A COMPARATIVE THEORY OF DISPUTE INSTITUTIONS IN SOCIETY

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I. INTRODUCTION

Why study the legal systems of other times or places? Are there reasons beyond an antiquarianism or exoticism that seeks stimulation for a palate jaded by preoccupation with the minutiae of American law? The increased understanding to be gained by such intellectual exploration seems to me similar in origin to the pleasure any of us takes in travel. Differences of physical environment, modes of social intercourse, or patterns of culture awaken us to phenomena which at home are so familiar as to be almost invisible. When we resume our mundane round, the residue of such impressions compels us to recognize the contingency of our own ways, and leads us to look for explanations.

Although the scholarly tradition of speculation about alien legal systems is long and distinguished, with roots in classical philosophy, Montesquieu is generally credited with the revival of such studies in the modern era, having journeyed imaginatively both in time and space (Montesquieu, 1949; Ehrlich, 1916). Inquiry into the past reached maturity in the historical jurisprudence of the nineteenth century (*e.g.*, Maine, 1950; *see generally* Pound, 1923; Kantorowicz, 1937). Academic interest subsequently shifted to the anthropological exploration of contemporary exotic societies through extensive fieldwork.[1] More recently, sociologists have turned inward to examine neglected

regions of our own law — the unofficial behavioral patterns discernible within every agency that administers official rules, the innumerable non-governmental legal systems functioning throughout our society.[2]

Nevertheless, the corpus of social theory concerned with legal institutions is small, and what little there is rarely encompasses contemporary non-Western societies. Anthropology and history abound in empirical description but are notorious for their unwillingness to theorize; though sociology consistently strives to develop theory it has been parochial in its geographic and historical scope. This essay grows out of my efforts to understand the development of a particular legal system, that of Kenya — a plural society which experienced rapid change under the impact of colonial rule, change that has further accelerated with the advent of independence. But here I have subordinated that immediate objective to a programmatic goal. Rather than contribute yet another case study to the proliferating literature in the ethnography of law,[3] I have sought to synthesize that literature in order to give a sense of direction to further research, my own and others'.[4] I will set forth several alternative approaches and state explicitly my reasons for choosing a particular path, although I make no pretense of having achieved a comprehensive theory.

I begin with the most elementary of problems: How are we to understand the diversity of legal systems we discover through historical and comparative study? First, what differences seem important, and what concepts shall we use to describe and categorize them? I choose to concentrate upon one set of variations — the ways in which disputes are handled. I then consider where we might turn for an explanation of those differences. What factors seem likely to be causative? I conclude that certain structural properties of the dispute are highly significant — in particular, the role of the person who intervenes in the dispute. I therefore develop three related microsocial theories which explain the characteristics of a particular dispute process in terms of the role of the intervener; from these I derive a large number of structural and processual variables which are intended to provide the elements for a set of working hypotheses. This constitutes the framework within which to answer that half of my original question which concerned the internal organization of dispute institutions: we will explain behavior within a particular dispute in terms of its structure.

I then turn to the other half of that question, which concerns the relationship between such institutions and the larger society. In much more tentative fashion I offer a macrosocial theory to explain, in terms of social structural variables, what kinds of dispute institutions will be found in a given society and with what frequencies, and how change in those institutions is related to change in social structure.

