MOBILIZING PRIVATE LAW: AN INTRODUCTORY ESSAY

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I. INTRODUCTION

The mobilization of law may be thought of as the process by which legal norms[1] are invoked to regulate behavior.[2] In the area of private law, mobilization has two distinct aspects. The first is the process by which existing disputes become engaged in the legal system. In theory this means that disputes are transferred from an arena where their resolution and the enforcement of resolutions depends on the relative power of the parties as enhanced or constrained by nongovernmental normative systems to an arena where disputes are resolved by reference to governmental (legal) norms and resolutions are enforced by the power of the state. In practice the separation between the governmental and nongovernmental spheres is rarely complete. Legal norms may influence the way in

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1. I think the reader will understand the way the term "legal norms" is used here if legal norms are defined simply as "rules embodied in laws." For those who wish a more technical, less circular definition, I would define legal norms as: *rules that explicitly or implicitly authorize or direct the government to take or refrain from taking action that will render a mode of behavior more or less costly to the actors*. Legal norms are likely to be effective only when there is some probability that the government will act as authorized or required. Thus, the efficacy of legal norms depends in part on the mechanisms that exist for bringing behavior sufficient to occasion government action to the attention of the government.
2. Professor Donald Black, in an interesting and important article (1973), has defined the concept of "mobilization of law" as "the process by which a legal system acquires its case." Since this article, more than any other, has attracted the attention of legal sociologists to this area of theoretical concern, it is with some reluctance that I have advanced a definition of the concept different from Black's. However, I am convinced that Black's definition is unsatisfactory. Not only does it require that the term "case" be very broadly conceived, but it also suffers from Black's definition of law as "governmental social control." According to Black's use of the term, it would appear that the FBI was mobilizing law when it attempted to foment trouble between various black nationalist groups or when it engaged in judicially unauthorized breaking and entering. I prefer a concept of legal mobilization which excludes such activity. There are real and important differences between governmental power that is exercised in accordance with legal norms and governmental power exercised in opposition to legal norms or without reference to them. E.P. Thompson makes this point nicely in the conclusion to his study *Whigs and Hunters* (1975: 258-269). Also the term "cases" in Black's definition of mobilization, while broadly conceived (it includes, for example, offenses reported to the police), is in certain respects too narrow. For example, Black states that a contract becomes a case only when a suit is filed. I would argue that the law may be mobilized at an earlier stage than this. If the parties, through their attorneys, settle a contract dispute on the basis of the attorneys' judgments of what a court would do if faced with the case and with the threat of suit constantly in the background, law, in my opinion, has been mobilized.

which parties resolve their disputes even when there is no threat that the matter will be taken to law,[3] and both the parties' resources (Galanter, 1974, 1976) and nongovernmental norms[4] clearly affect the way disputes are resolved in the legal system.

The second aspect of the mobilization of private law involves the invocation of legal norms and, hence, the possibility of governmental action, to guarantee a desired course of behavior. The actual involvement of governmental agents may be dependent upon events which are contingent (as in a contract) or certain (as in a will). In both instances the goal in mobilizing law is often to avoid future disputes. Even when the exercise of governmental power remains contingent, law has been invoked and not necessarily without effect. It may be the potential for governmental action that prevents the triggering contingency from occurring.

Providers of legal services—for the moment let us call them lawyers or attorneys—play a central role in each of these aspects of the mobilization of private law. Often they are crucial intermediaries in processes that link citizens to legal institutions. Usually their services are required for effective participation in judicial or administrative decision making, and professional expertise is often essential to success in using law as a guarantor of some desired future course of action. But the lawyer's role in mobilizing law is not limited to that of intermediary. It is not unusual for a lawyer effectively to determine the implications of legal norms for his client. Many civil disputes are settled by attorneys in the light of legal norms but with little or no governmental intervention (see, e.g., Ross, 1970).[5] And the virtue of the well-drafted instrument is that it guides future behavior without any need for judicial interpretation or governmental action. In addition, attorneys play

