternal control) to comparative predictions.

It seems natural for the courts to consider social science in making such evaluations; identifying variables that predict behavior and measuring their impact is a central concern of social science. Nevertheless, the process of using social science to aid legal prediction in legal contexts has been far from smooth. Several significant institutional features make it difficult to incorporate social science in the procedures involving individual assessments.

First, because most of these cases involve no great principle or issue, highly regarded social scientists are unlikely to become directly involved. Clinical practitioners in allied fields are most easily and inexpensively available, and perhaps the most willing to shape their testimony to the desires of the lawyers who call upon them. Further, the very lack of judicial expertise that makes the use of social science desirable also makes it difficult to establish adequate guidelines about suitable credentials; thus, it is frequently the case that the people who attempt to base their testimony on social science research and theory have only a passing familiarity with the field.

Second, the questions with respect to which prediction is sought are typically not

questions that social science has addressed directly, nor are they questions that are regularly dealt with by clinicians. Thus, there is no reason to assume that clinical experience is necessarily valuable in addressing them. Clinical psychologists are trained to make diagnoses of various degrees of psychological maladjustment, but the value of such diagnosis for the prediction of specific forms of future behavior, such as violence and parental cruelty, has so far proven highly dubious. In addition, clinicians are rarely trained to make comparative judgments. Complex behaviors like criminality or child-rearing are obviously the product of the interaction of a large number of situational and individual factors. In extreme cases, the individualized diagnoses of the quasi-experts probably do not make much difference to the judgments that would have been rendered anyway; in the large gray area of borderline or "middling" cases, the use of such diagnoses probably serves to make a speculative enterprise slightly more rational and standardized, but not necessarily more accurate.

Third, the processes by which experts are recruited, prepared, and questioned is calculated to make their presentation more adversarial than scientific, and the circumstances by which experts learn the facts are sometimes highly suspect. They are frequently called upon to testify on the basis of clinical criteria, without having examined the party about whose characteristics they are testifying. Much of the literature on the use of expert witnesses has therefore focused on the weaknesses of the process.

Fourth, problems connected with the use of clinical evaluation have led to efforts to achieve greater accuracy through the use of general standards derived from aggregate data in such areas as parole and bail proceedings. But judging the individual case in terms of statistical generalities also presents problems. The use of aggregate data makes it more difficult to take into account possibly significant idiosyncratic circumstances. Moreover, certain standards based on aggregate data—such as education or family background—are so closely related to race, ethnic background, or poverty that their use raises substantial constitutional issues and jurisprudential questions.

Social science is also frequently used in situations where the law is prepared to withhold or modify its judgment depending on an evaluation of the defendant's mental condition. Such issues as fitness for trial, the insanity defense, and diminished responsibility are of this type. Most of the problems relevant to the legal use of clinical experts apply in adjudging mental states in these areas as much as they do when the question is primarily one of prediction. The adversarial nature of the proceedings, the difficulty of obtaining valid data, and the weakness of the experts' scholarly credentials continue to be problems. This sort of assessment differs from prediction, however, in that the legal questions involved in judging mental states appear to be closely related to the clinical questions frequently addressed in determining a course of treatment; indeed, there is a substantial overlap in terminology. The similarities between the legal and clinical issues have turned out to be deceptive, however, and the differences are greater than earlier legal commentators recognized. Even though similar characterizations are used, when notions of insanity and mental illness are used for different purposes—such as punishment and treatment—they generally turn out to have different content. Use of the same label can mask the fundamental differences in the questions addressed, resulting in a fair amount of confusion. The problem is compounded by the fact that legal standards seeking to incorporate scientific judgment may become outdated by changes in science; thus, the law embraced the medical concept of mental illness just when scientists came to distrust

it. The law must presume a definable difference between the mentally insane and the morally reprehensible, while scientists assume that similar elements of compulsion and choice are present in a wide range of conduct usually treated as criminal. As it turns out, the determination of mental status creates many of the same problems as does prediction, with the additional problem of distinguishing between legal and clinical judgments.

The great majority of interactions between law and social science involve neither high-level social science nor high-level law. They involve people at the margins of both disciplines; sometimes, people who are not lawyers consider recommendations or evidence from people who are not social scientists. Thus, the changes in the legal system brought about by social science are in the main likely to be gradual, slowly proliferating as changes in both disciplines reach to the lower-level practitioners. It is for this reason, among others, that the general climate of informed opinion is much more likely to lead to significant changes in the operation of the legal system than is innovative research aimed at changing legal standards, especially when the conclusions of that research are unexpected.

Occasionally the legal goals and the social-scientific capacities are well suited to each other, and where this occurs progress may be rapid. Although originally defined as a fundamental goal by the law, the concept of the representative jury developed and changed partly in response to the recognition of the capacity of social science to measure it. The case of jury representativeness is perhaps the simplest (and most successful) example of the assessment of unequal treatment by means of blind statistical definitions of equality, and the consequent clarification of the legal concept of inequality. Similar attempts in other areas have become common, and show promise, but they have rarely worked out quite so simply.

In comparison with other questions about legal substance or procedure that social scientists might be asked, it is striking how frequently they have been asked to measure or define, justify or condemn unequal treatment in domains as diverse as those of *Muller* v. *Oregon*, *Brown* v. *Board of Education*, and *Furman* v. *Georgia*. In labor law, the Congress has referred to social science findings to determine whether unions and employers have equal opportunity to get their messages heard. It is a hallmark of our period that claims to equal treatment are more frequently made and, once made, are treated more seriously than they were in the past. Thus, the need to assess differences and the task of defining equality arise repeatedly in different contexts. Because, almost by definition, social science investigation is concerned with the existence of differences between groups of subjects, its use in responding to legal questions involving equality of treatment is not surprising.

The role of social science in addressing questions of equality suggests both its appeal and its limitations. Questions arising out of efforts to enlist the law on behalf of claims for equal treatment almost always include an empirically testable component. Do certain hiring standards tend to disqualify more blacks than whites? Do unions have an opportunity equivalent to the employers' to get their message to the employees during an organizing campaign? Are blacks more likely than whites to receive the death penalty? Are prison terms equal for men and women? Do men and women differ in their ability to endure long hours of work? Does racial segregation improve the quality of education? Is it likely to have negative emotional consequences for pupils?

None of these questions is easily answered empirically, but in all cases, strategies have been developed to help address the legal question. In most cases the cost of collecting the data has been great, but since these questions are of considerable importance, they have all been addressed, and the work has received recognition from courts or legislatures. The quality and quantity of data available to respond to these questions have, however, frequently been unsatisfactory. Where the establishment or reversal of legal rules is involved—particularly constitutional doctrine, which is likely to be relatively permanent—it is dangerous to proceed unless the data are powerful or unless they support the rule that would be employed in their absence. The use by courts and legislatures of such data has frequently been unsophisticated.

Moreover, in none of these cases does resolution of the empirical question necessarily resolve the legal question. Behind the empirical question are always questions of public policy; sometimes, these are brought into sharper relief, but sometimes they are obscured by the availability of data. The relationship between the policy question and the empirical question is crucial in determining the influence of the data. In the case of employment discrimination the policy questions were answered in a way that made the data of great importance. In school-segregation cases, it is difficult to be sure, but the policy questions seem to have been answered in such a way as to make the social science data largely irrelevant. With regard to union access to employers' policy, intuitive judgments have thus far outweighed the impact of the data.

The evidence suggests that the role of social science in defining the major goals of the legal system is necessarily limited but that it can help to give more precise meaning to existing standards. Social science methodology can also help to determine which of a number of procedures can best achieve a desired goal. Such a limited role does not mean that the contribution of social science to the legal system will be a modest one. The impact of such collaboration has been highly significant in such areas as employment discrimination and jury representativeness. The use of social science techniques made an important legal standard workable, and in so doing, it clarified and modified the standard itself.

Social science rarely shapes the legal rules applied to judge conduct, but when it has, it has often been in areas of constitutional principles involving major questions of national policy, such as the death penalty or the legality of segregated education. In each of these areas—as is typically true when social science data are used—they were first employed for the relatively simple task of challenging the underpinnings of a rule of law, the validity of which was already in doubt. But in areas of great importance and controversy, the use of social science for limited purposes has generated more sophisticated data and analyses, casting doubt upon the validity of the data or analyses originally relied upon by the courts. The resulting attempts to come to grips with large amounts of contradictory data and analyses have not been notably successful. Characteristically, the law has become committed to one body of scientific data before the scientific debate has crystallized; with the advent of new information, it has had either to create additional distinctions—as in the areas of jury size and unanimity—or to ignore data—such as those bearing on the problems of white flight to avoid integration. Where social science data are not addressed to topics of major national debate, as was true of the study of union representation, unless the issue is controversial enough to generate a great body of legally oriented research, the

existing system is likely to remain intact and the impact of social science to be merely interstitial and minor.

The fact that social science has largely played an interstitial role in shaping general rules of law should be neither surprising nor even depressing. Most important legal decisions involve empirical questions; questions of values, often competing values; political questions; and, in the case of the judiciary, questions of precedent and statutory interpretation.

Of those questions that are empirical, many may not have been addressed by social scientists, and many may only have been addressed in ways that have dubious relevance to the question in its legal context. Thus, while empirical data may be very important in the consideration of some of the questions raised in any of a large variety of legal decisions, few such decisions are restricted to empirical questions. Typically, the empirical issues coexist with a variety of nonempirical issues, and in such cases the appropriate role of social science data is a partial one.

In focusing on social science, we, like our predecessors, have found that the empirical data are subject to abuse and neglect at every level, from the assessments of individuals to the interpretation of constitutional principles. But these problems are not unique to social science. The task of working out general rules and achieving satisfactory resolutions of complex controversies is extremely difficult and complicated, and it is not at all clear that the use of social science is any more haphazard or convoluted than the use of any other type of information. Had we chosen to write on the role of lawmakers' values, or legal scholarship, or political considerations, or judicial precedent in legal decision-making, we doubt that our conclusions would have been simpler or more straightforward.

Thus, the interstitial use of social science data is not the problem, and the confused and often contradictory uses are not unique to social science data. The problem is that the relevant considerations are rarely spelled out in advance or even explicitly delineated in retrospect. The legal question is seldom parsed in a way that clearly identifies the empirical issues and separates them from the moral issues or the political issues, and almost never is any direct statement made about how much weight should be given to each of these classes of information. If social scientists knew which empirical questions lawmakers were likely to care about, and how much influence persuasive data on such questions would have, they could make informed choices about which interstices they wanted to try to fill. Instead, they are in the position of everyone else who wants to influence the law and must proceed on hope and guesswork.

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12

METHODS FOR THE EMPIRICAL STUDY OF LAW

Shari Seidman Diamond
University of Illinois, Chicago

Scientific study of the behavior of law uses some of the same methods that law itself employs. Both build on comparison (Levi 1949), draw from experience with human behavior, and attempt to provide rules that will govern future observations. Refutations of both legal and scientific theory occur when the theory is shown to be internally inconsistent. In legal theory, however, refutation also takes place when a court rejects the proposed legal theory. In contrast, a social scientific theory or hypothesis makes predictions that must be testable (or falsifiable; see Popper 1959) by patterns of behavior, rather than by authoritative decision. The data need not be immediately available, as when a scientific theory predicts that if law A is passed, behaviors X, Y, and Z will follow. It must be possible, however, to anticipate an arrangement of events that will either support the hypothesis or provide grounds for its rejection, based on observed behavior.

My primary emphasis in this essay is on problems encountered in testing scientific theories and hypotheses about law. Like most inductive processes, the development of theory is difficult to chart, and I will make only a few methodological points about exploratory analysis that may stimulate new theory. Yet the emphasis on theory-testing methods is not a reflection of the unimportance of theory development. Indeed, if the scientific theories about law were less fragmentary and underdeveloped, many methodological difficulties would dissipate. A theory that makes clear predictions is perhaps the best guide for a researcher in choosing the most appropriate research design and analytic techniques. Although the focus is on theory-testing and research design, it is important to acknowledge that valuable exploratory work may use little of either, at least in its early

stages. Before specific research questions take form, it may be necessary to become well acquainted with the environment. A rigid plan for data-collecting may not help, simply because it is difficult to anticipate where the data will come from and what form they will take. Since methodological concerns with the reliability and validity of data are critical at every stage of research, the discussion of these topics will be applicable to research on law both at exploratory and at later stages. The material on research design is most useful at the stage when questions have already taken shape. After some introductory observations on distinctive features of law that have implications for methodology, I shall discuss methods in four major categories under which research in law is being done. Finally, I will mention certain special problems of measurement.

DISTINCTIVE FEATURES OF LAW WITH IMPLICATIONS FOR METHODOLOGY

Most of the characteristics of law and legal institutions that have implications for methodology are not, as individual qualities, unique to the study of law. As a group, however, they form a distinctive collection that exerts a powerful influence on the contours of research possible in this area. Some of these features of law and legal systems—such as multiple separate but interacting system components and the low frequency of some legal events—consistently create problems of method. Other features—such as the partially public nature of legal activity and the existence of various jurisdictions with differing legal structures—both impose special difficulties and provide unusual opportunities for the researcher.

Boundaries and Apparent Boundaries

The legal system is made up of a variety of separate but interacting organizations. The apparent quasi-independence of law-enforcement activities from adjudication and of adjudication from postadjudication treatment of offenders in criminal justice has led researchers to focus on only one of the three institutions—police, courts, or corrections. Such a "slice-and-chop" approach ignores important sources of influence on the behavior to be explained. Police officers' actions may be influenced by what they expect of the courts; court sentences may be responsive to jail conditions as well as to characteristics of the probation and parole systems. Moreover, a change in one part of the system may not affect a particular outcome because other parts in the system compensate for the change. Thus, a legislative increase in a minimum penalty may have no effect on sentencing if prosecutors adjust to the legislative change by altering their charging policies. These interlocking relationships create problems of method because the researcher cannot confine research to a readily identifiable self-contained group of actors and yet understand what determines and what is affected by a targeted behavior.

The borders between legal and nonlegal activities create a similar need to extend the usual boundaries of research on the behavior of law. Since law is both socially formed and designed to socially influence, the interpenetration of legal behaviors and institutions with nonlegal activities is ubiquitous and inevitable. Thus, the legal relationship between the union steward and the contractor in the better-dress business (Moore 1973) both shapes and is influenced by the contractual relationship between the union and the employer; the characteristics of a court may affect the way disputing individuals press

claims in nonlegal settings (Yngvesson and Hennessey 1975); the characteristics of community mental-health facilities and civil commitment procedures employed to deal with disturbed persons may affect police and court behavior in the criminal-justice system; and, most broadly, the legal culture (Friedman 1977) that encompasses all citizens may affect and be affected by the way laws are implemented, the way they operate, and the way they change. If a major purpose of the scientific study of law is to explain variation in legal phenomena (Gibbs 1968), the absence of clear channels of influence is a major obstacle. Because of the multiple sources and receivers of legal influence, there is a dangerous potential that important influences will be neglected or missed. The result is a continuing methodological problem of how to extend the research focus far enough so that the behavior at hand may be fully understood.

The Leaky Funnel of Legal Activity

A funnel has sometimes been used as a metaphor for the way the legal system processes cases. A leaky funnel is probably a more accurate image, because numerous holes allow a case to escape before it reaches the spout at the bottom. On the civil side, only a portion of arguments result in complaints; complaints may be filed and then dropped; and only a tiny percentage of filed complaints are tried. The appeal system extends the winnowing process even further. On the criminal side, surveys of victimization indicate that many offenses are never reported to the police. Those reported may or may not result in arrest. Arrest may or may not be followed by indictment, and retained cases may or may not be followed by trial.

This pattern of activity creates several related methodological difficulties. If the interest is in a particular decision-maker—for example, the prosecutor—the cases actually brought to the prosecutor will form only a partial set. The police may not bring some cases to the prosecutor because they know these cases will not be pursued. The omitted cases can only be examined if police screening procedures are studied directly, since cases not actually brought to the prosecutor have escaped the funnel at that earlier stage. Because each decision-maker can terminate activity of some cases and these cases have no continued identity in the legal system, the only way to obtain a full picture of case processing is to begin with the earliest stage and to follow the cases through completion. This procedure is extraordinarily expensive; in addition, the independent record-keeping methods of the agencies at the various stages may make complete tracings almost impossible.

Low Frequency of Some Events

In part because of the leaky-funnel effect, the low frequency of some legal events is likely to make research costly and time-consuming. A sample of 3,000 civil cases found only 27 appeals and 9 overturned verdicts (Rosenberg 1964). The number of cases that actually go to trial is a tiny fraction of all cases filed. A study of jury behavior in a large urban United States District Court that had the cooperation of three federal judges took a year and a half to obtain a sample of 13 criminal jury cases (Diamond and Zeisel 1974; Zeisel and Diamond 1978). Only two cases were lost to this study because of attorney objection; the majority resulted in pleas, a few in trials before the judge when a jury was waived at the last moment, and one in a successful motion to suppress. A sample of decisions to arrest can be gathered only by observing police during long time periods

when no behavior occurs that is likely to lead to arrest. Prison riots, hijackings, and major antitrust and water-pollution cases are happily rare; but this circumstance may prove frustrating to the researcher interested in observing and studying them.

All-or-None Judgments

Many legal decisions are naturally dichotomous—arrest or no arrest, contest or plead guilty, find guilty or find not guilty, find for plaintiff or find for defendant. Even among more complex decisions, the basic initial question may be dichotomous. In sentencing, the primary decision is whether to incarcerate or to release, and only secondarily how long should the period of incarceration be.