II. CHOICE OF A CONCEPT: WHAT IS TO BE STUDIED

A. Law

Many scholars have approached social phenomena in other societies by asking whether they are "law." Implicit in such questions is the choice of "law" as the subject of inquiry, and the concept by which to describe differences and similarities between societies. It is not surprising that these pioneering efforts to develop comparative social theory about legal phenomena should draw their conceptual apparatus from commonsense discourse;[5] parallels can be found in the early history of the natural sciences, as well as in the contemporary travails of social science. We may evaluate the selection of law by a variety of standards. A concept must, of course, have meaning, *i.e.*, an ascertainable and agreed content. In addition, I will adopt other criteria which are not so generally accepted. I prefer to use concepts which can apply across as broad a spectrum of societies as possible.[6] Greater variation increases the opportunities for testing the hypothesis; the more such tests it survives, the greater is its explanatory power (Stinchcombe, 1968: 19). I will also seek to define concepts so that they are not dichotomous, *i.e.*, restricted to polar values (Stinchcombe, 1968: 28-30). The differences we discern among social actions seem to me to be continuous, and therefore unhappily distorted by such either/or characterizations.[7] Moreover, dichotomies curtail further refinement; once you learn that a variable is not present in a given instance, there is little more that can be said.[8]

Law does not appear to satisfy any of these requirements. To begin with, the meaning of law is highly problematic. Although all definitions are stipulative, agreement upon a definition of law has been unusually difficult to achieve.[9] Weber has stressed the absence of sharp boundaries around what should be called "legal" within the domain of substantive rules:

> Law, convention, and usage belong to the same continuum with imperceptible transitions leading from one to the other.... It is entirely a question of terminology and convenience at

> which point of this continuum one shall assume the existence of the subjective conception of a "legal obligation" (1954:20).

Bohannan (1968a) makes the point more generally: Law in all its manifestations is a noetic concept, whose content must depend on our purposes (*see also* Jack Gibbs, 1968). Because law is intimately connected with systems of ethical belief and political ideology, definitional controversies are frequent, lengthy and heated.[10] Each proponent is often unaware of his values, or of the way in which they color his strategy; as a result, the argument soon becomes circular and impossible of resolution.

A further pitfall accompanies the choice of law as a concept. A recurrent word in everyday usage, it carries a substantial cargo of cultural connotation; *i.e.,* it is a folk rather than an analytic concept.[11] If this folk meaning is unconsciously adopted, "law" acquires abundant content, and thus a shared meaning, but only at the cost of warping the analysis by the introduction of a serious ethnocentric bias.

Radcliffe-Brown's extremely influential conception of law[12] exemplifies this last danger of adopting untested the assumptions of one's own culture. Borrowed mediately from Pound (1942), it may be traced to legal positivism and in particular to John Austin's perceptions of, or prescriptions for, English government in the nineteenth century (1954). Law is "social control through the systematic application of the force of politically organized society" (Radcliffe-Brown, 1933a). When Radcliffe-Brown applied this definition outside the western context, he was forced to conclude: "in this sense, some simple societies have no law" (*Ibid.*). He did not question whether it was valuable to continue to use the word "in this sense"; on the contrary, he argued that such usage was "more convenient for purposes of sociological analysis and classification" (*Ibid.*). His pupil, Evans-Pritchard, utilized this conceptual framework in his fieldwork on the Nuer of the Sudan; predictably, he reached the same judgment in almost the same words.

> In a strict sense the Nuer have no law. There are conventional compensations for damage, adultery, loss of limb and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict (1940a: 162).

Although "conventional compensations" might satisfy the "systematic" or orderly element of a legal system, they still could not be dignified as law because they were not backed by "the force of politically organized society," here understood to mean

"the power to adjudicate on such matters or to enforce a verdict."