3. Parties may, for example, adopt the procedural norms of the legal system to set up a system designed specifically to minimize or eliminate the prospect that a dispute will be taken to law. They may also engage in such borrowing even where it is clear that the actions of one party, no matter how arbitrary, would not give the other party a legal cause of action (see, e.g., Evan, 1962; Selznick, 1969).
4. The clearest example of this occurs in instances of jury nullification. This can happen and, indeed, is probably more frequent in private law cases than in criminal law cases. An example of legal norms commonly "nullified" are the tort rules requiring a defendant's verdict when there has been any contributory negligence and forbidding the "quotient verdict" (see Kalven, 1958).
5. Note that the out-of-court settlement of some disputes turns on the invocation of lawyers more than it does on the invocation of law. It is the ability of the lawyer to force certain expenses on the other party, regardless of legal norms, which gives a claim what is appropriately called its "nuisance value." But even this nuisance value depends on the existence of a legal system and the lawyer's ability to start it in motion. So it is the potential invocation of the law which gives the claim its value even though it is clear that if the law were invoked the moving party would not get the remedy he purports to seek. In theory, professional ethics will keep an attorney from mobilizing or threatening to mobilize legal processes in situations where legal norms deny the possibility of a colorable claim.

another role in the private law area that does not amount to the mobilization of law, but is related closely to it. Individuals do not wish to have the law mobilized against them, so they often consult with attorneys to minimize the probability that this will occur and/or to maximize the chance of a desirable outcome if it does occur. Interpretations of the law by advisor attorneys may, in some areas, have a greater effect on behavior than law mobilized by third parties in attempts to regulate behavior.[6]

For present purposes the implication of the preceding argument is simply that research on the utilization of legal services is likely to be relevant, at least implicitly, to a core problem in the sociology of law, the problem of how the law is mobilized. The papers that follow were prepared for a conference called to review current knowledge about the delivery of legal services and to generate ideas for research which could add significantly to current knowledge. The conference was concerned primarily with the situation of low and middle income individuals faced, at least potentially, with private law problems. The papers were prepared to give the conference participants a common perspective on what was known about the delivery of legal services and on what might be worth knowing.[7]

The discussions in four of the papers are particularly interesting because of their bearing on general questions relating to the mobilization of private law. In introducing these papers, I shall try to take advantage of the critical thinking of the writers to specify some of the elements that any theory of legal mobilization must subsume. This approach will necessarily slight much that is in these papers, for none was written with this theoretical concern directly in mind. Some may wonder whether the proposed focus, looking toward the eventual development of theory, is appropriate in an introduction to papers presented at a conference organized around the very practical goal of generating concrete research ideas. I believe that it is. If we had an adequate theory of how private law is mobilized, much of the research suggested at the conference would not be necessary. Even an inadequate theory might aid systematic exploration. Indeed, one of the lessons implicit in the papers prepared for this conference is that the very generation of research ideas may require a sophisticated view of the way in which the legal system operates. A further lesson, reminiscent of *Catch-22*, is that such sophistication can only be built around the results of well-conducted research. Fortunately, in the small and often unsatisfac-

6. Obviously the two are closely related. Absent a real threat that law might be mobilized, there would be little incentive to seek this kind of advice.
7. One of the "papers" is actually the edited transcription of a speech given by Ralph Nader.

tory body of research relevant to the delivery of legal services, there are enough reliable data to allow authors to map out promising paths for future exploration. Much of this research is also relevant to the general issue of the mobilization of law.

The two other papers presented in this volume could be squeezed into the conceptual framework of legal mobilization, but they do not relate directly to this topic. They will be discussed with reference to the issues that they raise more naturally.

II. THE PAPERS: ON THE MOBILIZATION OF PRIVATE LAW

Raymond Marks's paper, titled "Some Research Perspectives for Looking at Legal Need and Legal Delivery Systems: Old Forms or New?", was intended to summarize and critically review the literature on legal need and legal services delivery systems. Perhaps the most striking feature of Marks's paper is the sparseness of the literature directly on point. There has been little empirical investigation of the utility of legal services for individuals, of the ways in which individuals are linked to providers of legal services, or of the spillover effects which ready access to legal services may have on individuals' lives.[8] Conspicuous by their absence are any studies of the legal needs of organizations or the ways in which organizations gain access to legal services. In addition, existing research deals disproportionately with the needs and problems of low and middle income consumers. It is as if there were a tacit assumption among those interested in the use of lawyers that given sufficient wealth, there is little that is problematic about the mobilization of private law. But we know that even those who can easily afford legal action often choose to avoid it (Macaulay, 1963). It may be that their reasons for doing so are shared by those less able to pay for legal assistance.

Marks points out that virtually all studies of "legal need" have measured need, at least in part, against some sort of a priori checklist of legal problems. Implicit in the checklist approach is the belief that private law can be invoked only with respect to a certain set of specific problems, the most important of which can be specified by knowledgeable individuals. This belief is not necessarily inaccurate. The body of private law, however many problems may be subsumed under it, is finite, and situations in which private

8. Marks cites his Shreveport study (Marks *et al.*, 1974) for the interesting proposition that the sense of entitlement to legal services will in many instances be as important to the client as the actual fact of representation. The study suggests that the availability of legal services made individuals more willing to assert themselves in situations where legal services were potentially useful. This increased assertiveness led to more satisfactory outcomes without any need for legal assistance. Further research is needed to determine if this result holds generally and, if so, to specify its implications.

law remedies are commonly sought or appear particularly useful are easily identified. However, this belief may also be misleading. It is likely to lead to research that fails to identify certain legal needs and overestimates the degree to which other legal services are needed.