The most commonly used statistical tools of social science—such as multiple regression and analysis of variance—are most appropriate and powerful with continuous measures as dependent variables. Newer models, such as log-linear analysis, are designed to handle dichotomous independent and dependent variables, but require larger samples for analysis. When the loss of power associated with dichotomous legal decisions is combined with the case loss brought about by the leaky-funnel effect, the problems of analyzing such low-frequency events as appeal outcomes are magnified.[1]

Multiple Varying Jurisdictions

The wide natural variation in laws and legal environments across different legal jurisdictions creates both advantages and disadvantages for research. Even within the United States there are 51 separate jurisdictions at the state level, and the variation in laws and legal institutions is tremendous. For example, 44 states employ lay judges (Silberman 1979); in some cases these are elected, in others they are appointed by the governor, in still others they are selected by local government officials or by the chief judge of a superior court. While most states allow lay court judges to sit alone, in Vermont they sit with attorney judges. In 40 of the 44 states, some form of training is provided, and in 25 it is required. Training programs vary from three days or less (Indiana) to seven weeks (Florida). In some jurisdictions, lay judges can exercise civil jurisdiction to a $200 monetary limit (Georgia), while in others the upper limit is $5,000 (North Carolina); lay judges in Texas are not permitted to impose prison sentences, while those in New Hampshire can sentence up to a year.

If the search extends beyond the borders of the United States, the variety is even greater. Lay judges preside over the bulk of criminal-trial practice in England, sitting in panels of three, assisted by a legally trained clerk who advises them during the proceedings but does not deliberate with them. Socialist countries use lay judges extensively. Other countries employ mixed tribunals, in which laymen sit with professional judges; in

[1] *Multiple regression* and *analysis of variance* are both statistical techniques that can be used to analyze the relationship between a dependent or outcome variable and a set of independent or predictor variables. Both techniques assume that the outcome variable is a random variable with a certain probability distribution. When used with a dichotomous outcome measure, this assumption is violated. *Log-linear techniques* permit the researcher to test directly the interaction effects of more than one independent dichotomous variable on a dichotomous dependent variable. *Power* is the ability of a test to detect effects or differences when the effects or differences actually exist. Many statistical tests make assumptions about the behavior and characteristics of the measures on which they are used (see Berk 1980). When these assumptions are incorrect, the power of the test is reduced.

such situations the laymen may be advisory (in some African countries) or able to outvote their professional colleagues (the French mixed bench includes three professionals and nine laymen, with eight votes needed for conviction).

The example of practices governing lay judges shows marked variation within a relatively small area of legal behavior. In a larger conceptual framework—for example, practices in different cultures governing the use of third parties to settle disputes—the range expands much further.

This heterogeneity, which provides a rich arena for exploring the sources and effects of legal variation, also means that research results obtained in a single legal setting may not apply in another context. For example, supplying counsel for youthful offenders in Zenith produced better outcomes for those clients, while in Gotham counsel apparently had no effect (Stapleton and Teitelbaum 1972). A probable explanation for the difference appeared to be the different court organizations. In Zenith, the juvenile-court judges were relatively new to the bench; a state's attorney was present at each stage; arraignment, adjudication, and disposition were separate, with time provided for attorney preparation; and transcripts were made of court proceedings. In Gotham, experienced judges held a traditional view of the juvenile court; no prosecutor was present at hearings, the stages of processing were combined, and transcripts to facilitate appeal were not made. The study suggests that Gotham, less accustomed to defense counsel, discounted their presence and reduced their ability to be effective. But even this hypothesis is tentative, for it may be that only one of the observed differences between Gotham and Zenith was crucial, or even that some unnoticed difference was responsible. Thus, variety, a rich source for hypotheses, may also hinder attempts to generalize.

The Partially Public Nature of Legal Activity

Finally, and perhaps most significantly, a distinguishing characteristic of the legal system is its partially public nature. Some centers of legal activity, including most courtrooms and many legislative sessions, can be entered with unusual ease by both the casual observer and the serious researcher. Appellate court opinions and legislative votes are systematically reported, providing voluminous materials to document the behavior of law. Indeed, it can be argued that the ease of access in large measure explains the extensive research on judicial behavior. Studies focusing on appellate courts, whose decisions and opinions can be scrutinized in any major library, avoid most of the financial and logistic problems of ordinary field research and laboratory experiments.

But the greater part of legal activities is less public. The criminal history of offenders, internal police documents, and jury deliberations are but a few of the areas to which access is either limited or forbidden by law. Only in Switzerland do panels of judges debate and reach their verdicts in public. The interaction of attorneys and clients, settlement conferences between attorneys and clients, settlement conferences between attorneys, and the invocation of legal norms and threats to sue in disputes between neighbors or businessmen, all occur at the edges of the formal legal apparatus and are often viewed only indirectly, if at all, through retrospective interviews with the participants.

Other aspects of the systems are also difficult to trace. As much as one third of the money expended in the criminal-justice system may go to private police and protection.

Since some states require only one license for a firm of private investigators, which can then hire an unlimited number of operatives, it is difficult even to know how many private police are active (Scott and McPherson 1971).

Finally, perhaps the most troublesome problem of accessibility arises because law is a system of social control, with a central focus on deviant behavior. Deviants typically take great pains to shield their activities from both official and unofficial observation. Some behaviors, such as burglary and assault, can be indirectly assessed, but only insofar as victims report them. Other behaviors, such as income-tax violation and much white-collar crime, may be known only to the violator himself. Patterns of invisible deviance encourage researchers to accent the relatively more visible crimes, and this factor may partially account for both the steady flow of studies of driving violations (for example, Feest 1968; Robertson 1976; Ross 1973) and the general dearth of empirical research on white-collar crime.

Not all police departments and judges' chambers are equally inaccessible to the researchers. When research requires the cooperation of police, judges, attorneys, or violators, the difficulty may be not whether access is permitted but who permits it. One study of pretrial settlement met with refusals by 14 jurisdictions before it could be implemented. Reasons for refusing to participate ranged from case overload through the view that it was inappropriate for a judge to take a role in plea discussions to prosecutorial objection to what was considered an invasion of executive function (Kerstetter and Heinz 1979). The methodological questions are whether and to what extent findings obtained in settings willing to permit research can validly apply to contexts where the actors are more recalcitrant.

When access can be obtained, the researcher interested in legal phenomena can often unearth records of behavior extending back in time that would turn researchers in mental health or family structure green with envy. Tax accounts, land sales, marital unions and dissolutions, the names of disputing parties, and the nature of legal disputes have all been recorded more or less regularly in most literate societies. Unfortunately, all too often the precise kind of information needed to test a critical hypothesis was not viewed as important by earlier clerks and recorders. The vote of a hung jury, for example, may not appear in the court file; no effort was made to keep track of whether court-ordered recoveries were paid (Yngvesson and Hennessey 1975), and testimony was not recorded in arbitration (Sarat 1976) or in small-claims courts. Parole boards may not record the reasons for their decisions (O'Leary and Nuffield 1972), and no record, apart from the final decision, is kept of sentence review in Massachusetts and Connecticut (Zeisel and Diamond 1977). Because, as a rule, prosecutors in criminal cases cannot appeal, few transcripts are available for cases ending in not guilty verdicts; in civil cases, transcripts for cases not worth appealing are not available. Even where some attempt has been made at regular record-keeping, omissions and other sources of both biased and unreliable measurement are common.

The public quality of some legal records is precisely the characteristic that contributes to their weakness for some research purposes. Because the records and decisions are public, they may be designed in part for audience effect. Police departments, for example, justify their budgets on the basis of their crime statistics; because offense categorization requires substantial judgment and the arrest decision is subject to wide discretion, crime and enforcement patterns are particularly susceptible to police organizational pressures.

Prosecutors, looking toward election, typically include guilty pleas in their conviction tally and exclude dismissals from the base of their conviction rates. Other legal participants also have the regular responsibility of publicly justifying each of their decisions. Much can be learned from the reason provided by a judge, for example, in his public explanation (Llewellyn 1960), but such a reasoned justification is not necessarily a complete picture of the construction of a decision.

Increasingly in recent years researchers have been finding creative ways to take advantage of public access and to overcome barriers to access and weaknesses of available data. Schwartz and Orleans (1967) were able to obtain aggregate information on groups of income tax returns, thus avoiding objections to the release of individual data. Carroll (see Carroll and Payne 1977) and Wilkins and his colleagues (see, for example, Gottfredson et al. 1975) have successfully conducted research on decision-making by parole boards, an area long closed to public view. They observed parole hearings and analyzed justifications, but in addition devised information searches and judgment tasks as well. Surveys of victimization (U.S. Department of Justice 1975) have helped to overcome local idiosyncrasies in official crime reporting.

Each of these strategies solves some of the problems associated with other techniques of data collection. Yet each is subject to its own limitations, and no one approach is likely to be without problems. Surveys of crime victimization, for example, face inherent limitations from memory decay in their respondents (National Academy of Sciences 1976).

The real methodological benefit of the partially public nature of law is that, for any question, a variety of data-collecting methods is likely to be available. Thus, law is an area in which it is eminently possible to use a variety of different measures and approaches to study the same problem. This multimethod strategy allows weaknesses in one design to be corrected by strengths in another. When outcomes from different methods converge, greater confidence in the research findings is the result (Feigl 1958).

In the range of research approaches to law explored below, the tensions imposed by these qualities recur: public–confidential; record richness–record unreliability; boundaries–overlap; heterogeneity–ability to generalize. The tensions cannot be completely resolved, but acknowledging them may help to shape more self-conscious research decisions.

For this discussion, research on law has been divided into four major categories. Studies within each category show similar methodological problems. The first category of research focuses on the emergence and change of law and legal institutions and traces changes in legal behavior, treating law and legal behavior as dependent variables at the societal or group level. The second category, which takes the individual as the unit of interest, explores the emergence of legal problems and legal knowledge and attitudes—more generally, legal culture. The third studies the operation of law and legal institutions; research on the ways courts conduct their business and how judges are selected falls into this group. The final category, which deals with studies on the impact of law and legal change, treats laws and legal arrangements as independent variables in causal analyses.

Some studies will not fall neatly into a single category. For example, comparative studies often focus on both operation and impact. The general research questions posed in each category, however, tend to share methodological obstacles; the groupings used for discussion are made with that focus in mind.

EMERGENCE AND CHANGE OF LAW AND LEGAL INSTITUTIONS

Emergence and change are perhaps the most difficult social processes to assess, since a law or legal institution may command interest only after it is in place or has undergone alteration. Typically, therefore, historical questions (for example, how did the regulation of energy sources develop? what produced the current structure of the criminal code?) are explored by cross-sectional research techniques.

Tracing Emergence and Change

Investigators often interview informants who recount how matters were handled in earlier days and who report their beliefs about how changes came about. To the extent that time dims and interests distort these responses, materials based on retrospection may be limited or misleading. In some cases, of course, such sources are the only ones available. In societies with an oral tradition, the past may be almost totally inaccessible except through informants willing to reconstruct it (Nader 1969; Nader and Todd 1978). Careful cross-checking of responses from several sources and attempts to identify informants with different vested interests can help to reduce reporting bias (see Richardson, Dohrenwend, and Klein 1965 for an excellent discussion of interviewing techniques), and the result may significantly contribute to knowledge about the past.

This approach has many limitations. It presumes that informants originally absorbed the material that the researcher wishes to uncover, that they remember it, and that they are willing to share it with the interviewer. Social scientists tend to be skeptical of respondents' reports even on current events; the passage of time only increases most of the distortions associated with such data. Legal anthropologists (for example, Allott, Epstein, and Gluckman 1969) have been sensitive to the many problems of reconstructing events by using informants, and they have suggested some strategies to reduce the impact of those problems (see, for example, Black and Metzger 1965; Epstein 1967).

It is easy to criticize almost any research tool; a crucial issue is whether other methods are available with fewer or different flaws. Often it is possible to supplement interview data in reconstructing past events. For example, a study of changes and sources of change in California criminal legislation during the turbulent period from 1955 to 1971 began in 1971 with a substantially qualitative analysis based primarily on interviews with legislators and members of special-interest groups active during that period. The report examined eleven selected legislative sessions, identifying major bills and trends observed in party shifts, partisanship changes, and lobby activities. To the interview data were added materials from newspapers, interest-group propaganda, committee transcripts, and a variety of secondary sources (Berk, Brackman, and Lesser 1977, p. 24). Even so, as the authors pointed out, the data base represented a purposive sample, constrained by feasibility (organized lobbies may leave substantial paper, for example, but may have little impact). Moreover, because it is difficult to explain the process of transforming these voluminous primary-source materials into an analytic product, the traditional methodological requirement that the reader be informed about how a study, or at least an analysis, may be replicated is not met.

In sharp contrast to the chapter that reports this qualitative effort is the quantitative analysis that followed. Examining the manifest legislative intent of almost seven hundred

revisions in the California Penal Code, the authors attempted to detect trends in the code by systematically analyzing a wide range of changes. Most of these were unlikely to cause repercussions detectable, and therefore susceptible to report, by system participants, but small alterations can have overall effects that may be observed by using a systematic quantitative approach. The results indicate the value of the quantitative analysis. The qualitative chapter implied that the interests of civil-liberties advocates and of law-enforcement professionals were in straightforward competition, so that what one lost the other gained. Successful years for those on one side were remembered as disheartening by those on the other. But the quantitative analysis indicated that this picture of a zero-sum game was too simple. Because law-enforcement advocates concentrated on criminalization and penalties while, at least in the early 1960s, the civil-liberties lobby focused primarily on issues of due process, both sides could achieve success through the same legislation.

In addition to coding legislation, the authors developed quantitative measures of partisanship, lobby influence, and newspaper coverage for the same period and identified data on crime rates and public opinion from other sources. Using these additional measures, they explored various causal models that might explain changes in the Penal Code. Although this aspect of the study is relatively weak, in part because of the short time series and some unavoidable weaknesses in particular indices, the work provides a useful model of the potential sources of data available over time in a literate society that can be used to trace legal functioning.

I have discussed this example in considerable detail to show that researchers can often take advantage of the pervasive documentation of legal behavior to obtain a check on the subjectivity of informants and observers. Since qualitative data will generally be richer in detail and may be a fruitful source of hypotheses, mixing the two research approaches is a natural resource for the study of legal behavior.

Many attempts to investigate legal change over time have focused on courts. Even though regularity in the recording activities of these institutions eases some of the difficulties of answering longitudinal questions, obstacles are by no means absent. One study, which recorded the number and type of civil cases filed in two California Superior trial courts in 1890, 1910, 1930, 1950, and 1970, reports that changes in the distribution of cases support the hypothesis that the function of trial courts has shifted away from dispute settlement toward routine administrative tasks (Friedman and Percival 1976). Testing the hypothesis in the Superior Court was complicated by changes in the jurisdiction of the Court during that period. For example, the jurisdictional floor of the Superior Court went up from $300 to $3,000 during the period between 1890 and 1970. Even after corrections for inflation, a "real" increase in jurisdictional amount apparently occurred (Lempert 1978, pp. 113–14, n. 22). Because this research, which sought to test a hypothesis about changes in court usage over time, was confined to the superior-court level, an alternative explanation for the pattern shifts cannot be dismissed—cases may have been diverted to other courts. But if the study had attempted to examine inferior-court cases as well, it would have faced additional problems: the records of the lower courts, particularly for early periods, tend to be incomplete (Friedman and Percival 1976, p. 277). Under such circumstances, another strategy—examining the data on the superior courts immediately before and after changes in the jurisdictional amount—would have allowed the researchers to test the effect of the jurisdictional change. By

confining the observations to twenty-year intervals, the opportunity to make this test was missed.

The choice of interval has a major effect on the ability to detect trends over time. One study (Grossman and Sarat 1975) examined litigation rates in American federal courts at ten-year intervals, from 1902 through 1972. Changes from decade to decade are portrayed in Figure 1. Had a twenty-year interval been selected for this study, the change in rates would have appeared as in Figure 2 if 1902 had been the first year chosen for analysis, suggesting a slow, steady increase in rate, or as in Figure 3 if the starting year had been 1912, suggesting a more erratic pattern. The difference between these figures makes the clearest case for attempting to increase data points and to decrease gaps between them when research is aimed at detecting patterns over time. A ten-year interval, of course, is not necessarily ideal. Had the authors collected their data at intervals of five years, two years, or one year, still different patterns might have emerged.

With limited resources, there will always be a tradeoff between the stability of estimates at given points—a function of the number of cases sampled at each point—and the identification of actual trends—facilitated by increasing the number of data points. If the cost of data collection is held constant, increasing the number of data points over time usually forces a reduction in the total sample size as well as a reduction in the sample size at each time point. It is more expensive to sample ten cases every fifth year than to sample twenty cases every tenth year, because the researcher using the smaller interval must work through twice as many files to draw a sample of the same size as must the researcher using the larger interval. The smaller interval may introduce still additional costs because of the difficulty of locating extra files housed in different storage locations over time (different filing cabinets, storerooms, basements, and warehouses across town).

The balance between intervals and the number of cases at each time point must

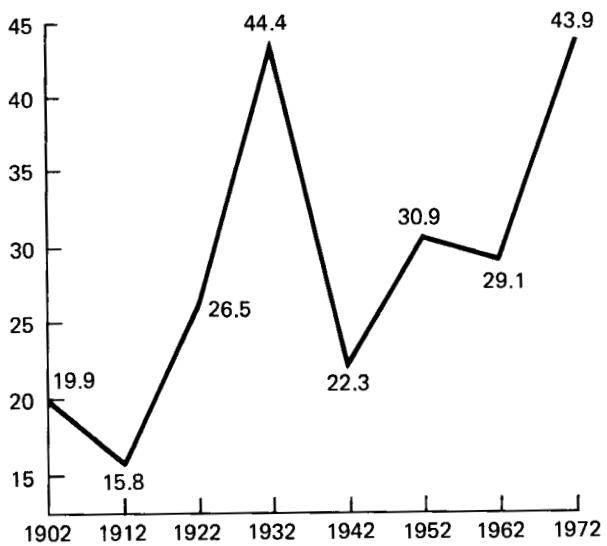

FIGURE 1

Federal civil cases per 100,000 population, 1902–72 (adapted from Grossman and Sarat 1975, Figure 3).