The mistake of both anthropologists was to employ a concept, derived from a parochial system of jurisprudence, which had been designed for description and understanding within a particular institutional framework. Used elsewhere, it rendered a verdict of "no law." Because the concept revealed only dissimilarities between domestic and exotic phenomena it oversimplified comparison. However, this lack of fit between definition and data led Evans-Pritchard to expand his concept in order to recognize the modes of social control and conflict resolution he had discovered.[13] Shortly thereafter he published an article in which he acknowledged the existence of law among the Nuer: "within a tribe there is law: there is machinery for settling disputes and a moral obligation to conclude them sooner or later" (1940b: 278).[14] He perceived that legal institutions were not restricted to adjudicative bodies, and that they did not have to enforce a verdict as long as the dispute was ultimately settled. Legal authority could derive from moral obligation as well as from "the force of politically organized society." Together these efforts at conceptual refinement provide us with a number of less general concepts and variables which have proved central to our understanding of legal systems: the processes of social control and dispute settlement; the orderly quality of all social life, to which convention contributes as much as coercion; the contrast between political force and a sense of moral obligation, between adjudication and other methods of decision; and the importance of finality, whether achieved through a verdict or by more flexible procedures. The value of such refinements may be seen in the sophistication with which subsequent investigators, familiar with Nuer ethnography and Evans-Pritchard's interpretations, have been able to discern and investigate legal phenomena where Radcliffe-Brown would have found none.[15]

If ethnocentrism commonly leads the investigator to construct a concept in the image of his own folk legal system, he may occasionally adopt the perspective of the society he studies instead.[16] Malinowski strenuously criticized the error of "defining the forces of law in terms of central authority, courts, and constables . . ." (1926: 14). For he perceived that Trobriand Islands society was orderly even though those forces were lacking. To account for this orderliness, he offered a "minimal definition" of law (*Ibid.*)[17] which was intended to be universally applicable.

> There must be *in all societies* a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to the individuals to be enforced by any abstract agency. This is the domain of legal rules, and I venture to foretell that reciprocity, systematic incidence, publicity and ambition will be found to be the main factors in the binding machinery of primitive law (*Id.* at 67-68; emphasis added).

But in maintaining that the law of "all societies" is characterized by "reciprocity, systematic incidence, publicity and ambition," Malinowski was committing exactly the same anthropological sin as Radcliffe-Brown.[18] For a concept modelled wholly upon Trobriand ethnography overlooks many significant phenomena commonly categorized as legal in other societies — for instance, that vast body of rules relating to torts in Anglo-American common law, which are not obeyed out of ambition nor primarily maintained by the forces of reciprocity or publicity.[19] In fact, M.M. Green, one of the few anthropologists who adopted Malinowski's concept, was soon persuaded to add the ingredient of sanction so vehemently rejected by her mentor (1947: Ch. 4-7).[20] Nevertheless, Malinowski's efforts, like those of his fellow controversialists, add to our armory of concepts the positive sanction of reciprocity, rendered potent by the force of personal ambition and reinforced by the glare of publicity.

The conclusion to be drawn from these two landmarks in the history of anthropological inquiry appears to me irresistible. Folk concepts of law possess a meaning, but one tainted with ethnocentrism. When applied to divergent societies they blind the investigator to significant phenomena. Moreover, since the concept is often dichotomous — something either is law or it is not — a negative characterization frequently discourages further inquiry. An analytic concept which avoids the contamination of any folk system (if that is possible) can of course be given content at the whim of its creator, but he is not likely to persuade others of its utility. The results are endless wrangling, of which the Gluckman-Bohannan controversy is a contemporary example,[21] and continuing preoccupation with the definition of concepts to the hindrance of more fruitful endeavors. For the time being, at least, it seems clear that we must displace law from the center of our conceptual focus as we attempt to build social theory. Gluckman himself has urged as much (1965b: 18-26).[22]

B. An Alternative Conceptual Focus: Dispute

Some narrowing of vision must therefore be accepted, even if any less inclusive perspective will necessarily be incomplete. I have chosen to concentrate on disputes. I believe I can give that category of phenomena a content which is both unambiguous and generally acceptable, and I shall try to do so below. When so constructed, the concept can be applied more widely across disparate societies than any of the definitions of law already discussed, and will thus help to avoid that dead-end of analysis in which the object of our concern has been defined out of existence. Finally, disputes lend themselves to description in terms of variables with continuous rather than dichotomous values.