The law, although bounded, accommodates itself to many different needs. Lawyers have devoted considerable attention to the study of how existing doctrines are reinterpreted to provide solutions to novel problems (see, e.g., Casper, 1972; Scheingold, 1974). Social scientists should study the social conditions that lead attorneys to press for the reinterpretation of legal doctrine and lead to the success or failure of such efforts. So long as such reinterpretation does occur, the static list approach is likely to miss problems that require creative legal services or the application of emerging legal doctrines.

The static list approach also misleads to the extent it suggests that a failure to mobilize law in listed situations is unfortunate or inappropriate. That one has spotted problems that are legally remediable but have not been remedied, does not mean that one has identified "unmet legal needs." There are no general norms that specify that those who break contracts must be taken to court, that those who make their spouses' lives miserable should be divorced, or that those who injure us should be made to pay our damages. Private law merely provides a resource that may be used to achieve a desired end. So long as alternative means of achieving the end do not violate the law, no norms suggest that the remedies available at law should be preferred to other remedies or to no remedy at all. This is an important distinction between private law and much public law, particularly criminal law. Citizens are generally supposed to mobilize the criminal law when the occasion arises,[9] and remedies available through public authorities are often exclusive, or at least preferred to remedies available through private action.

Researchers using the checklist approach do not assert that the law should be mobilized if the selected problems exist, but they often assert or imply that individuals with listed problems would be better off if they could and did take their problems to lawyers. Often the implication is correct, for the law is a valuable resource,[10]

9. Thus it may be a crime not to report a felony or to hide the perpetrator of a crime, and it is technically a crime to demand compensation in return for not mobilizing public authorities to deal with a public law violation or physically to punish a public law violation in a private capacity. Of course, subgroup norms may proscribe the mobilization of public law in certain circumstances, and public authorities often cooperate in substituting private compensation for public prosecution (e.g., dropping bad check charges if the check is made good).
10. The law is a valuable resource in that the state pays much of the cost of delivering those benefits which Marc Galanter in his paper subsumes under the rubric "legality." Particularly valuable is the coercive power of the state which is put at the disposal of the successful private litigant.

and access to valuable resources will usually operate to one's advantage in the long run. However, it by no means follows that there always are advantages in taking problems to law. Marc Galanter in his paper, "Delivering Legality: Some Proposals for the Direction of Research," draws our attention to the possibility that existing or novel nonlegal institutions might resolve disputes less expensively and more satisfactorily than the mechanisms of the legal system. Since there is no normative reason to prefer dispute resolution through private law to nonlegal means of dispute resolution, the private legal system, including lawyers, may be viewed as simply an alternative path to achieving certain ends. It is not irrational to fail to invoke available private law unless other less expensive means of achieving equivalent satisfaction are not available. The implication, as Galanter points out, is that the optimum solution to a perceived shortage of legal services will not necessarily involve the extension of legal services to areas where they are in short supply.

The checklist approach, by suggesting that individuals, both respondents and researchers, can pinpoint problems for which legal solutions are appropriate, obscures an important feature of private law: the role of attorneys in translating grievances into language that renders them amenable to private legal solutions. Attorneys not only provide access to legal institutions, they often render disputes legal in the first place. The general failure of researchers using the static list approach to appreciate the dynamic role that lawyers play in the creation of legal problems is an important reason why Marks criticizes this approach. He puts the following question: how does the community and how do lawyers respond to a group member's sense of injury or his quest for a remedy or resolution? It is a question that must be answered by those interested in effectively extending the availability of legal services. It must also be dealt with as part of any general theory of the mobilization of private law.

Professor Black, in his overview of the mobilization of law, refers to the situation where a citizen sets the legal process in motion by bringing a complaint as a *reactive* mobilization process and to the situation where government agents act without the prompting of citizen complainants as a proactive mobilization process (1973:128). Private law is generally associated with reactive mobilization processes. Indeed, Black tells us that private law may be loosely defined as law in which the initiative to bring cases is left exclusively with the private citizen (1973:128).