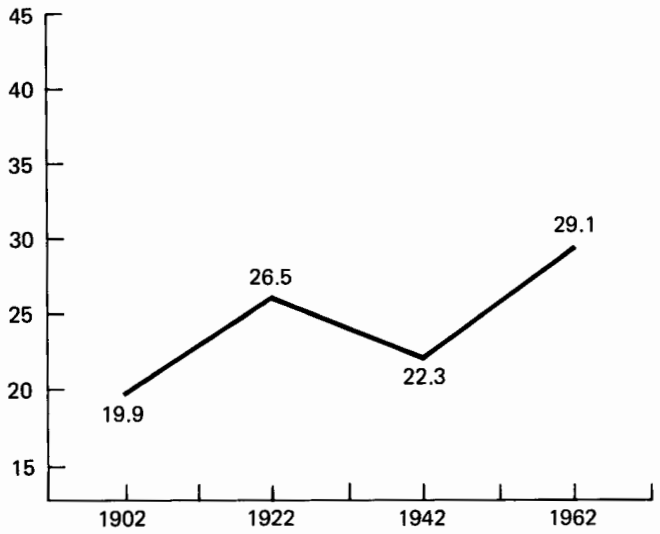

FIGURE 2

Federal civil cases per 100,000 population, 1902–62 (adapted from Grossman and Sarat 1975, Figure 3).

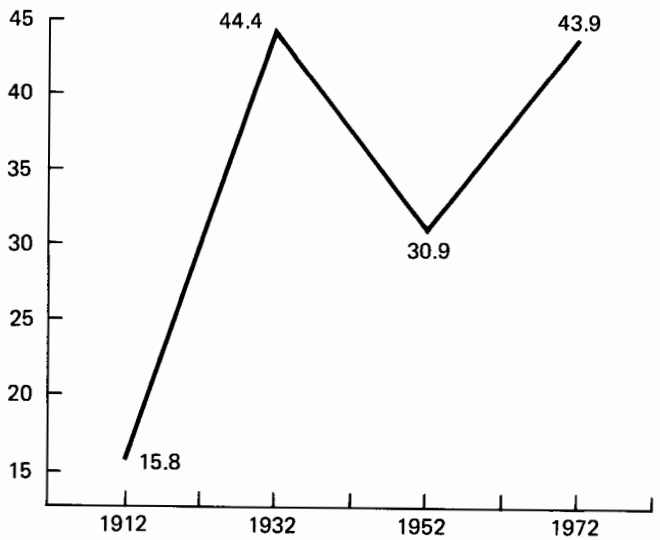

FIGURE 3

Federal civil cases per 100,000 population, 1912–72 (adapted from Grossman and Sarat 1975, Figure 3).

ultimately be struck according to what is most essential to the hypothesis of interest. It is not possible simultaneously to maximize detailed breakdowns both at given points in time and over time. Where prior research or good theory suggests stability over time or homogeneity at given points, sampling decisions can emphasize the more important source of variance. When neither prior research nor theory provide clear signposts, it may be useful to collect pilot data, sampling to gauge variations within and across years on major variables, before the final sampling framework is established.

Anticipating Change

In each of the three research examples just discussed, it has been assumed that the investigator was forced to ask a retrospective question. Yet legal change may often be anticipated. Part of the extensive literature on Africa and India reflects the recognition that the transition from colony to independent nation and the confrontation between customary and externally imposed legal systems are fertile arenas for legal change. Modernization in general is associated with the restructuring of societies and their legal systems. Anthropologists have been alert to these opportunities (for example, Baxi and Galanter 1979; Collier 1976), but they and other social scientists have rarely taken advantage of the opportunity to anticipate and study legal emergence and change in the United States.

For example, advanced computer technology means that new crimes must be defined, and the laws of privacy may undergo alteration. When New Jersey proposed new gambling activities, the state created a plausible research opportunity for those interested in the emergence of a new scheme of legal control. Discoveries in the areas of recombinant DNA and the catastrophe at the Three Mile Island nuclear plant have raised concerns that are likely to generate legal responses. The enormous problems of energy sources and supplies may promote new or altered mechanisms of legal control.

The difficulty in studying any emerging or changing area is that the time frames over which important changes will occur are less predictable than in most other subjects of research. Neither researchers nor their granting agencies will readily accept a gestation period that cannot be estimated and a research strategy that must remain consistently malleable and potentially mobile. Yet the research problem may call for such flexibility and patience. Not surprisingly, the passage of time is helpful in answering longitudinal questions. To realize its advantages may require a "technology" of funding research and a method of distributing tenure and other awards more akin to the lifetime studies of public health and epidemiology than to the short-range studies that characterize most social-scientific research.

TRACING LEGAL DEVELOPMENT IN THE INDIVIDUAL

Legal Socialization

How people come to understand and develop attitudes toward law and legal institutions has been the focus of research deriving from two traditions—psychological interest in moral development and studies of political socialization from political science (Tapp and Levine 1977). As is true for other kinds of studies of emergence, questions concerning legal socialization are basically longitudinal. Retrospective attempts to answer such

questions have serious inherent weaknesses. Interviews with adults are unlikely to identify sources of their beliefs and attitudes, if only because few are aware when or where they accumulated their ideas about the law. However, four types of studies of legal socialization attempt to cope with these difficulties.

Correlational Studies The first approach is through correlational studies comparing the attitudes or knowledge about law of individuals known to come from different backgrounds. If the attitudes and knowledge differ among groups, the difference is attributed to the background variable. For example, to the extent that children of educated parents have greater knowledge about law or more consistently adhere to legal principles of free speech than do those born to parents with less education, the proposition that parental instruction is a source of legal socialization receives some support.

As is true for all correlational research, the objection to such an inference is the possibility that the obtained correlation is spurious, the result of a third—unknown—variable, such as parental intelligence or income, which affects parents' education and exerts a separate effect on the child's legal socialization. The likelihood of spurious relationships is particularly high in the literature on legal socialization, because many reported results are limited to zero-order correlations between single potential causes and the measure of legal attitude or knowledge. Although they do not provide a complete cure, multivariate methods (Blalock 1972) offer some improvement by providing a simultaneous test of various potential influences on legal socialization. The degree of improvement depends upon (a) how well potential influences are identified and measured and (b) the extent to which they are uncorrelated with one another.

Cross-Sectional Studies A second approach, the cross-sectional "developmental" research design (Cutler 1977), attempts to identify the points at which individuals undergo changes in legal knowledge and attitudes by testing individuals of different ages. Its value hinges on the assumption that sampling and test materials do not differ across age levels. When applied to some comparisons, this assumption may be plausible. For example, fifth, seventh, ninth, and twelfth graders were studied for their reactions to laws that present potential intrusions on individual freedoms (Gallatin and Adelson 1971). The four age groups in the American sample were all drawn from the same midwestern suburb, and the subjects were largely middle-class, suggesting that the rate of high-school dropouts in the sample was likely to be small. Differences across age level were therefore not likely to be due to the selective loss of students in the higher grades. By contrast, a purportedly developmental study that compared responses of high-school students with those of college students would be ignoring the fact that not all high-school students go to college. The attitudes of the college students might differ from those of the high-school students because the groups contained different types of individuals and not because they differed only in maturation or educational experience. Such concern is more than speculative; it has been found that college-bound high-school students are more tolerant than those who are not college-bound (Langton and Jennings 1968), and others have reported that college attendance is a good predictor of adult support for civil liberties (see, for example, Key 1961; Stouffer 1955).

Other kinds of socialization studies raise the same selection question. One study of judicial socialization divided 128 Florida judges into three groups—those who had been

on the bench 5 years or less, those who had been judges between 6 and 15 years, and those who had served for more than 15 years. Differences in response among the three groups were attributed to a combination of agency and judicial socialization (Alpert, Atkins, and Ziller 1979). But the explanation may, in fact, reflect the pattern of decisions to leave the bench. The authors suggest that 4.5 to 5 years as a judge represents a critical point at which to decide to make judging a career. Judges still on the bench, policemen still on the force, or guards still employed in a prison after 15 years all may differ from judges or policemen or guards who leave their positions after a shorter period of time. An assessment of attrition rates in the proposed research setting will help the researcher to evaluate how much of a threat selection poses to a developmental explanation of differences, but as a general rule, the larger the interval in age or experience, the greater will be attrition and the consequent danger of a selection artifact.

Other methodological difficulties arise in the cross-sectional developmental design. Even assuming zero attrition, "the older may differ from the young at any given point in time due to maturational factors, or because they are members of different cohorts and were raised in differing sets of social and political circumstances" (Cutler 1977, p. 295). In a study of the magnitude of age and cohort effects (Nesselroade and Baltes 1974), the effect of age was evaluated by comparing the attitudes of 14-year-old high-school students (in their freshman year) with attitudes of students from the same class during the following year, when they were 15 years old. The cohort effect was evaluated by comparing the attitudes of 14-year-olds in the first year with the attitudes of the new cohort of 14-year-olds in the following year. These two 14-year-old classes were thus the same age when tested but had been born (and raised) on the average of one year apart. The researchers showed that the cohort difference was as large as the age effect, suggesting that generational differences can be as powerful as developmental effects.

The Cohort Approach A third major type of study design for legal socialization, the cohort approach, requires multiple cross-sectional samples collected at more than one point in time for different groupings stratified by age, year in school, or time in office, to help distinguish age, cohort, and time-of-measurement effects (Schaie 1965). For example, a finding that the attitudes toward law of 18-year-old boys differed from those of 14-year-old boys in 1968 might arise because the particular political turbulence of that year influenced 18-year-olds, while leaving 14-year-olds unaffected. An alternative explanation is that a general developmental trend changed the attitudes of 14-year-olds by the time they became 18. An additional cross-sectional survey of 14-year-olds and 18-year-olds in another year would test these alternate explanations. If a generational explanation is not responsible for the difference found in 1968, the same difference should appear in comparisons between the same age groups tested in 1966, 1970, and 1976 (see Mason et al. 1973 and Glenn 1976 for discussions of the statistical analysis of cohort designs).

The need for a test of generational effects will, of course, depend upon the probable difference in the relevant experience of different cohorts. For example, a cohort or generational explanation for differences observed in 1953 between 14-year-olds and 15-year-olds (born in 1939 and 1938, respectively) would be less plausible than a generational explanation for the difference in 1968 between 14-year-olds and 18-year-olds. The life experience of the 14- and 15-year-olds would be closer because of the smaller age gap.

More importantly, the year 1953 was unlikely to have different legal implications for children of 14 and 15. Unlike the 18-year-olds, neither group could vote or be drafted.

The Panel Design Unlike the other three methods, the fourth method for the study of legal socialization traces changes in the same set of respondents over time. When the original sample includes respondents at different stages of development, the so-called panel design (Lazarsfeld and Fiske 1938), like the cohort design, provides the opportunity to distinguish developmental trends from age-specific historical effects. In addition, because the same respondents are tested several times, the direct tracing of attitudinal change is facilitated. The researchers not only learn that 54 percent of the sample, for example, distrust attorneys, as compared with 49 percent of the sample measured two years earlier, but they can also identify the 15 percent who became more trusting and the 20 percent who became less trusting. The backgrounds and recent experiences of the respondents who switched can be examined for clues about the source of their changed attitudes.

Panel designs are costly both in terms of researchers' time and in the extra effort entailed in relocating respondents who have moved, disappeared, or simply grown tired of contributing data. In addition, the possibility always exists that response content will be influenced by prior testing (Campbell 1957). A small cross-sectional sample of new respondents in each wave of the panel can be examined to gauge the extent of shifts attributable to prior testing, however, and the multicohort panel remains the strongest source of interview data on legal socialization.

Emergence of a Legal Problem

Nader, writing about dispute settlement among the Zapotec of Mexico, noted that "it is obvious that no case (or only the very rare one) begins and ends in the courtroom" (1969, p. 71). Although legal problems tend to be examined only after the problem has formally emerged with the filing of a complaint, legal problems begin much earlier. Tracing the development of legal problems and identifying the types of conflicts that do and do not lead to legal action require a method to identify a population of potential sources of conflict. Studies that begin with filed court cases can investigate directly only the types of cases most likely to be settled after that point (see, for example, Wanner 1975). Because those that are winnowed away before filing cannot be systematically traced, data are lacking on the circumstances that lead to avoidance—limiting or withdrawing from the relationship with another disputant to such an extent that the dispute no longer remains salient (Felstiner 1974). Little information exists about the process or incidence of claiming legal rights when the formal enforcement of these rights turns out to be unnecessary. A study of complainants to the Massachusetts Commission Against Discrimination—which found that social class was directly related to greater participation in the complaint process and to better outcomes from it—did not investigate whether class was a predictor of willingness to initiate the complaint process (Crowe 1978). Similarly, one attempt to explain why certain conflicts in the textile industry were brought to commercial arbitration was hampered because it examined only those conflicts that were in fact arbitrated. The conclusion that sellers "do not arbitrate cases which are weak or cases against buyers with whom they enjoy good business relations" is supported

by interviews with attorneys and parties in the arbitrated cases (Bonn 1972, p. 577). Yet, such a claim can be directly validated only by examining a sample of conflicts, tracking those that are brought to arbitration and noting those that are abandoned.

There is a logical problem in developing causal structures to explain litigation—"we have somehow to define the total population of law-relevant conflicts and legal needs in order to operationalize the question, which factors determine the portion that is finally taken to court," which cannot be done without normative assumptions defining "legal needs" (Blankenburg 1975, p. 316). As a preliminary approach to this problem, Blankenburg selected a population of conflicts for which legal action is no doubt a possible outcome and one that requires an early decision: he examined those litigants who, having lost in court, must decide whether to appeal. This population of defeated parties defines a somewhat limited, and perhaps idiosyncratic, set of conflicts. It is, of course, more time-consuming and costly to follow conflicts defined at the pre-judicial stage, for the life of a conflict may be long.

Other studies suggest deeper historical probes. It is often possible to identify a class of potential complainants or a population of possible disputants. One telephone survey questioned consumers about their experience with thirty-four typical products. This approach enabled the researchers to gauge rates of reported complaints and efforts to obtain redress. They could also identify those who reported having experienced problems but did not attempt formal action, and, within the limits of the survey technique, they could distinguish the characteristics of successful complainers from those who were unsuccessful or who failed to complain (Best and Andreasen 1977). In another study a sample of TV and washing machine purchases was drawn from the files of a cooperative appliance company. The researchers questioned the customers on their experiences with the purchased item and on whether and how they lodged complaints. In addition, field observations of sales, delivery, and service were conducted, and complaint letters to the company and the Better Business Bureau were analyzed (Ross and Littlefield 1978). Even this design, however, is somewhat incomplete; as the authors pointed out, the data do not indicate the correspondence between "objective" defects (potential sources of action) and subjectively defined problems. Such an extension could be handled with an inspection of a sample of merchandize, which would then be traced to the consumers who purchased each. These consumers would, in turn, be questioned in a longitudinal design.

In each of these consumer studies, the population of purchasers formed the universe of individuals who could potentially generate complaints. Other kinds of conflicts are likely under specifiable circumstances—the signing of a lease opens the door to possible landlord–tenant disputes; a condominium conversion may stimulate legal conflict among neighbors. The cost of tracing the development of legal conflict will be reduced if the researcher can take advantage of knowledge about the contexts in which conflict is likely to occur and can draw the sample accordingly. At the very least, it is possible to define the total population of potential complainants or disputants who can become involved in a particular kind of legal dispute.

Two basic strategies can be used. In the first, a subgroup is identified that has a particularly high probability of becoming legally entangled. For example, individuals who previously have been divorced are more likely to become divorced again than those who have never been divorced. The researcher will accumulate divorces at a higher rate from a sample of these divorced individuals than when data collection proceeds from a random

sample of all adults. The potential cost of this strategy is the possibility that the previously divorced may have unique patterns of marital conflict and resolution and may use the legal system differently than do their counterparts in first marriages.

An alternate strategy identifies all individuals who can potentially become involved in the legal conflict under scrutiny. Thus, for divorce, the total potential group of parties is the married population (and, as Rich Lempert pointed out to me, at current rates of divorce, simply tracing all marital outcomes may result in a substantial proportion of contemplated and completed divorce). Of course, not all target outcomes are highly probable; and the tradeoff between representativeness and required initial sample size will depend on the research question. An optimum solution may be a stratified sample, in which the researcher oversamples from subgroups known to end up with high rates of legal action.