Lest there be any confusion, let me disclaim explicitly any suggestion that the concept of dispute is an equivalent for, or coterminous with, law. On the contrary, there are numerous other behavioral patterns which we denominate as legal and which are equally worthy of study: social control, the articulation and change of norms, social engineering, administration, etc. Recognizing this, I have deliberately sought to abstract from the totality of legal phenomena a coherent subcategory.

In choosing disputes rather than one of the alternative perspectives toward law, I am merely following others along an established path of inquiry. It is worthwhile speculating briefly on the origins of this preference, as a matter of the sociology of knowledge,[23] for social scientific interest in law has been so largely an interest in disputes. Intellectual milieu has certainly exerted a strong influence. Every new discipline desires to carve out a proprietary niche for itself; the comparative social theory of law is clearly in just this position. If, provisionally, we demarcate its boundaries as encompassing the formulation of norms, the application of those norms, and the behavior to which they apply, then two of those three categories have already been partly occupied by established social science. Political science studies the legislative process (and now also the judicial process) by which norms are articulated and changed. The behavior to which those norms speak is largely the province of economics, sociology, and psychology; furthermore, those disciplines have generally discarded legal norms as of little relevance in explaining behavior.[24] But in the routine operations of the courtroom or administrative agency, where norms are applied, legal scholarship has held unchallenged sway, at least until recently.[25] At first sight, this is peculiar. Legal realism,

which has furnished American legal scholarship with its prevailing perspective for more than half a century, has repeatedly proclaimed that the key to law lies in its application, that such application cannot adequately be explained by legal norms alone, and that social science offers a fuller understanding of the process of application.[26] Yet lawyers have been extremely ambivalent toward social scientists who actually offer competing explanations for legal decision-making.[27] Political scientists — the first to enter this hitherto exclusive domain with their theories of behavioral jurisprudence — were immediately criticized and subsequently ignored (Becker, 1963; Stone, 1966: 687-95). Fortunately, anthropologists and sociologists appear undaunted by the threat of a similar rebuff; but the cordiality of their ultimate reception by legal scholars is still in doubt.

Social milieu has also been important. Most research on non-Western legal systems has been conducted within the confines of a colonial regime, and therefore to some degree under its aegis. Where, as in the British and Dutch empires,[28] colonial policy was one of indirect rule, administrators required a thorough understanding of indigenous institutions and processes, especially those that dealt with disputes.[29] On the basis of the information acquired, colonial authorities proceeded to "recognize" these indigenous institutions, inevitably transforming them — a process which was accelerated by the intensified demands for modernization which anticipated and followed independence. Western scholars frequently exhibited a romantic nostalgia toward the institutions they had studied and now saw changing. Tribal institutions for handling disputes seemed to them qualitatively different from contemporary western institutions. Many scholars, most conspicuously the anthropologists, shared a negative ethnocentrism which valued tribal institutions above their western counterparts.[30] Because those institutions were now seriously threatened, the study of disputes became a matter of urgency[31] and real social consequence.

1. Definitions of concepts for analyzing disputes. My purpose is to understand the great variety of ways in which disputes are handled within every society and across different societies. I must therefore construct what Malinowski calls a minimal definition (1926: 14), a concept that will, as far as possible, incorporate all empirical instances of disputing, and also permit the differences between those instances to be described in terms of continuous variables. I start from the perception that a dispute is nothing more than a form of social

relationship, a developmental stage through which any relationship may pass. As such, it has certain chronological antecedents. In order to engage in a dispute relationship, the participants[32] must first make physical contact with each other, and that contact must lead to significant *interaction.* Such interaction must contain an element of *conflict* — the parties must develop inconsistent claims to a resource.[33] Disagreement about a matter of fact (for example, the name of the seventeenth president of the United States) is not conflict; it might become conflict if the participants desired not only factual vindication but also an admission of intellectual superiority. As the illustration suggests, intangibles like reputation can also be the subject of a dispute. Denial of another's claim creates conflict just as effectively as the existence of a counterclaim. By characterizing conflict as a common developmental stage in any relationship, I seek to emphasize that it is not an instance of deviance.