Perhaps the most important contribution this set of papers makes to the sociology of law is to emphasize that the decision to

mobilize private law is in no way a simple reaction to problems. Marks's fundamental criticism of the static list approach is that occasions when the law might be mobilized occur all the time. Whether law is in fact mobilized depends upon the type of problem, the potential parties, and the structural setting in which the problem arises.[11] It also depends, sometimes critically, on the way in which systems for delivering legal services are organized. Lawyers not only define problems as legal; they also play a crucial role in drawing problems, capable of being so defined, into the legal system. At times, as in ambulance chasing, the lawyer's role in generating business is open, intentional, and personal (see, e.g., Reichstein, 1965). More often, it is the intended or unintended offshoot of institutional arrangements for providing legal services. The location of a poverty law office, in the ghetto or downtown, may be an important determinant of the extent to which the law is mobilized by the poverty population, and bar rules on prepaid legal service plans influence the extent to which working and middle class people use the law.

The essential difference between reactive and proactive mobilization of the law is that in one the government, through its agents, takes the initiative in setting legal processes in motion: in the other it does not. Black equates government reactivity with complainant proactivity.[12] Close attention to the mobilization of private law indicates that the situation is more complex, for there are at least two ideal types of reactive mobilization. One occurs where individuals with complaints seek out lawyers to bring cases, the other where lawyers skilled in handling complaints seek out individuals on whose behalf legal action may be initiated. The usual situation is often a mixture of these types. Individuals with problems see legal action as one way of resolving their difficulty, while lawyers, both individually and through institutional arrangements, try to encourage people to seek legal services when faced with certain problems. The more disposed the individual is to resolve his problem through law, and the more aggressive lawyers are in offering their services, the greater the likelihood that the law will be mobilized.

I have sketched above what I think are some of the fundamental themes that underlie Marks's critique of the existing research on legal need and the delivery of legal services. Marks, however, does

11. See the discussion of the work by Mayhew, and Mayhew and Reiss, in Marks (1976: 192, 196).
12. Black's empirical work relating directly to legal mobilization has been with the police (1970, 1971). When the focus is on the police it makes more sense to divide all cases into two types, government or citizen initiated, than it does when the focus is on the mobilization of private law.

not develop these themes; indeed, he does not state them as they are stated above. His work is critical and suggestive. The task of being constructive and specific is left to Ladinsky, Galanter, and, to a lesser extent, Nader. Their papers focus on variables that are important to an understanding of how private law is mobilized.

Jack Ladinsky's paper, "The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients," deals with the problem of getting to a lawyer—the first and sometimes the last stage in the mobilization of private law. Ladinsky makes the basic point that legal problems are both culturally and professionally defined. Whether a person faced with a situation where the legal system offers the potential for relief will decide to invoke the law depends in large part on whether those around him interpret the situation as one in which a legal solution is appropriate. Interestingly enough, those most likely to define another's problems as legal are often the ones most able to direct the other to a lawyer.[13] The task of defining a problem as legal is not completed, however, with the decision to seek out legal services. A lawyer may respond to a client's accounts by perceiving different or more serious problems than those the client identifies. This is one of the most important services lawyers render: choosing what law is appropriately mobilized.[14] A lawyer may also dispute a client's tentative definition of a problem as legal and tell him that there are no available legal remedies. Finally a lawyer may cool out a client, discouraging him from using law even though the client's problem is, in theory, amenable to a legal solution.[15]

Ladinsky's second major point is that the professional model, which dominates the delivery of legal services, profoundly affects the way in which people search for attorneys. Professional rules, Ladinsky tells us, limit the dissemination of information about lawyers. With limited information, the knowledgeable lay intermediary becomes an important figure, both in channeling people to lawyers and in deciding that the situation is one in which the search for a lawyer is appropriate. Change in the norms that govern the

13. See Ladinsky's paper in this volume (1976:207), and the studies he cites. Note that all the cited studies relate to the use of lawyers by individuals. We know almost nothing about how organizations come to define problems as legal and to acquire legal services. We do know that the definition of a problem as legal is not necessarily followed by a decision to acquire legal services. The businessmen studied by Macaulay (1963) knew their contracts had legal significance but in the typical case declined to use the law to resolve their disputes.
14. The police and prosecutor play a similar role when private complainants seek to invoke the criminal law.
15. One of the bases for contention between those who prefer to deliver legal services to the poor through staffed law offices and those who prefer Judicare programs is the asserted difference in the willingness of attowneys in the two systems to take an expansive view of what the law can do to alleviate client problems.

legal profession could substantially change the rate at which problems are taken to lawyers, the kinds of problems taken to lawyers, and the characteristics of those chosen to handle particular legal problems.