It may be possible to reduce the costs of longitudinal research by identifying a population retrospectively and using archival data sources to trace changes over time. One study, for example, traced the officially recorded criminal careers of the birth cohort of nearly 10,000 males born in 1945 in Philadelphia who resided in the city from their 10th to their 18th birthdays (Wolfgang, Figlio, and Sellin 1972). Research did not begin until 1964, but school records and selective service lists enabled the researchers to identify the group retrospectively; official records on encounters with the law from police, courts, and correctional agencies were used to trace dealings with the criminal-justice system. School records also offered a wealth of information on such items as race, intelligence scores, achievement measures, and attendance. Moreover, because income correlates highly with other measures of socioeconomic status and school files include residential location, an estimate of socioeconomic status could be coaxed from the available data. The researchers were able to examine the correlations between these measures and police records in their efforts to identify precursors of formal contact with the legal system. Greater interest in the regular recording of social indicators as well as computer capability for data storage may make such research more feasible in the future.[2]

THE OPERATION OF LAW AND LEGAL INSTITUTIONS

Since the legal system is a product and source of public activity, it may appear surprising that so little is known about the range of its daily activities and the criteria it uses in arriving at decisions. Yet the amount of primarily descriptive research reported in the literature—for example, characteristics of cases brought by civil courts (Wanner 1974); the charging process by prosecutors (Neubauer 1974); jury-selection procedures (Levine and Schweber-Korea 1976); reduced-fee work by attorneys (Lochner 1975); misdemeanor trial court proceedings (Mileski 1971)—testifies to an absence of basic information. This lack may be due, in part, to the relatively recent history of systematic empirical investigation by social scientists on the operation of legal institutions. The fact that law is not fully open to scrutiny is another potential explanation. Finally, the tremendous variety of laws

[2] There are, however, countervailing trends that seek to limit such data accumulation. Concern with privacy and protection of subjects suggest to many that data collection should be limited (see Katz 1972; Capron 1975).

and legal organizations and activities may inhibit the descriptive work required to order the legal universe and stimulate the development of theory.[3]

Some Current Approaches and Their Limitations

The primary methodological obstacles to description involve sampling problems, limits on access within a setting, and bias in records and respondents. When the research purpose extends beyond simple description, additional difficulties arise. The researcher concerned with explaining the activities of the legal institution under examination must consider the interdependent nature of the legal system—acknowledging, for example, that decision-making on the part of public defenders may influence and be influenced by prosecutorial practices and that both may influence and be influenced by the local trial bench. With respect to studies of litigation, for example, there are "difficulties in analyzing the flow of business in a single forum that is part of a larger complex" (Galanter 1975, p. 365). Contextual effects similarly inhibit attempts to simulate adequately the operation of a legal institution extracted from its normal environment.

The approaches widely used to study legal operations include case studies, participant surveys, samples of official production records, and, less often, simulations.

The Case Study The case study typically focuses on one small part of the universe. At some level, nearly every research project represents a kind of case study. Apart from national probability surveys, all these efforts focus on a small, nonrandom subgroup of settings—a nonprobability sample of respondents or institutions. Even national probability samples, except for multiwave ones, may be viewed as case studies of a single time period. Typically, however, the term "case study" applies to an examination of one location and one set of interacting participants. Thus, a case study can concentrate on a single prison (Jacobs 1977), a single parole agency (McCleary 1978), a group of delinquent high-school-age boys (Chambliss 1973), a mechanism for dispute resolution in a small African village (Gibbs 1963), or even a single trial (Zeisel and Diamond 1976).

A good case study closely scrutinizes the context of the behaviors it examines with an intensity not generally possible in other research designs. Because legal and illegal organizations and activities often have quite distinct public and private faces, intensive extended observation of a group of actors may be necessary to dig beneath the surface. The case study can, therefore, be an especially revealing tool in sociolegal research.

The research plan of a case study is typically more flexible than are other research strategies, precisely because the researcher does not know in advance exactly what information will be most useful and where the best sources of data will lie. Perhaps this crucial flexibility is why case studies are among both the most and the least illuminating pieces of research.

The intensive case study of legal behavior is probably most productive in situations where very little is known about the general type of legal behavior in question. At the extreme, study of unfamiliar dispute-settlement procedures in China by Westerners might begin with an exploratory case study in this unknown territory. Similarly, case studies of

[3] Although theory jumps ahead of description and provides a structure for further observation (Popper 1963), a framework of familiarity with the range of character of legal activity, rather than a census of its behavior, seems necessary to promote the most powerful theorizing.

Neighborhood Dispute Centers (see, for example, Buckle and Thomas-Buckle 1980) have laid critical foundations for subsequent, more tightly structured examinations of the Centers' impact on disputes.

The case study may also be usefully employed when the terrain is well known but investigation deals with an unusual instance. For example, when John Mitchell and Maurice Stans were acquitted of conspiracy to impede the investigation of Robert Vesco, a fugitive financier, a *New York Times* reporter interviewed the jurors in the case, who reported that their first vote had been 8 to 4 in favor of conviction. It was known that jury verdicts generally reflect the majority view on the first ballot, particularly when the majority has as many as eight members (Kalven and Zeisel 1966; Penrod and Hastie 1979); this trial provided an opportunity to investigate the reasons why a majority would alter its choice of verdict. The results provided a clue: the single juror who was a college graduate began in favor of acquittal. A bank vice president, he arranged to have movies and other entertainment provided to the jurors during their sequestration; during the deliberations, he apparently drafted requests to have portions of the testimony reread. The verdict and reports from his fellow jurors indicate that his influence on the ultimate group decision was strong.

Perhaps more than almost any other research design, the value of case studies depends on the conclusions drawn from them. An attempt to generalize about the legal landscape from an examination of a tiny corner can be entirely misleading. Law is quite different from the natural sciences, where sampling concerns pose limited threats to the ability to generalize because there is little variability among the units being studied—such as metal bars or beakers of sulfuric acid—with respect to the properties being investigated. In the social sciences, and particularly in studies of legal institutions, variety is both rampant and important, since it may directly relate to and affect the behavior of interest. For example, as a result of the Mitchell-Stans case study, it can be hypothesized that a minority juror's social class and educational background can cause a significant increase in the persuasiveness of the minority position. This hypothesis may not be an accurate explanation for the particular verdict. Even if it is correct, it may hold only in cases where the defendants and witnesses are prominent and themselves well educated, when the trial receives substantial publicity, when the jury is sequestered, or when the more educated juror has provided the jury with concrete benefits.

The case study is often criticized as a research method because its results may lack external validity—that is, it is not clear that insights obtained from the particular sample of behavior can be applied to other settings, to other subjects, and the like. The challenge is to integrate the potentially rich yield of the case study with other kinds of research to build theory by sensitive comparisons and to generate new hypotheses that can be systematically tested.

The Participant Survey The survey is popular with scholars interested in the social-scientific study of law. Since it is often easy to sample respondents with information about the law, legal problems, or the legal system (for example, a questionnaire can be mailed to every tenth lawyer listed in the Martindale-Hubbell Directory), the survey appears to avoid many of the weaknesses of the case study. Surveys were the primary data collection instrument in more than half the sample of research proposals I reviewed as a panelist for the Law and Social Science Program of the National Science Foundation.

This romance with the survey is of relatively recent vintage, and there has been a tendency for its new acquaintances to hit every legal topic with this methodological hammer. Thus, members of the general public have been asked about their support for the police and their fear of crime (Block 1971), their experience as crime victims (Ennis 1967, among others), and their attitudes toward civil liberties (Wilson 1975). Consumers have been questioned on their complaint behavior (Best and Andreasen 1977). Defendants have been respondents in studies of perceived fairness in treatment (Casper 1978). Judges have responded to surveys covering a wide range of topics, from their perceptions of the roles they occupy (Ungs and Baas 1972) to the way they reach decisions on sentencing and bail (Hogarth 1971; Koneçni and Ebbesen 1979).

One problem with many legal surveys, not inherent in the survey method itself, is particularly likely to arise in studies of law. Because there are so many legal jurisdictions, actors, and communities, definitions of common terms may vary dramatically across potential respondents. A survey that does not determine in advance how respondents define key terms may discover too late—or not at all—that respondents have been inconsistent in their interpretation of questions. For example, a survey of prosecutors across the country might ask how often plea bargaining occurs in their court.

> Some prosecutors will tell you that in their jurisdictions no "plea bargaining" goes on, but readily admit that many cases are "settled" before trial. Some judges . . . deny that any "plea negotiations" go on in their courts. They are right: . . . defendants are simply informed that . . . they can either "plead guilty and get mercy or go to trial and get justice." Some prosecutors, defense counsel, and law professors share the view that such an arrangement is not plea bargaining. [McDonald 1979, p. 385]

The investigator whose pilot work discloses such variation can define or avoid ambiguous terms in the survey, thus reducing the probability that respondents are answering what are, in effect, different questions.

A survey of citizens, lawyers, judges, clerks, or litigants may provide fascinating data on the perceptions of these legal participants. But when the research question asks, "How does a law or legal institution operate?" the survey is likely to be only partially successful in providing answers. Some instances of potential distortion are clear: the defendant claims his guilty plea was the result of external pressure (Blumberg 1967) or judges deny that lawmaking is a judicial activity of any frequency or importance (Ungs and Baas 1972).

Other instances of potential error are less obvious. Lochner (1975) was interested in learning how private attorneys came in contact with no-fee and low-fee clients, why they helped them, the age and ethnic composition of the clients, and the kind and caliber of legal work performed for them. Attorney–client privilege would preclude any sampling of case files in an attorney's office, and since these cases infrequently result in official court action, court files would provide little relevant data. Lochner conducted a survey of attorneys to obtain his answers. Yet, even assuming the best intentions on the part of the attorneys, it is questionable how accurate attorneys are likely to be when asked to summarize the demographic characteristics of part of their practice or how much attorneys can tell us about the caliber of the legal services they provide.

Sampling Official Records When descriptions of legal operations are based on samples of officially produced records, fewer questions are raised about their accuracy. The usual rationale is that figures collected by an organization for its own use in the course of its regular activities are not subject to presentational distortions. However, motivation to manipulate regularly collected measures also exists whenever the figures are used to justify resource allocations or to reflect on the skill or industry of those responsible for producing them. For example, until 1973, larceny under $50 was not included in the FBI Crime Index; larceny above $50 was included. Since the classification of an offense as an index or nonindex crime depended on a police evaluation of the lost property, there was ample opportunity for police to affect index larceny rates before 1973. Change in property evaluation by police may be the real explanation for an apparent drop in index larceny rates following the enactment of Nixon's anticrime program and the installation of a new police chief in Washington (Seidman and Couzens 1974). To the extent that an organization's records are the object of outside attention, they should be viewed with some skepticism.

At least two organizational clues signal potential bias in archival data. The first is the distance of the record-keeping portion of an organization from its operating activities. The Administrative Office of the United States courts, for example, is organizationally separated from the activities of the various courts. In contrast, until recently, the Federal Bureau of Investigation had responsibility both for law enforcement and for keeping national crime statistics; the new separate department of Criminal Statistics in the Justice Department was formed in large measure to create an independent archive; some interesting research waits to be done evaluating the impact of this separation on federal crime statistics.

Second, national reporting systems may foster inaccuracy of information. They invite "invidious comparisons among information producing units" (Reiss 1980, p. 370). As a result, strictly local reports may be more reliable.

It is difficult to provide many useful specific guidelines to uncover bias and unreliability in archival data. The best counsel is to check for consistency among different sources of data. For example, a study of homicides by police officers compared homicide figures from two data sources—local and state police department reports and coroners' death certificates (Sherman and Langworthy 1979). The assumption motivating the comparison was that the coroners' figures would be more accurate and that the police figures would produce an undercount. In fact, 50 percent fewer homicides were listed in coroners' data than in police reports. According to interviews with coroners, this surprising result was apparently due to the dependence of coroners on police for information in nearly all homicide cases and the reluctance of coroners to alienate the police by homicide classifications. This example does not contradict the general principle that vested interest can strongly affect record-keeping; it does indicate that sources of self-interest are not always obvious.

As with survey data, definitions in archival data can fluctuate—over time, and across institutions. Homicide, for example, has a different meaning in Vital Statistics than in FBI data. A formal complaint to an antidiscrimination agency in one state may be classified as an informal action in another. Researchers may also come to records with definitions that differ from the understandings of those who did the recording. Never-

theless, because of their comparatively easy availability and generally low reactivity,[4] compared with most other data sources, legal records can provide valuable information about legal life. The meaning of an entry should not routinely be taken at face value; it is itself a research question.

Simulations and the Problem of Context In their attempts to avoid being swamped by the complex context of legal behaviors, researchers may temporarily ignore or hold constant some of the forces that normally impinge on the behavior of interest. Simulations of legal institutions and activities offer a potential for control unavailable in the typical legal setting. At their best, they permit a microscopic examination of processes usually layered with a confusing set of extraneous influences, and sometimes they permit a kind of access to activities shielded from direct observation. Jury simulation is a popular example of this type of research. Investigators, typically psychologists (such as Landy and Aronson 1969; Mitchell and Byrne 1973), expose subjects to information on an offense and offender or a dispute between parties. The "jurors" are then asked to respond to a set of questions about the material they have viewed or to deliberate with other respondents to reach a decision in the simulated case. A goal of this research is to disclose the way juries process information and reach their verdicts.

Greater control and narrow focus have their costs, however. The magnification they allow sometimes results in distortion. A jury simulation using a section of a trial that dwells heavily on the character of the defendant, for example, may produce findings that mistakenly suggest a heavy weighting on defendant characteristics in jury deliberations. The omission of voir dire and judicial instructions from most jury simulations neglects the role of these mechanisms in channeling jury decisions. In addition, experimental subjects, aware that their decision will have no consequences for the parties in the case, may decide cases differently than do real juries (Diamond and Zeisel 1974; Wilson and Donnerstein 1977).

Additional difficulties occur when an attempt is made to simulate the operation of legal activity in the system as a whole. The ambitious simulation research program of Thibaut and Walker and their colleagues (Thibaut and Walker 1975; Lind, Thibaut, and Walker 1973) has attempted to compare the operation of adversarial and inquisitorial systems for the resolution of disputes. In one study law students were asked to play the role of attorneys in one of two systems (actually four systems, but two of them are not relevant to this discussion). In the adversarial system, the outcomes were to be contingent on how successful each subject was in representing their client's interests. In the inquisitorial system, the subject-attorneys were responsible to the court, and their outcomes were to be determined not by the result in the case but by their ability in helping the judge arrive at "as fair and accurate a decision as possible" (Thibaut and Walker 1975, p. 31). After reading a description of the trial case, the subjects had five opportunities apiece to spend points to buy facts that might help prepare their cases. Since the number of points at the end of the experiment would in part determine the outcome for the subject, there was some incentive to buy as few facts as possible. The facts available for purchase were varied, so that as the subject-attorneys purchased facts, they might find that 25 percent,

[4] *Reactivity* refers to a change in behavior produced because the person or organization being measured is aware that his behavior is being monitored.

50 percent, or 75 percent of the facts favored their client. The results of this study showed that client-centered (adversary system) attorneys purchased more facts than did court-centered (inquisitorial system) attorneys only when the distribution of facts appeared unfavorable to the attorney's client. The authors conclude that "the adversary system apparently . . . does instigate significantly more thorough investigation by advocates initially confronted with plainly unfavorable evidence" (Thibaut and Walker 1975, p. 40).

Perhaps the conclusion is correct, but advocate behavior embedded in a single case context is rare indeed. The decision is generally not whether or not to invest time and effort in an attempt to win a lone case, but how to allocate time and effort among cases that have greater or smaller promise in an attempt to optimize outcomes across a number of clients. When confronted with an unfavorable initial assessment in the presence of additional pressures and choices, the adversary outside the laboratory may be even more likely to terminate his investigation and settle or plead without further information search. The question in this simulation, as in all legal simulations, is whether the behavioral influences are so basic that they can be generalized to apply to real attorneys or other legal actors in real legal settings.

Contextual problems are particularly noticeable in simulations because the researcher must construct each source of potential influence (such as additional cases on the subject-attorney's caseload). Similar problems, however, occur outside the laboratory and off the computer as well. One response has been to focus inward and avoid the spillover and feedback influences of the environment in which a legal activity or organization operates. A study of the distribution of civil cases in two California counties shows that the percentage of family and tort cases among all cases filed has increased over time (Friedman and Percival 1976). The authors suggest that this change in the mix of cases supports the hypothesis that the courts have come to function less as dispute resolvers and more as ratifiers of decisions already reached by the parties. The use of the court's total caseload as the base against which changes are assessed, however, assumes a peculiarly insular use of the term *function* (Lempert 1978). To be sure, the Friedman-Percival analysis describes what the courts do, but it does not address the more interesting question of what function, or changing function, they occupy in society.

To answer this second question requires a larger view, one that extends beyond the boundaries of the court's behavior and examines the court's role in resolving disputes as a proportion of the disputes arising in the population. There is, of course, no direct way to count the number of disputes a court might be asked to settle, and certainly no way to obtain this figure for various times in history. It is, however, possible to obtain a reasonable proxy by using the adult population figures for the two counties. A reanalysis of the data using this population base illustrates the consequences of extending the research on function beyond the court docket; one of the two counties shows no evidence of reduced dispute settlement by the court, even though the percentage of cases reaching trial or hearing has dropped. The court has simply come to play a greater role in other areas (Lempert 1978).

The discussion of the Friedman-Percival study illustrates a general problem that arises in much descriptive research on law—a lack of attention to the context of the behavior under scrutiny. The frequency of civil jury trials in a jurisdiction, for example, may be conditioned by the court calendar's backlog and a preference for criminal cases. Rates of

settlement without reference to such organizational constraints are of limited value in understanding litigant preferences. Descriptive research need not be insensitive to context, for researchers can usually collect the necessary background information; it is simply that they rarely do.

Comparisons That Increase the Yield from Description

The form and yield of descriptive research on the operation of law are conditioned by three important characteristics of legal behavior. The first is the great variety across settings of legal behavior and organizations. This variability requires replication across settings to ensure that results are not idiosyncratic to a single tested site. A second critical characteristic of legal settings is the presence of numerous partisans with different loyalties. Partisanship can be employed to advantage by using the multiple perspectives of the various actors in a legal setting to test the validity of descriptions obtained from each group. Finally, a third characteristic of law important for descriptive yield is the frequent availability of several different types of data sources—for example, archival as well as interview—in each setting. Multiple data sources produce a more rounded picture when the results of the multiple measures can be compared.