Conflict may develop into a *dispute* if the inconsistent claims are asserted publicly, *i.e.,* if the claims, and their incompatibility, are communicated to someone.[34] When a claim is voiced, it is commonly justfiied in terms of a norm — the party or his spokesman argue that the claim ought to be satisfied. The extent to which this normative justification is explicit or implicit, of central importance or merely incidental, will obviously vary greatly. It may be useful to distinguish two variants of dispute. In the first, one party asserts his claim directly to his opponent; I will call this an argument or quarrel.[35] In the second, both assert their claims to a third person, whom I shall call the *intervener;* I will use the terms case or controversy for this situation. Obviously, many actual disputes will fall at the edge of either category, or somewhere between them. Although a dispute presupposes conflict, and conflict assumes interaction, the chronological sequence is not otherwise inevitable or irreversible. Contact may not lead to significant interaction (brushing against a fellow passenger on a bus); interaction may not produce conflict (one party to the above interchange immediately apologizes); and conflict may never ripen into dispute (the injured party still harbors a silent grievance, but departs at the next stop). Moreover, the developmental sequence may be reversed: a dispute may subside into conflict if one of the parties ceases to assert his claim publicly; conflict may disappear from interaction if he ceases to believe he has such a claim;[36] significant interaction may

subside into mere physical contact, and contact itself may cease. Because these social relationships are extremely fluid, I will refer to the situation in which the disputants find themselves at any given point in time as the outcome.[37] When I wish to emphasize greater finality I will use "decision," a term which suggests both a choice between alternatives and a resting place in the dispute, if one which may be no more than transitory. A decision need not be the unilateral utterance of a third person; it can also result from agreement between the parties. I have deliberately avoided the more common phraseology "dispute settlement" and "conflict resolution."[38] Anthropologists and sociologists have tended to write as though "settlement" must be the ultimate outcome of disputes, "resolution" the inevitable fate of conflict.[39] The prevalence of this perspective may be due to the assumption of functional anthropology, and structural functional sociology, that every society tends toward an equilibrium state.[40] Or it may simply be another instance of the romantic idealization of tribal societies.[41] But it has recently become almost commonplace to observe that the outcome of most conflicts and disputes are other conflicts and disputes, with at most a temporary respite between them (*see, e.g.*, MacGaffey, 1970; Burridge, 1957; Berndt, 1962; Kopytoff, 1961; Tanner, 1970; Collier, 1973).

The definitions offered above mark the boundaries of the phenomena I wish to study. Although my notion of dispute bears considerable resemblance to the judicial process — indeed, precisely because of this superficial similarity — it is worth emphasizing that the two are in no way equivalent. The vast majority of disputes in any society never enter its judicial institutions, however broadly the latter may be conceived. And a significant proportion of the business with which most judicial institutions are concerned does not involve disputes at all but rather the routine administrative processing of uncontested divorces, wage attachments, evictions, default judgments, bankruptcies, and many criminal misdemeanors.[42] A social theory of disputes is thus both more and less than a social theory of law.[43]

In order to develop that theory we need additional concepts to analyze the phenomenon we have now circumscribed. The number of paths a dispute could conceivably follow is, of course, very large. Even within a given society, the number of paths actually taken may be substantial. Nevertheless, in every society most of the disputes will fall into a relatively limited

number of patterns. We speak of these recurrent patterns for disputing as being *institutionalized* (Nadel, 1951: Ch. 6). What this means, at a minimum, is that the participants occupy *roles* within the institution which handles the dispute.[44] These roles define the relationships among all of the participants in the dispute, and between each participant and the outside world; I call this role set the *structure* of the dispute or dispute institution. The definition of roles within the dispute affects the way in which incumbents of those roles perform; I call their behavior the *process* of the dispute or institution. Although we can usefully talk of structure as having some chronological, even causal, priority over process, or view process as action which occurs within a structural environment, these concepts are obviously relative, and their interaction is reciprocal. Finally, the extent to which a dispute pattern is institutionalized is itself a variable: litigation in official courts is highly institutionalized, marital squabbles are not;[45] yet both, to some degree, possess a recurrent structure and display patterned behavior.