Ladinsky discusses one suggested change at length, relaxation of the rule that forbids lawyers to advertise or engage in other forms of solicitation. He reminds us that the effects of relaxing this ban are problematic and cannot be sensibly discussed unless one knows exactly how the ban is to be relaxed. Dignified advertising in the telephone book will have effects different from the effects of leafletting at supermarkets. No matter how the ban is relaxed, the most crucial effect may lie not in putting clients directly in touch with attorneys, but rather in changing popular cultural beliefs about when the law is appropriately mobilized.

In his discussion of how people acquire lawyers, Ladinsky ignores the factor of cost, no doubt because it is so obvious. However, no theory about how lawyers are acquired and the law mobilized should ignore the relationship between the cost of legal services and the decision to get a lawyer and pursue particular remedies. Mayhew and Reiss (1969) have nicely demonstrated the nexus between the decision to acquire a lawyer and the system of property rights. Part of this linkage is explained by the fact that those who possess property usually possess some means to pay for legal services. Devices that reduce or spread costs should also increase the utilization of legal services (Johnson, 1974). Thus government programs, group plans, and legal insurance should all increase the rate at which law is mobilized.[16]

Marc Galanter's paper picks up where Ladinsky's leaves off. Galanter is not concerned with the problematic aspects of obtaining legal services; instead, he focuses on two other questions. The first is whether legal services are the best way of providing those benefits that the invocation of law can, in theory, achieve.[17] Galanter calls this mix of benefits "legality." The second is what determines the likelihood that such benefits will be realized once the decision to mobilize the law has been made.

Galanter's first question should remind us that private law is mobilized primarily for instrumental reasons. Usually these

16. There are, of course, other dimensions to cost than the purely financial. Prospects of delay may be a cost which will influence a decision to take a dispute to law. Psychological costs may also be very important. Thus the location and decor of law offices, as well as the perceived attitudes of those within them, may influence the mix of clients who seek legal service and the problems the clients bring.
17. According to Galanter these benefits include: protection, security, remedies for a variety of grievances and claims, securing accountability of officials, participation in decision making, feelings of justice, fairness, employment of facilitative rules to accomplish specific purposes, and the provision of frameworks for reliance.

reasons are concrete and personal. Abstract goals such as justice are rarely sought by the originators of legal action.[18] This has the important implication that private law is unlikely to be mobilized where less costly functional equivalents exist.[19] For those interested in the practicalities of delivering legal services, this is reason to explore the possibility of delivering legality by means that obviate the need to mobilize law.[20] Access to legality may also be enhanced by the creation of more accessible legal institutions[21] or by the transfer of areas of law from the private to the public sphere. In the latter instance the individual may still play a crucial role in the mobilization process as a complainant, but the cost of pursuing the new legal remedy will be borne largely by the state.[22]

The second of Galanter's questions reminds us that any theory of legal mobilization must account for the differences in outcome that occur when people choose to mobilize law. Law is almost always invoked with an end in view; hence one may speak of successful or unsuccessful mobilization with respect to that end. Expectations about potential gains from invoking the law are to a large measure shaped by perceptions of how others have fared.[23] The logic of the legal system contributes to this: success in litigation may generate precedent which increases the probability of future success in similar litigation.

18. See the data from studies by Mayhew and Steele reported by Galanter in the final portion of his paper.
19. The instrumental motives behind legal mobilization account for decisions to invoke only part of the available law. Thus one calls the police to quell a disturbance, but once the disturbance is quelled one tries to avoid a decision to press charges. Summoning police is an inexpensive form of legal mobilization that achieves the immediate goal desired. Pressing charges takes time, may cost money if trial occurs during working hours, and may be counterproductive if it disrupts a valued relationship or leads the defendants or their friends to create new disturbances.
20. Substantive legal change is one way to reduce the need to mobilize law. Galanter uses the example of a law requiring the early vesting of pensions. Where pensions are vested it will be less costly for an employee to walk away from a dispute with his employer by quitting, or to accept an employer's decision to fire him. If an employee had substantial unvested pension rights, they would provide an incentive to litigate disputes with the employer that might result in the termination of those rights.
21. As has been suggested, these institutions may deliver attorneys' services, allow attorneys to operate more cheaply, or eliminate the need for attorneys. Small claims courts are a common example of this third type.
22. Proactive agencies may also be created with the responsibility of searching out law violations. Private law remedies may persist along with public law activity. Thus the FDA attempts to prevent dangerous drugs from reaching the market but, if it fails, individuals injured may have a cause of action for their damages. It should be pointed out that legal disputes involve two or more parties. Thus a change which makes it easier for one party to mobilize the law may increase the need for other parties to use the law as a defense. This may increase the total demand for legal services and make the acquisition of legal services more costly for all but the favored individuals.
23. First the expectations of the individual will be important for they will determine whether a lawyer's services will be sought. Then it will usually be the lawyer's expectations that are important, for they will determine the choice of what law, if any, is to be invoked.