Replication The question, "Would this finding hold true with other subjects, in other settings, at other times?" can be answered directly only by explicitly replicating research in varying contexts. Yet, the variety of different types of sites and subjects makes replication across all potential sites and subjects impractical—and impossible across all possible points in time. The certainty that specific findings are generalizable—have external validity (Campbell and Stanley 1963)—is always logically questionable. The probability that results will apply generally, however, varies markedly from investigation to investigation. If, for example, the site of a case study is chosen because a progressive police administrator is willing to invite research scrutiny, and other police organizations that have been approached have decided not to participate in the research, the studied organization is probably atypical in other respects as well. The value of such a case study as a general description of police organizational behavior will be limited. But it is not only the obvious distinctiveness of this setting that undermines this case study as a general description; it is rare that *any* single case study of legal behavior can provide a picture of operations that will apply to most other nominally similar organizations. The variability across legal settings is too great.

The sampling approaches discussed below are presented in large measure as methods for extending the single-site descriptive study. It is important to note, however, that single-site impact studies also need replication to test the real possibility that causal impact of the treatment was conditioned by the environment of the research.

When description is the goal, the ideal research strategy uses both sampling and intensive study of a wide variety of sites and respondents, obtaining a large enough group to reflect the texture and heterogeneity of legal systems or prosecutors' offices or traffic courts in the population of interest. Because of the costs entailed in comprehensive sampling, it is rarely the preferred approach. If a researcher did draw a large sample from the population of all potential sites, the compromise with other aspects of the design would usually be so great as to destroy the value of the enterprise. For example, a mailed survey of a random sample, or even a full census, of all United States state prosecutors'

offices could be conducted, instead of a detailed series of case studies of a few offices. The survey would permit collection of some limited information on all offices willing to respond to the questionnaire, but it would provide a view of office functioning only through the (perhaps defensive) eyes of the respondents. The gain in breadth would be at a great sacrifice in depth. If the researcher is interested only in the number of lawyers employed in the typical prosecutor's office, the survey strategy is sensible. But if the information being sought is less readily available or more sensitive, such a superficial though comprehensive sampling strategy is a poor choice.

An alternate approach that capitalizes on the contributions of both extensive and intensive investigation selects a small number of sites specifically chosen to reflect the range of possible variation. This strategy usually involves choosing characteristics that, for theoretical reasons, are expected to be associated with variation in the behavior under study (such as crime rate or caseload pressure if the study deals with plea bargaining). Most often the number of potentially important characteristics will generate a series of types of settings, and the researcher must select from among them. Two guides may be useful. First, the full list of possible sites should be compared with the generated types, so that representatives of the modal category or categories can be included. Thus, research that attempts to characterize plea-bargaining practices in the United States would select one or more urban courts, where the bulk of criminal indictments occur. Second, an attempt can be made to maximize the heterogeneity of selected sites. If the research discloses that plea bargaining takes a similar form in a large urban court with a heavy caseload and in a small rural court with a small flow of business, replication across these extremes increases the probability that courts more moderate in character share analogous practices. Of course, sites at the tails of the distribution may not behave in the same way as do sites near the center. For example, in both extremely long, complex civil trials and in short, clear-cut cases, judges may be more likely to blame counsel for not settling than they would in moderately ambiguous, medium-sized cases. Both theory and available evidence are critical in evaluating the benefits of adding another site or case in light of the obvious increase in costs.

In addition to requiring some theory of relevant variation in the phenomena under study, site selection also requires some knowledge of the distribution of actual variation in possible sites. For this latter purpose, a survey may be necessary, but official records can often be used for an adequate approximation of cases handled, offenders incarcerated, housing-market characteristics, and the like.

While the absence of theory, data, or time and money may prohibit the study of multiple instances, the addition of a single second site, however selected, provides a substantial boost to the reliability of descriptive, or any other, research. If the findings can be replicated in a second site, they cannot be dismissed as idiosyncratic. It was found, for example, that neither the Massachusetts nor the Connecticut sentencing review divisions changed more than 3 percent of all sentences eligible for review (Zeisel and Diamond 1977). Though it can be argued that the explanation for this low rate of change lies in procedures shared by the two states—such as informal proceedings conducted by a panel of trial judges who at other times accepted pleas, tried cases, and sentenced offenders—the low rate cannot logically be attributed to characteristics that the two states do not share. For example, Connecticut's division gave reasons for its decisions, while in Massachusetts no reasons were given. The similar results in the two states eliminated presence or absence of reason-giving as a factor crucial to the observed results.

If replication does not lead to parallel results, the differences can be used to enrich description and restructure theory. It is important to note, however, that explanations resulting from nonreplication give rise to new hypotheses rather than test old ones. If plea bargaining is found to be extensive in city A (urban, high crime rate, heavy caseload) and rare in city B (rural, low crime rate, low caseload), it can mean that some or all of these three selection criteria explain the difference in response, or that some unmeasured characteristic is responsible.

While comparisons within the same research project usually have the advantage of general comparability in methods of design, data collection, and analysis, external validity can also be extended by comparisons with research conducted by other investigators. For example, Laura Nader and her students attempted to coordinate their ethnographic research on the disputing process in different cultures by agreeing in advance on "what data they would collect and within what framework the collection of data would be collected" (Nader and Todd 1978, p. xi); all researchers examined choices among the same seven procedural modes for dealing with grievances, conflicts, or disputes. While some substantial variation did occur in the ultimate products, the approach clearly facilitated the intended cumulative impact.

More commonly, comparisons must be drawn across independent studies. Ross and Littlefield (1978) compared their findings on complaint handlings with the results of previous surveys by Best and Andreasen (1977) and King and McEvoy (1976). All three studies showed a positive correlation between socioeconomic status and the frequency of complaints, despite different samples and different measuring instruments. The replication solidified confidence in the relationship and, in fact, gained added strength from the methodological heterogeneity of the three studies.

Failures to replicate are less directly illuminating. Both the Ross-Littlefield and Best-Andreasen studies revealed dissatisfactions among approximately 20 percent of the purchasers of television sets and appliances, strengthening confidence in the figure. King and McEvoy, however, found complaints among 32.4 percent of their respondents. Ross and Littlefield suggest that the disparity can be explained by the fact that the King-McEvoy study included a variety of consumer problems experienced in the course of a year. The difficulty is that, whenever different results occur across studies, methodological as well as substantive candidates for explaining those differences arise. These must be explored, and it is not always possible to decide among them.

If the exercise of comparing across studies is to produce some cumulative effect, it is critical that methodological choices in sample sites and measurement operations be specified as clearly as possible. To the extent that subsequent researchers can identify such differences in approach, probable explanations can be tested in further research.

Sometimes comparisons across settings and subjects are implicit rather than explicit. Such studies assume a standard of behavior in one setting and contrast the results obtained from a study conducted in another setting. A study of Korean dispute resolution, for example, suggests that Korean tradition is alegal and that, in contrast to Western tradition, a declaration of intention to resort to law is tantamount to a declaration of war. As evidence, the author cites a survey of Korean respondents who were asked, "When you are involved in a quarrel or a dispute with another person and he declares to you, 'I am going to settle this legally,' how would you feel?" (Hahm 1969, p. 24). The choices of response were *Bad, Indifferent, Good, Other,* and *No Response;* 56

percent of the Korean sample chose *Bad.* The study presumes that a Western sample would respond otherwise, showing greater indifference to or relish for a legal settlement. Yet, when I asked a haphazard sample of twenty Chicago adults the same question, half of them also chose *Bad.* While the sample selection in my informal study can be questioned, the results do suggest some of the dangers in relying on a presumed but untested standard of comparison. Explicit testing across relevant settings is the obvious cure.

Comparative testing is not easy. Much has been written in particular on the linguistic and contextual difficulties of parallel testing across cultures. Nonetheless, the difficulties cannot be circumvented by flatly assuming responses in an untested setting.

Utilizing Partisanship Participants in the legal system, more than those in other arenas, are commonly placed in partisan roles—lawyers, defendants, plaintiffs. This series of potential respondents with varying viewpoints creates an opportunity for researchers to examine their subject through these various filters; partisanship can create perils for those who are content to rely on the perspective of a single group of partisans. One study, for example, set out to evaluate the degree to which jury verdicts in criminal cases in Birmingham, England, were consistent with the evidence presented to the jury (Baldwin and McConville 1979a, 1979b). Since legal restrictions prohibited direct access to jurors or jury deliberations, the researchers interviewed the judge, the prosecution and defense solicitors,[5] and the police officer in each of the sampled cases. There was considerable disagreement among the groups of respondents. While no doubt was raised by anyone in one third of the acquittals, acquittal was seen as doubtful by only one of four possible respondents in 27 percent of the cases. Moreover, the distribution of evaluations by type of respondent was generally consistent with partisanship: defense solicitors saw acquittals as justified most often—83 percent of the time; police officers saw them as justified least often—48 percent of the time.

These results pinpoint two values of partisanship. First, because the direction of bias for particular respondents is often patently clear, it can provide a kind of ceiling or floor on the true value. A project that studied pro se divorce, for example, sent questionnaires to a sample of lawyers who handled divorce cases (*Yale Law Journal* 1976). One half the attorneys reported that they spent an average of twenty minutes or less preparing the complaint in an uncontested case; none reported spending more than an hour. Since it is socially desirable to appear to be spending more rather than less time on a case, these figures can probably be viewed as a kind of maximum estimate for the activity. Similarly, an interview survey of Oregon adults found that one in four admitted to some form of income tax evasion (Mason and Calvin 1978). While some respondents may have invented evasion out of bravado, it is probable that 25 percent represents a floor for the actual, but directly inaccessible, figure.

With the addition of a second partisan view, the other research value of partisanship emerges. That is, it is possible to get both an upper and a lower limit for some estimates. Thus, police officers in the Baldwin-McConville study saw acquittals as unjustified in 52 percent of the cases. Defense solicitors found them unjustified in 17 percent of the cases. The combination of these results suggests that in somewhere between 17 percent and 52 percent of these cases there were grounds to characterize the acquittal as unjustified.

[5] They attempted to interview the barristers in these cases as well but were unable to obtain the requisite permission.

When the responses of partisans are available, a further opportunity arises to categorize the observations as clear or conflicted. Thus, Baldwin and McConville classified a jury acquittal as questionable only when both the trial judge and one other respondent viewed it as doubtful. Of course, the way to combine such data may be open to dispute—for example, should a verdict be viewed as questionable only if both the police officer or prosecutor and defense solicitor agree?—but the availability of sources with conflicting perspectives offers a set of clues missing when a single source is employed.

Multiple Data Sources Bias and error are not confined to survey measures. A strength of research on law is its frequent ability to take advantage of other available data sources to cross-check results, both within method—such as resorting to two different archival sources—and across method—such as combining observation and self-report.

Legal behavior is studied and counted by numerous groups, providing a variety of unexpected sources (see Gottfredson and Gottfredson 1980 for a useful sampling). For example, data on thefts can be found in Interstate Commerce Commission files, which include these figures as a cause of loss and damage claims paid to common carriers of freight. While different agencies may use different definitions and independent data collection by all agencies cannot be assumed, multiple archives can provide an important check on consistency. The study of homicides by police described on p. 657 (Sherman and Langworthy 1979) is one example of this approach. A second is a study of the 1969 FBI Uniform Crime Reports section on Careers in Crime (Zeisel 1973). The FBI's follow-up study of offenders released from the federal law-enforcement system in 1963 showed a 92 percent rearrest rate in 1969 for those who had been acquitted or had their charges dismissed. Since this figure was surprisingly close to 100 percent and was much higher than the 65 percent average for all offenders in the group, the author became suspicious. The FBI had a clear interest in suggesting a high rearrest rate for this group—the agency was at the same time arguing that the courts were being too soft on crime and were dismissing cases and acquitting people highly likely to commit new crimes.

Figures from the Administrative Office of the United States Courts provided the needed check. These totals revealed that the offenders included in the FBI data base were only two thirds of the offenders counted by the Administrative Office. Moreover, the FBI sample was clearly biased: it included only one fourth of the persons in the dismissed or acquitted category.

The researcher's comparison of the distribution of offense charges in the FBI sample with the Administrative Office census showed that charges associated with high rearrest rates, such as auto theft and burglary, were greatly overrepresented in the FBI sample, while charges associated with lower rearrest rates, such as fraud, were underrepresented. He was thus able to prove that the FBI sample was nonrandom in a way that inflated rearrest rates.

Comparing results obtained by different data-collection techniques extends the strategy of cross-checking for consistency. Interview data from prostitutes who report that all of their clients are "important" people may be suspect. Such reports, however, could be supported by the researcher's own observations: "Of some fifty persons seen going to prostitutes' rooms in apartment houses, only one was dressed in anything more casual than a business suit" (Chambliss 1971, p. 1153).

Sociolegal researchers rarely take advantage of the available multiple sources for data.

Two studies of parole-board decision-making are notable exceptions. Parole-board members were asked to evaluate experimental cases in tightly controlled simulations, where their use of information in reaching decisions could be directly monitored. In addition, archival data on actual parole decisions were analyzed (Gottfredson et al. 1975; Carroll and Payne 1977).

There is, of course, the possibility that a widened net of measurements will reveal inconsistency. In such cases, the researcher or reader must reserve judgment or decide which data source carries greater weight. One study of judicial sentencing found that judges' reports showed the use of criteria different from those that were revealed by simulated studies of their sentencing judgments; results from the latter method also differed from results obtained from archival analysis of actual sentencing judgments and case characteristics (Koneçni and Ebbesen 1979). The researchers suggest that the actual case-file results are most trustworthy, but there are good grounds on which to question that conclusion. Case-file results suffer from problems associated with multicollinearity—high intercorrelations among the case characteristics—and the results may also be distorted by influential, but unmeasured variables.

Each method, of course, has its weaknesses; tentative resolution of inconsistent results from different methods will depend on the particular research problem and what is already known about the behavior under study. Interview data inspire less confidence when the questions are sensitive; simulation tasks requiring expert decision-makers to make judgments similar to those they make daily are probably more trustworthy than those that use tasks unfamiliar to the subjects. The payoff from the use of multiple methods arises because consistency in results builds a comprehensive picture and even inconsistency provides a starting point for correcting method-specific conclusions.

THE IMPACT OF LAW AND LEGAL CHANGE

Research on law has been criticized for its general focus on effects and its pervasive treatment of law as an independent variable (Gibbs 1968; Feeley 1976). While the literature shows increasing attention to issues of emergence and operation, interest in legal impact is likely to remain strong. Since legal change is a primary approach to social control, both policy-makers and basic researchers continue to be interested in the limits of and possibilities for effecting change through law. Moreover, as dissatisfaction with existent legal structure appears to be increasing, so, too, are attempts to alter and improve it (such as Neighborhood Justice Centers and attempts to eliminate plea bargaining); researchers are participating in the evaluation of these planned modifications and alternatives.

"Does a change in law (or legal arrangement) A produce a change in behaviors B, C, and/or D?" is a causal question. Drawing heavily on the work of John Stuart Mill, Cook and Campbell (1979) list three criteria important for inferring cause. It must be shown that (1) covariation, or correlation, exists between A, the presumed cause, and B, the effect; (2) the change in A precedes the change in B; and (3) no plausible alternatives can explain the variation in B. On the surface, it may appear that these criteria are easily met and that most causal research attends to them. In fact, causality is difficult to demonstrate, and the requisite criteria are often dismissed or ignored in studies attempting to gauge the effects of law. A review of the weaknesses of some designs commonly

used to assess the effects of legal change, with particular attention to alternative causal explanations or threats to internal validity, will illustrate the difficulties. Much of the terminology and the notation are drawn from Campbell and Stanley (1963); the interested reader is referred to Campbell and Stanley and the more recent Cook and Campbell (1979) for more complete discussions of concerns with validity in causal research and to Lempert (1966) for a discussion of how Campbell and Stanley's approach applies specifically to research on legal-impact research.

The present discussion focuses on the issues that most commonly create problems of inference for studies of legal change. One important issue of measurement logically precedes discussion of particular research designs in legal-impact research. Research of this kind generally assumes that the independent variable—legal change—has been implemented as planned. Researchers focus their attention on whether the dependent variables targeted by the research have been affected by the presumed change. Yet, in legal innovation, the slippage between design and enactment is likely to be great (Diamond 1981a). Treatments may not be implemented, may be implemented in a dramatically modified form, or may be implemented but not reach their intended audience; for example, a penalty for a particular offense is made more severe, but potential violators are not aware of the change. Researchers studying the impact of law may prematurely conclude that a legal change is ineffective, or they may adduce incorrect reasons for concluding that it is effective.

In laboratory research, it is standard practice to measure the "take" of the independent variable as well as the response in the dependent variable. If the independent variable is not manipulated successfully, no real test of its impact is presumed to occur. Researchers studying the effects of law in field settings can reduce the ambiguity of their results by taking a cue from their laboratory colleagues and measuring the extent to which their manipulations have taken place.