2. Parameters of the dispute process. By stripping the concept of dispute, as far as possible, of those elements peculiar to a particular instance, I simply postponed the job of charting the ways in which actual disputes differ. I will now turn to that task and try to identify significant parameters by which we might measure variation in the processual dimensions of disputes, selecting from previous analyses.[46]

Let me stress that this exercise is intended to illustrate the feasibility of an approach, not to survey the literature exhaustively. The processual variables may conveniently be charted by tracing the sequence of events in a paradigmatic dispute; of course, no particular element is essential, nor is their order foreordained.

Before a dispute can arise, an individual must claim a resource to which another asserts an inconsistent claim.[47] Societal definitions of resource and scarcity obviously will affect the nature and frequency of such conflict.[48] Its occurrence is also governed by psychological factors: individuals in a society may react to a threat of conflict by repressing their desires.[49] Even if a person is himself conscious of conflict he may decline to publicize it, for all societies offer alternatives (Hirschman, 1970): migration to avoid further discord,[50] postponement of a grudge for a more opportune time (P. Spencer, 1965: Ch. 7), and resignation, perhaps in the hope of vindication in an afterlife.[51]

If the individual does assert his claim, conflict becomes dispute. There will be variation in the way this occurs: which claimant makes the assertion,[52] whether he does so personally or through a representative,[53] and to whom he does so, especially in which forum or fora.[54] Once initiated, the breadth of the dispute must then be defined along three dimensions: the number and scope of grievances raised, the number and identity of parties involved, and the historical depth in which the controversy will be explored. Fallers has noted that a "case" is a culturally variable unit, and has contrasted processes which only inquire into the violation of "a particular rule" with others which plumb "the full moral complexity of conflict situations" (1969: 11-12; *see also* A. L. Epstein, 1967b: 230). Nader, independently and contemporaneously, offered a parallel distinction between situations where "the cause of the dispute is already known and proceedings function to settle" and others where a "variety of disputes is discussed to mediate the basis of the dispute" (1969c: 87).[55] Grievances may ramify not only between the nominal parties to the dispute, but also among others, and among all disputants across time. At one extreme is the dispute which only involves the "contending parties" (Cohn, 1967: 156), "total strangers" (Fallers, 1969: 13) whose relationship is limited to the transient encounter, frequently contractual, which generated this dispute. At the other is the controversy between parties linked by a "substantial period of association . . . in the course of which each has done things to the other of which he ought to be ashamed" (Fallers, 1969: 12); where disputants are enmeshed in multiplex relations "it is the wider social networks that influence a decision" (Nader, 1969c: 88; *cf.* Kawashima, 1963); "the case which is the crux of the dispute is only a minor expression of a long-standing antagonistic relationship between two families or groups" (Cohn, 1967: 156).[56]

The definition of issues interacts with the nature of the factual investigation. Aubert has sketched two divergent paths which this inquiry may follow (1963b). If those engaged in the dispute are motivated by considerations of utility, they will be concerned with historical fact only so far as it assists them in forecasting the consequences of alternative accommodations. These predictions are, of course, subject to verification, and will be revised if shown to be incorrect: the dispute will extend temporally into the future rather than the past. Subjective facts become crucial — the present emotional set of the dis-

putants — and suitable means for ascertaining them will be adopted: the therapeutic relationship exemplifies this approach. Alternatively, the participants in the dispute may seek to apportion praise and blame, and must then ascertain historical fact in detail.[57] This option brings into prominence the procedures for factual determination: who presents evidence and how, what evidence is acceptable or necessary, how the evidence is assessed and by whom, and what is done if the evidence is lacking. Such an interpretation of history is not subject to modification in the light of subsequent events.