Many factors are related to the successful mobilization of law. The variable that most intrigues Galanter is the institutional competence of the parties—the place they occupy in the social structure and the way they use or are involved with the legal system. Galanter makes a fundamental distinction between those parties, usually individuals, involved with the legal system because of a single nonrecurring problem, and those others, usually organizations, whose involvement with the legal system is recurring and routine. Often these "one-timers" and "repeat players" are on opposite sides of particular issues. Galanter tells us that when they are, the repeat player has significant advantages. These include the ability to utilize advance intelligence and to acquire expertise, the opportunity to develop helpful relations with institutional incumbents, a greater capacity to establish credibility as a combatant, the ability to play the odds or to seek precedent rather than immediate gain, and often, since the repeat player is usually an organization and the one-timer an ordinary individual, vastly greater resources to devote to the legal controversy.

I do not wish to dispute Galanter's conclusion that repeat players are advantaged in dealing with one-timers. They clearly are better able to use litigation to promote long-term legal change, the situation in which Galanter is most interested. On balance they may also have an edge in litigation designed to maximize short-term payoffs. But here the individual one-timer has certain advantages. Galanter alludes to some of these but slights others. First, small claims that are unlikely to be upheld if litigated may be more expensive to defend on a repeat basis than they are to settle; hence they have nuisance value. Second, all one-timers benefit to the extent their claims have a high probability of no recovery but a low probability of a very high recovery. A repeat player calculating the odds will typically settle such a claim. Third, one-timers may choose litigation strategies without being constrained by a concern for precedent. Finally, the obvious disadvantage of being an individual one-timer facing an organizational repeat player may lead to compensatory benefits such as jury sympathy.[24]

This analysis indicates another role that attorneys play in the mobilization of law. Attorneys, particularly specialists, are repeat players. They are able to acquire a knowledge base, develop both credibility as bargainers and helpful relationships with institutional incumbents, and secure other advantages that organizational

24. Several of these advantages appear much more likely to accrue to one-time plaintiffs than to one-time defendants. I would suggest that one-time defendants facing repeat players are considerably more disadvantaged than one-time plaintiffs. Plaintiffs, after all, know what they are up against and would not bring suit without some promise of success.

litigants routinely enjoy. Indeed, specialists often pay heed to the long-run interests of similarly situated litigants—their prospective clients—and this may lead them to lobby for legislation or to nourish test case litigation. They may also gain power to shape the law in favor of their former clients—whether one-timers or repeat players—when they ascend the bench or are elected to the legislature. However, here there is an irony. The fact that an attorney is a repeat player may also operate to the disadvantage of a one-time client (Galanter, 1974: 114-19). Where a group of cases is settled together, one client's interests may be sacrificed to those of another in the trade-offs that occur in reaching a series of agreements. Attorneys as repeat players may also become the captives of those with whom they develop informal facilitative relationships (see, e.g., Blumberg, 1967). The attorney's need to aggregate clients may lead to litigation or settlement strategies that reflect the attorney's interests more than those of the client.[25] In short, attorneys as repeat players differ from organizations in that the attorney's interests are not identical with, and may be opposed to, those of one-time clients. Organizations, on the other hand, are the clients. The challenge for those interested in expanding the availability of legal services to individuals is to develop organizations for delivering legal services that can capture the benefits that accrue to repeat players while minimizing costs to individual clients.[26]

Ralph Nader's speech, "Consumerism and Legal Services: The Merging of Movements," details the practical concerns and activities of one of this country's leading consumer activists. At the same time, Nader's insights add to the theoretical structure implicit in these papers. Indeed, he serves to round out the discussion.

Marks and Ladinsky are concerned with the way in which the law is mobilized to resolve individual problems. Galanter extends the discussion beyond the individual to the organization and concerns himself with connections between law as a mechanism for resolving individual disputes and law as a force for institutional change. Nader is concerned solely with the latter. His basic message is that where the goal is institutional change, the mobilization of law is typically not enough.