Preexperimental Designs

The case study used to assess cause-effect relations focuses on a situation in which the presumed cause is present and determines whether the predicted effect can also be found. A study of the effect of California's Lanterman-Petris-Short Act observed the petition hearings of 100 persons who filed writs of habeas corpus after being committed involuntarily to mental hospitals. In the language of the study, "it is important to assess the impact of the Act on the processing of mentally disordered individuals," since the "Act has been widely heralded as a vital step toward curbing unnecessary commitment while retaining some institutional control over the severely disturbed individual" (Warren 1977, p. 631). The comparative standard implicit in these statements, as in all causal studies, is the behavior that would have occurred if the presumed cause—in this case, the Lanterman-Petris-Short Act—had been absent. Yet Warren's data provide no such standard; all the observations took place after the effective date of the act. Thus, if X represents the act—or any presumed cause or treatment—and O represents the outcome measures for the cases before the court (or posttest observations for any individuals, organizations, or subjects whose behavior is being monitored), the design reads

X	O

where time advances from left to right. In Warren's study, the data simply reveal that the statutory criteria "were not strictly applied" in the examined cases. The handling of these cases may in fact have represented an improvement over past practice and may have signaled a real change attributable to the passage of the act. This research design cannot make that assessment. Nor can it prove that the act did not change matters for the worse. The analysis does contain one alternate standard—the act's criteria of mental disorder, dangerousness, and grave disablement. The research is an interesting evaluation of the extent to which behavior reflects the normative standard of the new law, and thus it adds to the literature of law on the books versus law in action. In this sense, the research is more properly categorized as a descriptive study of operation and is not a causal study at all.

The absence of a comparative no-X or other-X standard is partially handled by a second commonly used design, in which a pretest is added before X, the legal measure of interest, is introduced:

$$\underline{O_1 \; X \; O_2}$$

Differences between behaviors measured before and after the change are attributed to the intervention in this so-called before-after design. But legal changes evaluated by this method may erroneously appear effective because factors other than the legal change of interest are responsible for the O_1-O_2 shift.

Legal changes are frequently enacted against a background of demonstrated extraordinary needs. A sharp rise in crime leads to crime-prevention legislation; a sudden increase in traffic fatalities evokes an announced crackdown on speeders (Campbell and Ross 1968); signs prohibiting parking appear the winter following a blizzard that produced streets clogged with snow and stranded automobiles. A comparison of prechange behavior with postchange behavior discloses a drop in crime rate, a reduction in fatalities, an improvement in traffic flow that coincide with the legislative or enforcement change. The question remains whether the change would have occurred in the absence of the treatment. In all these examples, the preintervention level of performance—crime rate, traffic fatalities, street congestion—was unusual, perhaps because of weather or some other chance factor. Behavior fluctuates over time, deviating above or below its mean occurrence. If it is unusually high at one reading, it will generally be lower at the next; if it is unusually low on one occasion, the next measurement is likely to be higher. This statistical regression toward the mean may be mistaken for an effect of the treatment when the timing of a change or its allocation to particular individuals is determined by the extremity or deviance of the preintervention scores. Thus, any program for treating delinquency can appear to reduce recidivism when the participants are selected for the magnitude of their prior criminal records and a simple before-after design is used to evaluate the program (Maltz 1978).

Since legal changes occur frequently, identifying X as the treatment to be evaluated does not ensure that the legal system will remain constant in all other important respects. One study of the change from twelve-member to six-member juries in Michigan civil trials was interested in evaluating the effect of jury size on verdicts (Mills 1973). Accordingly, it compared the percentage of plaintiff verdicts and the size of awards before and after the jury size was reduced. Unfortunately, this legal change coincided with a series of

other changes that could also explain any changes or constancies in the pattern of verdicts shown in the data. A mediation board was instituted, and procedural rules were modified to allow discovery of the limits of insurance policies. The study was unusual in that the researcher searched for and uncovered a number of these rival explanations, but he was unable to identify their impact on verdicts and awards.

History—the set of events apart from X that occur between O_1 and O_2—poses a pervasive threat to causal inference in the before-after design. Such events are less likely if O_1 and O_2 are close in time, but because multiple simultaneous legal changes are common, the difficulty of distinguishing their separate effects may be substantial.

The comparison between O_1 and O_2 assumes that the measurement procedures are identical at the two time points. If changes occur, instrumentation or instrument decay may cause the false appearance of a treatment effect. Just as crime rates can be affected by a change in the monetary evaluation of stolen property by police, rates can also change when adjustments are made in the name of improvement. Until 1969, the Federal Bureau of Narcotics and Dangerous Drugs assumed that all addicts were known to hospitals or to the police and that, therefore, the total addict population was represented in the agency's register. In 1970, the estimate was subjected to the new assumption that only one addict in five was known. Therefore, the addict population suddenly quintupled (Epstein 1977). A treatment introduced between 1969 and 1970 would have looked remarkably addictive in the absence of information about this accounting change.[6]

Concurrent measurement of the two groups of subjects (cases, individuals, organizations, jurisdictions)—those who have and those who have not been subjected to the legal change—can control for some, but not all, of the deficiencies of the single posttest and before-after designs:

X	O
	O

In this design, two (or more) groups who have received different treatments are compared by measuring all groups at the same time. An enormous amount of research on legal change has used this nonequivalent control group design. The research has generally taken one of two forms. In the first, the groups represent different jurisdictions that have enacted different laws or made available different legal arrangements, such as the death penalty (Sellin 1959). In the second form the treated cases consist of those who have voluntarily selected to receive or apply X, while the untreated cases consist of those who have rejected it or chosen an alternate treatment, such as the six-person rather than a twelve-person jury (Bermant and Coppock 1973) or attorney- rather than self-representation (Sarat 1976).

While this design avoids some of the threats to validity faced by the before-after approach, a major competing explanation for differences between the groups remains: selection differences may have produced the variation in posttest performance. An early study on the death penalty, which compared the rate of homicides in states that had the death penalty with the rate in states without the death penalty, found no evidence for a

[6]In fact, the apparent jump in addiction was used by the Nixon Administration to justify its crusade against heroin.

deterrent effect on homicide (Sellin 1959). The use of adjacent states, however, did not guarantee that the states compared were similar in all relevant characteristics apart from their death-penalty statutes. Such unchecked differences can affect homicide rates and the deterrence hypothesis cannot be rejected solely on the basis of this original design.[7]

Investigators using the design often examine factors that characterized the two groups before the treatment—for example, unemployment rates and percentage of population aged 15–24 in death-penalty and non–death-penalty states (Baldus and Cole 1975). This analysis takes place either before one group actually receives the treatment or, more commonly, retrospectively. In either case, equivalence on the pretreatment measures is used to support the inference that they were equivalent before the time of treatment in other important respects—an inference always open to serious question.

The probability that an unidentified cause lurks in the background is particularly high when the treatment condition is determined by the choices of those who are being treated. A study of the New Jersey optional six-member jury system demonstrates the principle. Verdicts in civil cases when a six-member jury decided the case were compared with verdicts in cases when one of the parties requested and thereby received a twelve-member jury (Institute for Judicial Administration 1972). The results were used to test the causal question whether jury size affects verdicts. There was good reason to wonder why a party would request twelve jurors, since the decision would produce a higher jury fee and could be viewed by the court as imposing an additional burden. The data on case characteristics reveal the wisdom of this concern; twelve-member jury cases were more complex, led to higher average settlement levels as well as verdict sizes, and involved longer trial times apart from deliberations. These differences alone, and not jury size, could explain any pattern of results obtained from the posttest verdict comparisons (see Zeisel and Diamond 1974 for a more complete discussion).

A similar alternate set of explanations arises in studies that attempt to gauge the effect of legal representation on case outcomes by comparing plaintiff verdicts in cases with and without counsel (such as Hollingsworth, Feldman, and Clark 1973; Steadman and Rosenstein 1973). Attorneys are likely to be hired not only by plaintiffs who can afford their services but also by plaintiffs who believe the investment will pay off and whose cases may, in fact, be stronger.

The three research designs just discussed have been termed preexperimental (Campbell and Stanley 1963). Their general weakness in not ruling out alternative causal explanations or threats to internal validity typically leaves the investigator with questionable support for conclusions about impact. The designs can be valuable where well-grounded theory or supplementary data can rule out competing causal explanations. In the absence of such additional information, however, the lack of control can be fatal to valid inference.

In contrast, two other kinds of research designs avoid or can repair most, or at least many, of the weaknesses of these designs by their structural arrangements. They are controlled or randomized experiments and quasi-experiments.

[7] Subsequent studies (Bowers 1974; Sellin 1967; Zeisel 1976; and others) have combined this control-group design with time-series data before and after abolition; the similar results from these analyses make the original conclusions considerably stronger.

Randomized Experiments

In randomized experiments, units are assigned to treatment groups according to an intentionally arbitrary or random schedule. Pretest measures may or may not be used, but because group membership is determined by the roll of a die or a random number table, each unit has the same probability as any other unit of being assigned to a particular group.

Issues of Design Randomized experimental designs can be diagramed (*R* signifying randomization):

R X O	or	*R* O X O
R O		*R* O O

These designs ensure that, within the limits of sampling error, the groups will be equivalent at the time of the pretest, so that any differences that appear at the posttest can be attributed at a specified level of confidence to events that took place after assignment to conditions. The difference between the two designs is the absence or presence of a pretest.

Pretests are attractive because they increase the chance that a true difference between treatment groups will be detected at the posttest. Because pretest and posttest measures on the same variable tend to be highly correlated, the pretest can be used to control statistically for error variance due to individual variation, making systematic variation—treatment impact—more visible. The main disadvantage of the pretest is that it may be reactive: pretesting may affect the subject's response to the treatment. While pretests were once viewed as powerful sensitizers, however, there is little evidence for their impact outside the laboratory (Cook and Campbell 1979), and pretests are generally desirable, particularly in field research where their impact in reducing error variance is often crucial.

The difficulty with pretests for much research on law is that it often makes no sense to measure subjects before treatment on the major dependent variable. One randomized experiment studied the effect of court-supervised appellate conferences on settlement rates (Goldman 1978). Cases were randomly assigned the offer of a conference or no such offer; the rates of settled cases (and other outcome measures) for the two groups were compared after all cases were closed by court decision or settlement. In another study, delinquents were randomly sentenced to the usual probationary treatment or assignment to a new rehabilitative program; the recidivism rates of the two groups were then compared to test the program's effectiveness (Empey and Erickson 1972). If a treatment is expected to affect the recidivism, case dispositions, or criminal sentences of a specified group of treatment recipients, no pretest measure of these variables exists.

Alternative strategies to control error variance when pretests are unavailable include matching or blocking on other relevant characteristics before assignment to treatment conditions and using alternative measures expected to correlate with the dependent measure as proxy pretests (see Keppel 1973, chap. 23, for a good description of these approaches). Researchers studying the behavior of law generally face substantial variability in the particular population; strategies for controlling that variation can form an important tool of their research, reducing the likelihood that a real difference will be overlooked.

The pretest equivalence produced by random assignment procedures rules out nearly all the threats to internal validity that hold for preexperimental designs. Regression would not be mistakenly identified as a treatment effect, since the pretest performance of both treated and untreated groups should be equivalent, and even if both groups are selected for their extreme scores—for example, high rate of reported drug use—regression between the pretest and posttest should be equivalent in both groups. External historical changes, apart from the treatment—administrative procedures affecting appellate court cases, for example—by affecting all cases could not account for group differences at the posttest.

Instrumentation changes, like regression and history, would be the same across groups for most studies. An exception may occur, however, if record-keeping is not constant across groups. In some correctional programs, the information on the criminal violations of program participants may be greater than that for controls, because the program has more frequent and intensive contact with the treatment group (for example, Lerman 1975; Long 1979). One solution is to use an independently derived count, when it can be obtained, for an even-handed outcome measure (Long 1979). Even if the result is an undercount, the loss of information should affect all groups equally and will not distort the comparison between treatment groups.

No comparable solution is available when the different measurement across groups affects actual outcomes. Thus, if the experimental treatment is intensive supervision of parole cases and if intensive supervision means extensive surveillance resulting in a higher rate of parole violation for members of the experimental group, no outside measurement source can equalize the treatment and control groups. It may not, however, be appropriate to label this difficulty a problem of instrumentation. While the surveillance effect subverts the integrity of the original outcome measure as a reflection of actual criminal behavior, the difference in the rate of violation is a genuine effect of the treatment on the outcomes for such offenders.

Selection can account for posttest differences through differential attrition across experimental conditions. For example, if a residential treatment program for delinquents keeps them available to researchers for posttest measurement while some control-group members moved away, or if a less desirable treatment condition leads some of those assigned to it to drop out before posttest measures can be taken, researchers face differential composition of their groups at the posttest. Nonetheless, the differential dropout is an effect of the treatment and may in itself be of interest. Moreover, in many studies of legal impact, archival dependent measures—case outcomes, recidivism rates, and the like—are available and attrition by individuals, in the sense of unavailability for posttesting, may not be at issue.

Issues of Feasibility There is little argument about the general methodological superiority of randomized experiments for causal inference. But there is considerable controversy over the general feasibility of this strategy when the effectiveness of laws or administrative procedures is being tested.[8] Problems of morality as well as feasibility are

[8] In laboratory settings randomized experiments are used almost exclusively to test causal propositions. The weakness of such research arrangements hinges not on the question of internal validity but on the question of external validity or generalizability.

acute when the direct or indirect allocator of treatments is a representative of government. Ethical questions are then raised, informed by normative standards of due process and equal protection.

The arguments against random assignments hinge on the ethical and legal permissibility of withholding potentially beneficial treatments, such as a rehabilitation program or a pretrial conference, from some or of imposing potentially harmful treatments, such as a long prison term, or a work requirement associated with welfare payments, on only a portion of those eligible for them. The equal-protection clause generally requires that governmental classifications be reasonable rather than arbitrary and that they have a rational relationship to a legitimate government purpose.[9] A citizen who, as a result of experimental allocation, is subjected to a deprivation or a hardship that does not fall equally on all who are in similar circumstances can argue that the difference in treatment is not rationally related to a legitimate purpose. Where experimental deprivations or benefits are at issue, the legal question has never been resolved definitely, but the sense of required fairness underlying the Fifth and Fourteenth Amendments has influenced many decisions about the kinds of experiments with which the government can cooperate. It has also affected the designs of various experiments to allow potential subjects to opt out, so that randomization is applied only to those who remain. This method, of course, leads to questions about the extent to which the findings can be assumed to apply to those unwilling to participate.

Several responses can be made to arguments against randomized legal experiments that mandate participation. The first focuses attention on the allocation of treatment rather than the treatment itself. In fact, random assignment is designed specifically to ensure the identical opportunity to receive a particular treatment for all similarly situated individuals; this equality of opportunity therefore meets the standards of the equal-protection provision.

A second response is that evaluation of the impact of a proposed legal change constitutes a legitimate governmental purpose. Experiments are conducted only when the effect of a proposed treatment is not clear and the alternatives to systematic controlled experimentation are to (1) implement an untested policy on the total eligible population; (2) attempt no policy change; or (3) implement the policy on a trial basis on part of those eligible, but with unsystematic distribution, so that the groups are not strictly comparable. To the extent that the treatment in (3) is not reasonably related to the classification criteria, such uncontrolled trials may raise objections on grounds of equal protection, and for that reason unsystematic allocation is less defensible than is the controlled experiment that offers the greater promise of improved knowledge.[10]

The value and permissibility of the experimental allocation of treatments in legal contexts has received some federal court support. Approving a New York Welfare Service experiment in which 25 percent of those eligible were required to participate in a work program, the Court concluded that

[9]The Equal Protection Clause of the Fourteenth Amendment is aimed only at state action and does not extend to acts carried out under federal authority. The Fifth Amendment, however, contains a due-process clause, binding on the federal government, guaranteeing all citizens equal protection of the laws.

[10]This logic has a closer apparent link with applied research on law than with more basic research, but the long-term value of information about legal systems and their effects should constitute a similarly justifiable purpose.

> a purpose to determine whether and how improvements can be made in the welfare system is as "legitimate" or "appropriate" as anything can be. This purpose is "suitably furthered" by controlled experiment, a method long used in medical science which has its application in the social sciences as well . . . the Equal Protection Clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a statewide basis. [*Aguayo* v. *Richardson* 1973, p. 1109]

Apart from this case, little direct legal commentary addresses the acceptable limits of controlled experimentation in law. Some standards have been suggested, however, in an attempt to avoid legal and ethical conflict. When fundamental rights are involved, a controlled experiment must withstand the test of strict scrutiny demanding that the classification not only be reasonable but also serve a compelling governmental interest (*Massachusetts Board of Retirement* v. *Murgla* 1976).[11] Fundamental rights include the right to vote, the right to interstate travel, and rights guaranteed by the First Amendment. Since the list is quite modest (Gunther 1972), it will not substantially inhibit legal experimentation. Moreover, legal experimentation aimed at these rights is unlikely, since no policy change would be permitted to eliminate them (Zeisel, Kalven, and Buchholz 1959).

Morris (1966) has argued that even in an area as ethically loaded as the punishment of offenders, experiments using random assignment can be permitted if they follow two principles. The first is the principle of "less severity": "the new treatment being studied should not be one that is regarded in the mind of the criminal subjected to it, or of the people imposing the new punishment, or the community at large, as more severe than the traditional treatment against which it is being compared" (Morris 1966, pp. 648–49). This standard is not altogether clear in many settings, because the status quo may not be an appropriate reference when the policy choice is between the experimental introduction of new treatment X for some and a general shift to X for all. Theoretically, then, the standard should be what the individual would have received in the absence of an experiment; operationally, that criterion will be difficult to determine in many cases.

Morris's second principle holds that experimentation must take place at an administrative, not the judicial, stage. The present penal system is so full of irrational and unfair disparities that an experiment, which in the long run is expected to reduce irrelevant disparity, simply structures what is already rampant (Morris 1966, p. 653). This standard would presumably be applicable in any legal setting in which discretion is exercised without clear evidence that the decisions relate systematically to permissible criteria. The argument is not that the randomized experiment is desirable in an absolute sense, but that it introduces no greater variability than present practice at the administrative level and offers the promise of increased knowledge.