Law is ultimately the power of the state. People mobilize law so that they can enlist that power, actually or potentially, to advance their own interests. It is not surprising, then, that law has its limits

25. Rosenthal (1974) notes that in personal injury cases attorneys usually profit more from settling cases early than from litigating them, although clients usually profit more in the latter situation.
26. Conflict is inherent if the organization is concerned with promoting the general interests of a class of clients as well as the specific interests of individuals.

as an instrument of social change. For even if there is no one-to-one correspondence between those who have disproportionate political power and those who are best able to mobilize the law, a general correlation has been obvious since Karl Marx. This is important to any general theory of legal mobilization, for such a theory must also specify its limits.[27]

Nader's paper suggests several factors likely to limit the effectiveness of legal action as a force for institutional change. Nader echoes Galanter's point that the redress of individual grievances will rarely if ever be an important force for institutional change. According to Nader, one inherent limitation is that the law must be mobilized through individuals, or with the aid of groups, each of whom will have their own agendas to promote. He gives the example of a union-sponsored group legal service plan, and suggests that while plan lawyers might do a wonderful job with divorce cases, they are unlikely to be much help to workers whose dispute is with the union or company. By the same token it is difficult to make fundamental changes in government through mechanisms provided by the state. Nader points out that a potential for mobilizing law against the state often proves illusory because of technical doctrines, such as those relating to standing and sovereign immunity.

Nader, however, is not so much concerned with developing a theory of the limits of law as he is with creating institutions to help overcome current limitations. In his paper, he suggests several ways this might be done, some of which are close to implementation. Ultimately, Nader's suggested methods all rest on the insight that the effective mobilization of law as a force for institutional change requires a substantial power base independent of the legal system. Extralegal power is important not only for mobilizing existing law, but also for creating legal norms and for enforcing legal victories.

27. Social scientists are beginning to develop a body of research clarifying impacts attributable to attempts to mobilize law. Unfortunately, most of this research is more concerned with demonstrating that apparently successful attempts to mobilize the law have only limited efficacy—the so-called "gap" problem of legal impact research—than they are with specifying the factors that limit the effectiveness of legal mobilization. It is the latter that is the interesting theoretical question (see Abel, 1973). Gap researchers have demonstrated that the receipt of an official normative statement sanctioning one's preferred position and, in theory, entitling one to mobilize the sanctioning apparatus of the state does not mean that the goal for which the law was mobilized will be achieved. A reason for this is that even after judgment, activation of the state's enforcement apparatus, another stage in the mobilization of law, remains problematic. Those subject to sanctions may be unable to respond to the sanctions decreed—here we use the term "judgment proof"—or they may be able to evade the application of sanctions. Moreover, those charged with enforcing sanctions are subject to the same institutional deficiencies that afflict all bureaucracies. These limits apply, of course, after litigation is complete. Nader (and Galanter) are more concerned with the problems of mobilization before and during the course of litigation.

This analysis, implicit in Nader's approach, is almost surely correct. But it should not obscure the fact that the availability of law and the ability to use law may give substantial power to the relatively weak. This is true on occasion with respect to issues of institutional change, and far more often with respect to personal grievances that may be assuaged without fundamental rearrangements of the social structure.[28] It is because law augments personal power that it is a valuable resource. This is why many think it important to expand the access of low and middle class individuals to legal services.

To recapitulate briefly, the following matters should all be addressed in any general theory of the mobilization of private law:

(1) the role of attorneys in recruiting clients, in defining problems as legal, in choosing remedies to be pursued, and in effectively determining the law for clients;

(2) the role of lay intermediaries in defining problems as legal and in leading clients to lawyers;

(3) the relationship between the structure of legal service delivery systems and decisions to mobilize law;

(4) the costs (financial, psychological, temporal, etc.) of mobilizing law and the way they relate to actual mobilization;

(5) the extent to which the benefits of legality may be achieved without mobilizing law and the costs of doing so;

(6) the relationship between the competence of parties and successful mobilization of law;

(7) the relationship between the outcomes of legal mobilization and future decisions to mobilize law; and

(8) the relationship between extralegal power and the ability to mobilize law for institutional change.

There are three outcomes that a theory of legal mobilization should explain: the extent to which law is mobilized, the way in which law is mobilized, and the success with which law is mobilized. The above list by no means exhausts the factors that shape these outcomes. The list is based largely, but not entirely, on themes that are either explicit or implicit in the papers discussed in this section. These papers discuss some of these relationships in greater detail and review the literature that bears on them.

28. The converse of this is also true. The need to proceed legally to achieve certain ends often places substantial constraints on what the socially powerful can or will do. For a very nice statement of this point see Thompson (1975).