One basic dilemma must be addressed in any experimental effort—how to balance the severity of the problem and the promise of the proposed treatment, on the one hand, against the relative potential hardship in degree and duration associated with research participation, on the other. Even when constitutional arguments against experimentation are not raised, it is necessary to consider these factors, particularly in legal experi-

[11] But see *Pointer* v. *Texas*, 380 U.S. 400, 413 (1965) (concurring opinion, Goldberg, J.), in which it is maintained that fundamental rights may not be withdrawn for purposes of experiment.

ments. In law, more than in other social systems, the appearance of justice is critical. The tension between these factors has led some researchers to suggest that experiments should minimize differences between experimental treatments (Green 1976). If extreme contrasts are avoided, however, modest treatment effects may go undetected.

While the courts provide only limited support for the legality of randomized experiments on legal questions, other evidence shows that such studies are permitted—they have been carried out. Randomized experiments have examined the impact of bail on appearances for trial (Botein 1964–65); the effect of pretrial conferences on settlement rates in civil cases (Rosenberg 1964); the impact of counsel on outcomes for juvenile offenders (Stapleton and Teitelbaum 1972); the role of a pretrial conference to which victim, defendant, and police officer are invited in affecting the outcomes of criminal indictments (Kerstetter and Heinz 1979); the contrasting effects of mandatory milieu therapy for delinquents and traditional probationary supervision (Empey and Erickson 1972); and the extent to which gate money on release from prison can reduce recidivism (Lenihan 1977).

Clearly, randomization is a feasible approach in sociolegal research, but it is equally clear that some circumstances will be more congenial to experimental resource allocation than others. If there is general agreement among constituencies that a proposed experimental treatment is likely to have few or no detrimental side effects and that it may provide a novel benefit to those treated, experimentation of any kind is more likely to be favorably perceived. In the Manhattan Bail Project arrestees were categorized as promising or unpromising candidates for bail on the basis of a background check of family ties and other qualities believed to be associated with good bail risks. The names of a random half of those rated acceptable were then given to the judge, who was free to use or ignore this information in his bail decision. The study revealed that judges granted bail more often for the recommended cases, but the recommendation appeared to have no effect on whether or not the arrestee appeared in court at the appointed time. Moreover, those who were recommended for bail—the experimental group—were less likely to be convicted and received lighter sentences than the control group of the good but unrecommended candidates (Botein 1964–65). These results support the perception that the experimental treatment offered, if anything, a favorable opportunity for a random half of the sample.

A similar, if less frequent, sequence arises when treatments of similar desirability are compared. Court-supervised conferences between opposing counsel may be viewed as advantageous or as an additional burden to appellants who are asked to participate in them (Goldman 1978). In such an instance, therefore, it is not clear until after completion of the study whether the experimental group has been inconvenienced or has benefited, and it is hard to argue that randomization imposes unequal risks.

Legal treatments can sometimes be imposed simultaneously on all possible parties—for instance, a change to no-fault divorce or a raise in the guaranteed minimum wage. Often, however, it is simply not possible to implement a change in such a way as to include all eligibles. Legislatures will be willing to expend only limited funds for an untested change, or trained personnel and technological equipment may be in short supply when an innovation is first put in place. Random assignment of, for example, space in public housing (Greely 1977) may be viewed as an equitable solution to the allocation of scarce resources among equally deserving potential recipients.

Even when involuntary assignment is ruled out, it is often possible to introduce a

voluntary component without great loss in interpretability. Juvenile defendants could not be forced to accept a free attorney—they could only be offered the service (Stapleton and Teitelbaum 1972). Nor were these defendants prevented from obtaining outside legal services. The random assignment controlled the offer of a no-fee attorney. As a result, in city A, 82 percent of the cases in the experimental condition had counsel representation, while only 39 percent of the control cases were represented by counsel. The corresponding figures for city B were 83 and 11 percent. Even though the actual treatments received by experimental and control cases were made more similar by the voluntary design, outcome differences between treatment conditions were detected for city A; these differences could be attributed directly to the effects of attorney representation.

In other voluntary experiments, the contrasts have not been as well preserved. Counseling services were made available to a random half of a group of high-school-age women whose earlier performance and behavior in school had suggested that they might become delinquent (Meyer, Borgatta, and Jones 1965). Because many of the girls who were offered counseling made minimal or no use of the offer, it was not clear whether the treatment was ineffective: the two groups did not receive very different treatments.

The original design to test the effect of pretrial conferences on civil cases in New Jersey called for random assignment of cases to a pretrial conference or to a control condition without such a conference (Rosenberg 1964). Because New Jersey had previously required a pretrial conference in all personal-injury cases filed in the state's major courts, the judiciary was opposed to denying a random half of all cases access to what they believed to be a beneficial mechanism to which litigants were entitled. A compromise made the pretrial conference mandatory for half of all cases and optional for all others. One half of the defendants for whom the pretrial conference was not required elected and received one. Because one half of the control group actually received the treatment, the comparison was considerably watered down. The study's finding that conferences have no effect must properly read, "There is no effect of a required pretrial conference on settlement rates and outcomes." The study as implemented could not determine the effects of denying a conference to those who thought it desirable.

Voluntary treatment appears to have the greatest chance of preserving the intended experimental contrast when the offered treatment is perceived as more desirable than is a control condition. Only in that instance is it likely that subjects will voluntarily choose the offered treatment in large enough numbers to provide a strong test of impact.

The clear advantages of randomized experimental designs for inferring cause suggest that the boundaries imposed by legal, ethical, and political constraints should be pushed as far as possible by researchers attempting to assess legal impact. When randomization is not possible, however, a number of other designs can rule out many, if not most, alternative causal explanations or threats to internal validity. Such designs are called *quasi-experimental* (Campbell and Stanley 1963).

Quasi-Experiments

Time Series The interrupted time-series quasi-experiment is a natural choice for researchers interested in the compact of law (Lempert 1966). Behavior is charted over time according to the following basic design:

$$O_1\ O_2\ O_3\ O_4\ O_5\ X\ O_6\ O_7\ O_8\ O_9\ O_{10}$$

A series of measures are taken at regular intervals before the legal treatment and after the treatment is implemented. An interrupted time-series was used to study the impact of Britain's 1967 Road Safety Act on traffic deaths and accidents (Ross 1973). Examining the monthly fatality and accident rates from 1961 through 1970, the study demonstrated that the passage of the act, which imposed tests of driver intoxication through breath analysis and imposed severe penalties for drunk driving, was associated with a significant drop in traffic fatalities and in accidents involving serious injuries.

Though similar to the O_1 X O_2 preexperimental design, the time-series is able to rule out regression as an alternative explanation for change, since the stability of the pretreatment level can be directly assessed. Moreover, the ordinary seasonal variations that accompany some litigation rates, crime levels, accident frequencies, and other measures are also unlikely to be mistaken for changes caused by treatment. The effects of regularly occurring cyclical variation can be statistically removed in the analysis of time-series designs by expressing the series of measures as deviations from the expected cyclical pattern (Box and Jenkins 1976; McCain and McCleary 1979).

A time-series experiment can be examined for several different kinds of effects. The first is a change in level (or intercept), such as would occur, for example, if a determinate sentencing bill raised the duration of prison sentences in one jurisdiction an average of one year. The O_1 X O_2 design can be used to detect this effect, but it will not identify a second potential product of legal innovation, a change in trend (drift or slope). This effect would occur if, for example, prison sentences had been increasing on the average of one month every year until the new sentencing bill, after which the process speeded up so as to increase by two months each year. A third effect would be a change in the variation around the mean level. In this sentencing example, researchers might make entirely opposite predictions, some arguing that determinate sentencing will produce less variation in time served, because prisoners are less at the mercy and whim of the parole board, others suggesting that indeterminate sentencing allows the parole board to moderate the disparity produced by the varying sentencing practices of different judges, and that determinate sentencing will, therefore, lead to greater variation in prison sentences.

One of the clearest attractions of time-series analysis is its ability to test the persistence of change. An analysis of the effects of Nebraska's 1972 no-fault divorce law that studied divorce rates for various groups showed that the rate for black, but not white, couples increased significantly after the introduction of no-fault legislation, over and above the earlier pattern of an increasing rate (Mazur-Hart and Berman 1977). It further showed that the rate change for blacks gave no sign of returning to its earlier level. Since race and socioeconomic status tend to be correlated, this finding was consistent with the intended effect of making divorce more available to people of low socioeconomic status by reducing the cost. In contrast, an observed rate increase among persons over 50 was short-lived, suggesting that no-fault provisions relieved a backlog of potential divorces among older persons by changing the cost-benefit ratio sufficiently for them to seek divorces (p. 310).

Some of the weaknesses inherent in the O_1 X O_2 design also mar the simple interrupted-time series, despite its obvious strengths. Other historical events can coincide with the treatment and can offer competing explanations for change; particularly when politically sensitive results are at issue, instrumentation changes may occur (see discussions in Seidman and Couzens 1974; Epstein 1977). In addition, most discussions of time-series recommend 50 or more data points for analysis; researchers must therefore rely

largely on the existence of archival measures collected for other purposes. Many regularly collected figures are available in long series, but two problems are frequent—available figures are often recorded only at yearly or more widely spaced intervals, and some figures are missing and must be estimated.

Time-series experiments must also confront questions about the timing of the treatment and the appearance of effects. Not all interventions, even legal mandates, represent abrupt changes from which immediate effects can be expected. For example, in 1967, the Supreme Court guaranteed juveniles the right to representation by counsel when they are involved in proceedings that can result in a finding of delinquency and consequent incarceration (*In re Gault*). Yet research conducted in three jurisdictions after *Gault* went into effect (Lefstein, Stapleton, and Teitelbaum 1969) disclosed that the juveniles covered in *Gault* were fully advised of their right to counsel in only 56, 3, and 0 percent, respectively, of the cases observed. If a study of the effect of *Gault* were designed to examine the court outcomes for juveniles before and after the *Gault* decision, it is difficult to say when the post-*Gault* observation period should begin. When gradual diffusion occurs, time-series analyses must attempt to model that diffusion process (Cook and Campbell 1979, pp. 226–27).

Delayed causation creates similar difficulties, particularly when the lag in treatment effects is unknown. For example, how much time must pass before a regulation affecting the purchase of guns can be expected to affect their use in criminal violence? "Once the time-series data have been plotted, it is remarkably easy to generate plausible causal rationale for belated shifts in the series" (Cook and Campbell 1979, p. 228); it also becomes more likely that alternate explanations are responsible.

While such questions of timing weaken the time-series quasi-experiment, they lurk in the background of all causal designs. A single posttest administered when implementation has not yet fully occurred or when effects have not yet appeared (or have already disappeared) leads to a conclusion of "no difference." Because the time-series remains one of the most promising approaches for analyzing the impact of legal change, it is being used with increasing frequency. As in all research that depends on data collected regularly over an extended period, the growth in time-series research is being aided by the interest in social indicators, and the future looks more promising than the past, since one can plan on acquiring the relevant data at theoretically appropriate intervals.

Nonequivalent Control-Group Designs The combination of a control group with a pretest produces the following basic nonequivalent control group design:

O X O
O O

This design is used frequently in research on legal impact, often in situations that could otherwise result in use of the similar, but less interpretable, preexperimental design $\begin{matrix} X & O \\ & O \end{matrix}$, in which pretests are absent. While the pretest data introduce significant improvement, several cautions are in order. First, even if the nonequivalent groups do not differ on their pretest averages, they may differ in other ways that affect their posttest scores. Second, the available statistical techniques often used to adjust for pretest nonequivalence generally cannot completely control for initial differences. While their fallibility is most likely

to result in underadjustment of differences at the pretest because of error in random measurement, overadjustment can also occur, so that even the direction of bias cannot always be specified. The third caution associated with the nonequivalent control-group design is that the interpretability of the results from such an experiment will depend on the pattern of the outcome data.

A study of the effect on traffic fatalities of laws requiring motorcyclists to wear helmets illustrates some of these issues (Robertson 1976). The research compared the rate of fatal motorcycle crashes per 10,000 registered motorcycles per year in eight states that enacted laws mandating the use of helmets and eight matched states that did not. The analysis covered a three-year period, including the year before enactment, the year of enactment, and the year after enactment.

Suppose that the fatality rates were higher at the pretest in the legislating states and dropped to the same level as those in the control states by the time of the posttest. Differential statistical regression could reasonably account for the result if legislation is passed in a state when figures for the previous year are particularly shocking. If the rates in legislating states dropped significantly below those in the control states, regression would offer a less plausible explanation. This comparison illustrates how the interpretability of such designs depends on outcomes (for a more complete review, see Cook and Campbell 1979, chap. 3).

The data did not, in fact, reveal any significant difference in the preenactment fatality rates of the two sets of states, leading the researcher to conclude that the significant difference obtained after enactment was due to the legislation introduced in half the states. Unfortunately, pretest equivalence does not necessarily reflect general equivalence across the treated and untreated groups. The two may still differ in other variables that affect the posttest scores. To the extent that state environmental factors affecting fatality rates in motorcycle accidents also affect the introduction of legislation, such underlying nonequivalence can be expected; for instance, legislatures enacting helmet laws may also spend money on road improvements.

A variety of alternative analytic techniques can be used on nonequivalent control-group designs—such as analysis of variance, analysis of covariance, and analysis of variance with matching or with gain scores (for a review, see Reichardt 1979)—but reports of results must be tempered. "With the present state of the art in the social sciences, any one of these statistical methods could be biased enough so that a useful treatment might look harmful and a harmful treatment might look benign or even beneficial" (Reichardt 1979, p. 197; see also Lord 1967; Cochran and Rubin 1973).

More elaborate versions of the nonequivalent control-group design can introduce some additional controls to increase its interpretability (see Cook and Campbell 1979). One variation promising for research on legal impact is the regression-discontinuity design.

In some cases, nonequivalence is a result of explicit selection procedures. For example, the poor with incomes below a specified level may be entitled to free health services or free legal counsel. Research may be aimed at testing the extent to which this legally mandated treatment affects outcomes. Those who do and those who do not receive the treatment, such as free counsel, may be different in other ways that will affect their case outcomes, so that income may be expected to correlate with outcome even in the absence of treatment (Figure 4). If those below level X receive a treatment that improves their performance, the graph of outcomes may be altered as shown in Figure 5. By comparing

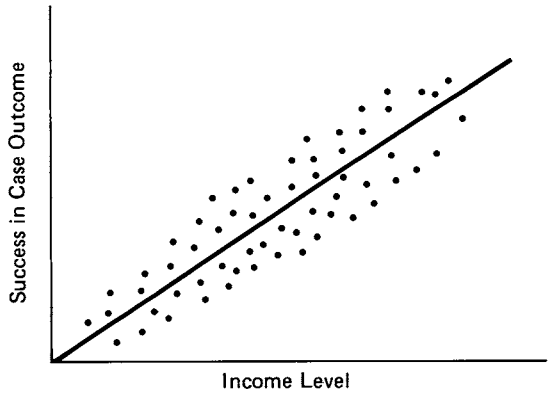

FIGURE 4

the success predicted at income level A based on treated individuals, and success predicted at A based on untreated individuals (by using the two regression equations), the plot of scores can be tested for the discontinuity that would be predicted if the provision of free counsel affected outcomes.

The allocation according to presumed need or desert frequently presents a satisfactory alternative to administrators or legislators who oppose random assignment. This design is not, however, without weaknesses. When the shape of the distribution is not linear, the researcher must examine more complicated models. Furthermore, the tails of a distribution are particularly likely to show behavior that does not closely fit a regression line, even in the absence of a treatment. Thus, when the treatment cutting point is near the edge of the range of the pretest, such as a poverty-level income might be, it will be difficult to estimate the shape of the distribution of scores on the short side of the cutting point.

A more practical problem can also arise. If the exact location of a cutting point is known, it can be manipulated so that, for example, income levels have a greater tendency to be reported at just below the cutting point than just above it; in such a situation,

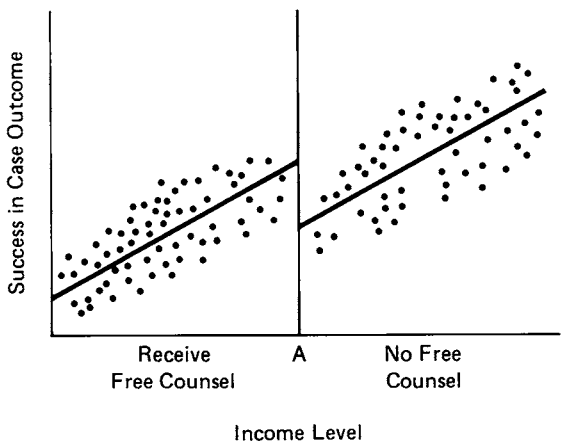

FIGURE 5

the borderline case is more likely to become eligible for desirable treatment. While it is possible to examine for inaccurate reporting or to base estimates on a range around the cutting point rather than on a single cutting score, a clear, rather than a fuzzy, cutting point will produce the most sensitive test of a treatment effect by this useful but underused design.

Combining Control Groups and Time-Series Because designs using either interrupted time-series or nonequivalent control groups have different weaknesses, combining them into a single design often enables the researcher to rule out competing explanations that neither design could handle alone. For example, traffic fatality rates in Connecticut were studied before and after a crackdown on speeding (Campbell and Ross 1968). The analysis also examined the pattern of traffic fatalities during the same period for neighboring states. The time-series allowed a check for regression and cyclical variation, while the control states permitted a test of whether fatality patterns based on some shared historical event, such as a particularly hard winter, could be responsible for a drop in Connecticut's fatality rate. (In fact, no clear effect of the new enforcement policy could be detected.)

The risk of a change in instrumentation was not controlled in this study, since states keep their own highway records.[12] In other cases, however, it may sometimes be possible to identify a control group that should be subject to the same adjustments of data as the group being treated. The study of the British Road Safety Act predicted that fatality rates from drunk driving should be affected only during those hours when the pubs were open; the fatality rate when pubs were closed was the control time-series (Ross 1973). The absence of change in the rate of the control series suggested that neither instrumentation nor shared historical influences could be responsible for the drop in fatalities that occurred during the hours that the pubs were open. While such nonequivalent control groups may be difficult to identify, the search pays off in one of the strongest available tests of legal impact.

Nonexperimental Methods

Because the behaviors that law attempts to affect are the products of a variety of nonlegal influences, ruling out selection and historical threats to internal validity is critical in the quasi-experimental test of legal effect. Purely statistical, rather than design, controls can also be used to unravel competing causal explanations. Such multivariate tools as multiple regression (Blalock 1972; Draper and Smith 1966), log-linear analysis (Bishop, Fienberg, and Holland 1975; Goodman 1970, 1972, 1975), path analysis (Duncan 1966, 1975), and structural equations (Goldberger 1972; Goldberger and Duncan 1973), when used to infer causality, represent a marked improvement over the simple correlational preexperimental design. At bottom, however, they share its basic weakness; they measure the strength of the relationship between independent and dependent variables and conclude that a causal relationship exists based on the correlational evidence. To the extent that the researcher has been able to identify and adequately measure all other variables that may explain the relationship, this method can be successful. Unfor-

[12] Actually a selection-instrumentation interaction (Campbell and Stanley 1963).

tunately, theories about legal behavior have generally not yet achieved such ability to specify causal models (for a good discussion of these and other problems in the literature on deterrence, see Fisher and Nagin 1978), and to the extent that variables are unidentified or are crudely or unreliably assessed, inaccurate conclusions about causal relations will be drawn.

Multiple regression is generally used to explain variation in an interval-level variable, such as the length of a prison term, by examining the correlation between that variable and a series of independent variables, such as severity of crime or criminal record. When the independent variables are known to precede the dependent variable in time, such methods can predict or forecast the value of the dependent variable from information about the levels of the independent variables. Thus, the offender's personal characteristics as well as characteristics of the crime may be used to help predict the length of a prison sentence a given offender will receive. If R^2—the amount of variation in the length of the sentence accounted for by the predictor characteristics—approaches 1 (100 percent), the prediction will approach perfect accuracy. In practice, prediction is usually far from perfect. For example, most studies have been able to explain only half the variation in criminal sentence levels (see, for example, Wilkins et al. 1976; Diamond 1981b).

It is, of course, useful to improve chance level predictions by 50 percent, but such results—or even the hypothetical 100 percent explanation results—do not necessarily disclose the causal structure of the criminal sentence. If psychiatric prognosis is a strong predictor of sentence when such other factors as prior criminal record are controlled, its predictive value may arise because prior employment stability—an unmeasured variable—affects both psychiatric prognosis and sentence. The omission or poor measurement of critical causal variables not only tends to reduce R^2, it can also create the appearance or disappearance of relationships between the measured independent variables and the dependent variable.

In research on legal decisions, the false identification of variables as causes, as opposed to predictors, may have important value overtones. If some independent variables, such as race, affected legal decisions, they would show unacceptable discriminatory behavior by legal decision-makers. But race tends to correlate highly with other variables viewed as permissible determinants of such decisions—employment record, for example—and this covariation will make attribution about the real causes of the decision questionable.

Multiple regression techniques assume that the dependent variable is quantitative. In much research on law, however, the outcome variable is more properly seen as dichotomous and qualitative: the parole board grants or does not grant parole, the plaintiff collects damages or does not. Multiple regression can still be applied by treating the regression coefficient as a change in the probability of being granted parole or collecting damages, but some statistical problems may arise. Heteroscedasticity[13] can be handled by reweighting, but predicted probabilities outside of the 1–0 range may require alternative estimation procedures (Berk 1980). Alternate models like probit, logit, and discriminant function analysis (see Finney 1971; Namboodiri, Carter, and Blalock 1975) were

[13] *Heteroscedasticity* occurs when errors of prediction have different variances at different levels of the independent variable.

specifically designed to handle data with dichotomous dependent variables and avoid the problems of range associated with multiple regression.

The dependent variable in sociolegal research is often a mixture of dichotomous (for example, incarceration or none) and quantitative (for example, length of incarceration). A modification of probit analysis, called a Tobit model, can be used to deal with the common legal situation in which the dependent variable is truncated in this fashion. (See Berk 1980 for a useful discussion of the strength and weaknesses of multiple-regression techniques and their alternatives in criminal-justice evaluation research.)

These analytic techniques all use some continuous data, either as independent or as dependent variables. Yet available data may often be intrinsically categorical—sex, type of plea—or may only be available in categorical form—aged 18 and over, versus under 18. When both independent and dependent variables are categorical, log-linear techniques are preferable to multiple-regression techniques and their derivatives, particularly since they permit direct testing for nonlinear effects.

Path analysis moves beyond simple stepwise regression to investigate the alternate underlying models that can produce causal relationships. Thus, it can be used to investigate, for example, whether the correlation between prior record and the sentence recommended by a probation officer is more likely to be the result of the record's direct influence on sentence, the record's effect on the probation officer's prediction of the prospects for successful adjustment on probation which in turn affects sentence, or the operation of both causal paths (Hagan 1975). While this approach can force explicit consideration of the variety of complex causal paths that the real world can include, the use of path analysis to quantify specific causal contributions assumes, like regression models, not only complete specification—all relevant variables are measured—but also that each variable is measured reliably so that a path will not be rejected or given too little weight because of measurement error. The difficulty in meeting these assumptions is acknowledged in textbooks (for example, Duncan 1975, p. 50; Greenberg 1979, p. 53) but is often ignored in more substantive writing.

Research on law is particularly susceptible to problems associated with missing variables and unreliability of measurement. Apparently fertile archives are replete with unreliable data or with gaps in the data, and it may often be necessary to code some variables rather crudely (see Carroll and Mondrick 1976; Cartwright 1975; Church 1976). For example, measuring the seriousness of offenses by using the maximum sentence permitted under the criminal code (Hagan 1975) is likely to result in an evaluation that only approximately reflects the seriousness of the particular offense being scored (Greenberg 1979). Some direct support for this observation comes from the finding that the severity of sentences in a federal New York court was higher for drug offenses than for other offenses, even when maximum possible penalty was controlled for (Diamond 1981b). If the drug-offense variable had not been included, the variance it explained might have been attributed to some other variable with which it was correlated, such as race.

In other cases, it will not be possible to measure a potentially important set of variables adequately. A study of parole decisions did not code information on education, marital status, and occupation, although those data were available, because the information was judged too unreliable (Carroll and Mondrick 1976). The researchers were also unable to

gain access to letters written to the parole board by such interested parties as wives—another variable that may have affected parole decisions.

The choice between experimental approaches and the nonexperimental or passive observational techniques (Cook and Campbell 1979) for assessing cause in studies of legal effects—the choice, that is, between design and statistical control of alternate causal hypotheses—tends to follow the disciplinary boundaries of the particular researchers. Psychologists typically favor the manipulation of experimental or quasi-experimental work, while economists more often rely on passive measurement. Sociologists and political scientists have traditionally done little experimental work, but there appears to be some evidence that the situation is changing. The strength of experimental methods lies in the fact that the active variation of the independent variable requires fewer assumptions, thereby facilitating causal inference. The benefits of experimental research can be garnered, however, only if the researcher can control events or is able to take advantage of natural experiments. These occasions will always be less frequent than occasions for passive observation.

Fortunately, legal change often creates opportunities to investigate theoretically important relationships. In 1966, in *Baxstrom* v. *Harold,* the Supreme Court held that equal protection of the law was denied any individual who was detained longer than the maximum sentence in an institution for the criminally insane without a new hearing to determine current dangerousness. This ruling, which resulted in the transfer of nearly one thousand reputedly dangerous mental patients in New York to civil mental hospitals, provided an opportunity to evaluate the validity of the predictions that had been used to justify extended detention (Monahan 1978). A subsequent similar ruling in Pennsylvania (*Dixon* v. *Pennsylvania,* 1971) released a number of mentally disordered offenders outright. Studies revealed relatively low rates of violence in the civil mental hospitals (Steadman and Cocozza 1974) and among those who were released (Thornberry and Jacoby 1974). Similarly, police strikes potentially create an opportunity to assess the effect of certainty of punishment on crime rate (but see Greenberg 1979 on reciprocal causation). Finally, Baldus and Cole (1975) have argued that on even a widely measured and analyzed policy such as the death penalty, the quasi-experimental time-series comparisons between abolitionist and death-penalty states before and after the introduction of the death penalty (Sellin 1967) have produced more reliable and convincing data than the multiple-regression approach (for example, Ehrlich 1975). In explaining their greater confidence in the use of the time-series, Baldus and Cole comment, "There are many questions which, because of inadequacies of data or theory, are best studied by simpler methods" (p. 173). The simplicity of control through design can often avoid weaknesses that statistical sophistication cannot eliminate.

SOME SPECIAL MEASUREMENT PROBLEMS AND OPPORTUNITIES FOR RESEARCH ON LAW

Several issues of measurement, which cut across the substantive and design categories, present special problems and opportunities for reliable and valid measurement of behavior related to law. They include access to confidential and sensitive information, some special weaknesses of legal archives, and the use of systematic observational techniques in research on law.

Confidential and Sensitive Information

Individuals often view their dealings with the law or the legal system as sensitive and personal. Reports of such dealings are highly vulnerable to distortion.

> The most common method of sociological research, the interview, usually misses the goal of getting valid data on norm-relevant behavior: the interviewees either do not admit how often they break a norm or they brag about actions they would never dare to perform. They try to evade an answer by giving an opinion: they tell the interviewer what should be done, not what they do in fact. Interviews are very good if we want to know something about attitudes or opinions, but it is always dangerous to make inferences about actual behavior from such data. [Blankenburg 1966, p. 113]

Even when noncriminal acts are under investigation, legal dealings are viewed as confidential, posing problems of access for the researcher. Moreover, the promise of confidentiality usually made by social scientists to their respondents cannot always be honestly given for studies of legal behavior. As is the case for reporters but not for lawyers, researchers' data can be subpoenaed. In the New Jersey Negative Income Tax experiment, experimental subjects were given guaranteed annual incomes; the Mercer County grand jury wanted to learn whether some of these same people were also illegally on welfare rolls (Kershaw and Small 1972). An out-of-court settlement was probably the only measure that prevented a court order to turn over the names of the experimental subjects. Whatever rules may come to prevail in the future, only National Institute of Justice grants can promise researchers and their respondents real protection from government attention at present.

Despite the obvious weaknesses of self-reports, they are often the only direct source of information on certain topics, such as victimizations unreported to the police or officially undetected drug use. Fortunately, some new techniques can increase the validity of interview and questionnaire data by providing a genuine guarantee of anonymity to respondents. One is the randomized-response approach. (See Fox and Tracy 1980 for a review of the growing literature on this method.) Using this method, respondents privately toss a coin to determine which of two questions they will answer. One question is the sensitive one of interest to the research. The other is a benign question, whose answer has a known distribution in the tested population. While no single answer can be tied to any particular respondent, the researcher can use probability models to obtain a true picture of the pattern of response among the subjects. The cost lies in the requirement of larger samples to achieve equally reliable results, but the potential for increased validity may warrant the higher cost.

Problems of access may also arise when data files are involved. Records containing sensitive information about individuals and their legal histories may be shielded by government agencies, making it difficult for researchers to obtain them. With appropriate arrangements to limit the reporting of information so that individuals cannot be identified, such access can often be arranged, at least in some form. Requesting aggregate tax-return data on groups of individuals avoided the objection that would have been raised had data on individual tax returns been called for (Schwartz and Orleans 1967). A similar objection to the release of background descriptions for individual jurors was overcome by the use of aggregate profiles instead (Zeisel and Diamond 1976).

Difficulties of access also arise because of systematic differences between those respondents who are willing and those who refuse to share their legal histories and experiences, between police departments or administrative agencies who welcome researchers and those who do not. It is difficult to document patterns of access to organizations because, while researchers commonly report their response rates in surveys of individuals, organizations' response rates are rarely reported. The probable magnitude of the problem of access to organizations could be gauged more readily if researchers reported their efforts at negotiation—failures as well as successes (for an example, see Kerstetter and Heinz 1979).

Legal Archives

As part of its daily operation, the legal system records information about the cases it processes. In view of the interplay among subsystems, the available archival data are a reasonable source for tracing the progress of cases through the system and learning how the legal system handles people and cases. While sensible, however, the approach can involve considerable difficulty. A discussion of efforts to identify and follow parties in a study of state supreme courts provides a revealing list of ways in which disputes can lose and gain parties as they are decided, appealed, remanded, and the like (Cartwright 1975, writing of his research with Friedman, Kagan, and Wheeler). In addition to deaths and disappearances there are, among other changes, unions and banks who intervene, judges who become respondents, subsets of plaintiffs and defendants who become joint appellants. "Legal disputes join disparate parties into temporary social units ('forced marriages') whose identity through time is always problematic" (Cartwright 1975, p. 372). Complex coding schemes are required to maintain order in the data, and reliable tracing will usually be possible only at the cost of substantial redundancy in the coding at each stage.

Similar difficulties may arise in tracing an individual through the criminal-justice system. Police and court identification numbers are often different. Individuals use aliases, and a criminal career may not be conveniently confined to a single jurisdiction.

Tracing changes in patterns—for example, whether cases are more likely to be dismissed under a new statute—can be done by using archival data, but several problems are common. The first is a substantial lag between the time a case is filed, even within a particular court or with a single agency, and the time it is closed. If cases opened during a particular calendar year are examined for outcomes that occur through the end of the following year, the cases opened early in the year will have a better chance of having been disposed of than those opened near the end of the year. The remedy for a study interested in changes in case processing over time is to keep the time constant across cases, even if that method means considering some early cases as still open when in fact they are closed. Thus, a case filed on January 3, 1988, can be coded according to its status—disposed of by dismissal, plea, and the like, or still open—on January 3, 1989, while a case filed on September 20, 1988, will be coded according to its status on September 20, 1989. This practice will keep lags more or less constant over time—but not completely, because equal time periods may not be equal in all important respects. Staffing changes, for example, may mean that a case opened on January 3, 1988, receives less official attention over the subsequent year than does a case opened on September 10, 1988.

The label given a case in its first formal contact with the legal system—such as the arrest charge—may not exclusively, exhaustively, or accurately describe a set of similar cases. The sample of cases may thus change over time if the formal label is relied on to define the set of cases, simply because the use of the label has changed. Ample evidence exists of the legal system's flexibility in processing similar behaviors differently. The British Road Safety Act was associated with a rise in drinking and driving charges. Yet careful investigation of police arrests on other charges—"dangerous driving" and "careless driving"—showed that the act, "contrary to popular impression, did not greatly increase the likelihood of police action in the event of drinking and driving. Rather, it changed the form of the action" (Ross 1973, p. 48).

Similarly, when the provision in the United States Code relating to the importation of drugs was changed in 1971, the range of penalties for heroin convictions was reduced from 5–20 years to 0–15 years. A study tracing sentences resulting from heroin indictments in San Diego found no change in sentence level after the change in law. A procedural effect on plea bargaining set in, however; 79 percent of guilty pleas under the old drug statute were to a statute with a lower sentence frame—such as crimes involving tax payments with respect to the drugs—while under the new law, only 19 percent involved a charge reduction. Thus, while earlier it had been necessary to use another statute to obtain a sentence of less than five years, after the legal change this device was no longer necessary (Nimmer 1977). Though the legal change produced an alteration in the name of the charge conviction, sentence level apparently remained stable. Both these examples suggest how critical it is to examine legal processing for spillover and compensatory effects, tracing both direct and indirect patterns of influence.

Despite these gaps, omissions, and coding nightmares, one of the greatest advantages the legal system offers the researcher is its proliferation of detailed records. As researchers gain experience in tapping the information maintained in legal files, and as the regular recording activities of legal organizations are more often computerized, retrieval of archival data can increasingly supply researchers with rich opportunities to analyze a wide range of legal activities.

Systematic Observation

The quasi-public nature of much legal activity suggests that much greater use can be made of systematic observational techniques as an additional tool in studying the behavior of law. For example, research on the processing of cases in a lower court used observational techniques to provide a detailed picture of arraignments and dispositions in that court (Mileski 1971; see Weick 1969 and Reiss 1980 for discussions of systematic observational techniques). Although this approach examines public behaviors while only partisan participants will be privy to behind-the-scenes activities, the systematic record-keeping of the public face of a case by a trained observer without a vested interest is an important source of information about legal institutions. Partisan participants may not be willing or able to make such observations, and archives will not record all the detailed information that observation can provide. Each method has its weaknesses, of course; a rounded description of behavior is most likely when multiple individual perspectives and measurement approaches—such as surveys, archival data, and observations—are used in the same study.

Sociolegal research uses research methods employed in other areas of empirical inquiry. But the characteristics of law and the state of theorizing about law and legal institutions create special difficulties and opportunities in the application of available methods. In this discussion, I have tried to alert the reader to those special characteristics that have the most important methodological implications for law.

The history of systematic empirical investigation of the behavior of law is relatively recent. While some of the qualities of legal behavior and records reviewed here create obstacles for research, it is likely that the coming years will see substantial growth of research on law. The value of the research will depend heavily on the ability of investigators to overcome these obstacles—for example, unreliability and change in the sources of measurement, to make use of the special possibilities of law for research—such as multiple-data sources with varying biases and limitations, and to make wider use of stronger methodological approaches, such as longitudinal study, randomized experiments, and time-series designs. Much remains to be done, but with sharpened tools, the future promises significant growth in our knowledge about the behavior of law. Certainly our first steps indicate that pursuit of that knowledge will be lively.

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