III. THE PAPERS: MEASURING THE QUALITY OF LEGAL SERVICES

The other two papers in this volume deal with the qualitative evaluation of legal services. The quality of legal services is obviously relevant to the topic of legal mobilization because the competence of attorneys plays an important part in determining how problems get defined and the results that follow from attempts to mobilize law. However, these papers do not deal with the implications of quality for the use of law, but rather with the practical question of how quality might be measured. It is from this perspective that I shall discuss them.

The papers by Rosenthal and by Carlson deal conceptually, and at a relatively high level of abstraction, with the problem of measuring the quality of legal services. Both are concerned primarily with the quality of services delivered by individual practitioners, although Carlson makes the important points that for some purposes we should be more concerned with corporate products—the output of firms, legal aid offices, and group plans—than with individual lawyer performance, and that quality performance at the individual level does not necessarily aggregate to good outcomes for society as a whole.

The strength of Carlson's paper lies in the author's familiarity with the literature on health care delivery systems and the evaluation of physician performance. His entire analysis is informed by the analogy to medicine and the research that has been done on evaluating medical care.

The strength of Rosenthal's paper is the usefulness of its systematic conceptualization in clearing the ground for a program to evaluate lawyer performance. Rosenthal suggests the following as possible measures of attorney competence: (1) the training an attorney has received and/or exhibits on a proficiency examination; (2) status in the legal community; (3) successful or unsuccessful outcomes in matters handled; (4) minimum standards of performance applied in actions for legal malpractice; and (5) breaking down the handling of cases into component parts and determining how these tasks are performed in the light of specific values. Rosenthal points out that the first two approaches do not measure competence directly, but only measure factors presumed to correlate with competence. Unfortunately, as Rosenthal tells us, there has been little research designed to test the correlation empirically. There have also been few systematic attempts to apply those techniques that measure competence directly.

Rosenthal prefers the last method for evaluating the competence of attorneys. He suggests that for purposes of applying this technique, the handling of a case might be broken down into the following tasks: (1) getting information; (2) sifting information; (3) devising a preliminary strategy for going forward; (4) putting the strategy into operation; and (5) reviewing and revising the strategy in the light of new experience. Finally, he attempts to sketch some of the values by which performance on these tasks might be measured.

There is a marked difference in outlook between Rosenthal and Carlson. Rosenthal is avowedly optimistic. He believes that we should get on with the task of evaluating the competence of attorneys, and that we can do so successfully. Carlson calls measuring the quality of legal services an "idea whose time has not come." One reason for this difference in perspective may be that Carlson is explicitly concerned with six prerequisites for a "legal practitioner quality assurance system." They are specifications of: (1) the types of services that lawyers perform; (2) standards of performance; (3) criteria to determine whether standards have been met; (4) the manner of applying criteria (e.g., on a sampling basis, or to every case); (5) whether outcomes or processes will be considered; and (6) how results will be used: only educationally, or as a basis for sanctions.

Rosenthal concentrates on the first two of these points. He would leave the next three tasks to the methodologists and does not really consider the last. Yet all are crucial to the practical implementation of the type of qualitative evaluation that Rosenthal advocates. The intensive systematic evaluation he prefers—using direct observation and peer review boards—is expensive, intrudes on the attorney-client relationship, and is likely to be perceived as threatening by the attorneys being evaluated. This kind of evaluation may be possible in government or group legal service plans, where participation may be ordered from above, but it is likely to be resisted by those in the private practice of law. Even where it is possible, it will almost certainly be too expensive to repeat on a regular basis in any government or group office, or even to administer once in most or all offices around the country. Assuming this is so, it means that it is absolutely essential to develop a number of inexpensive, unobtrusive, operational measures of lawyer performance. Thus research of the kind Rosenthal suggests is not an end in itself, but should be directed primarily toward validating other more practical indices of quality performance.

Finally there is the problem of applying what is learned about quality performance to improve the product of individual prac-

titioners. Neither Rosenthal nor Carlson discusses this, yet the techniques we choose will depend on our newly acquired knowledge. If we were to learn that objective tests could pinpoint deficiencies in knowledge that led to poor legal services and that remedial education could remove these deficiencies, it would be relatively easy to devise a system that would upgrade the quality of the bar. If, on the other hand, we were to learn what Rosenthal believes to be the case—that active client participation can improve the quality of legal services—it might be more difficult to put this knowledge to work. Attorneys, in the privacy of the client relationship, might subvert attempts to increase client participation if increased participation made the attorney's task more onerous. I fear that whatever we learn, we will find that lawyers and legal service delivery organizations have a great capacity to hide their deficiencies from evaluators and to subvert those attempts at improvement that are perceived as making their lives more difficult.