While the above observations by sociologists and anthropologists are relatively novel, legal philosophy has long reflected upon the characteristics of norms and the way they are employed in disputes. Pound asserted: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion . . ." (1922: 70). This distinction has been refined to recognize the clarity and discreteness of rules when contrasted with vague, overlapping standards (*see* Fallers, 1969: 11; Yngvesson, n.d.; Eckhoff, 1969: 176; Dworkin, 1967: 25 ff.). Application of the norms may focus upon the general, repetitive patterns of conflict situations, or the idiosyncratic features of the dispute (Pound, 1922: 70). The underlying thought processes have been described as falling along a continuum between the rational and the irrational (Weber, 1954: 63-64), or between intelligence and intuition (Pound, 1922: 70, following Bergson). The process may be characterized by formal orderliness, expressed in adherence to a code or doctrine of precedent and achieved by means of legal conceptual reasoning; or it may subserve substantive ends and result in a series of *themistes,* disjoined from both past and future decisions (Maine, 1950: Ch. 1; *see also* Weber, 1954: Ch. 4). Norms may be advanced by a party in support of an argument, or by a third person urging a particular outcome; these arguments may be more or less explicit.[58]

Disputes differ in the outcome toward which they tend: some simmer indefinitely without firm resolution; others generate considerable pressure for a decision of any kind.[59] This may be a clear, simple, dichotomous decree favoring one party to the excusion of the other; or it may be an ambiguous compromise which considers "all the rights and wrongs of this situation" (Fallers, 1969: 13), and awards to each party some of what he seeks while denying other elements of his claim.[60] The outcome may be imposed unilaterally upon the parties, or an effort, greater or less, may be made to secure their assent

by a variety of means (Fallers, 1969: 11; Aubert, 1963a). The remedy may be expressed in sanctions which are repressive or restitutive, positive or negative, diffuse or organized (Durkheim, 1947; Radcliffe-Brown, 1933b). The judgment may be announced as final, or finality may consciously be avoided (Cohn, 1967: 156); in either case there may be further opportunities for review or reinterpretation. And there will, of course, be variations in the manner in which subsequent behavior is affected by the decision.[61]

3. Are there two types of dispute, legal and political? In this brief survey of variations in the dispute process, I viewed the role that norms may play as simply another parameter, similar in nature to all the others. Some social scientists have argued that this factor divides disputes into two groups, fundamentally different in kind, which require distinct conceptual frameworks for analysis. Fallers contrasts the adjudication of rule violations with what he calls "political" disputes, "conflicts of *interest*" arising out of the pursuit of inconsistent policy goals; since in such controversies the choice of decisional rules is itself the issue, resolution cannot be governed by rules (Fallers, 1969: 12, italics in original; *see also* Aubert, 1963a). Gulliver has carried the analysis further, and conceptualized "two polar types of process — judicial and political — between which there is a graduated scale . . . ."

> By a judicial process I mean one that involves a judge who is vested with both authority and responsibility to make a judgment, in accordance with established norms, which is enforceable as the settlement of a dispute. . . .
>
> The purely political process, on the other hand, involves no intervention by a third party, a judge. Here a decision is reached and a settlement made as a result of the relative strengths of the two parties to the dispute as they are shown and tested in social action. The stronger gains the power to impose its own decisions, but it is limited by the degree to which its opponent, though weaker, can influence it. In this case the accepted norms of behavior relevant to the matter in dispute are but one element involved, and possibly an unimportant one (1963: 297-98).

Gulliver developed this typology in an attempt to portray dispute settlement among the Arusha of Tanzania. He has since modified his position somewhat in order "to avoid the establishment of precise ideal types or models" and to emphasize that "there is no absolute dividing line between the two modes" (1969a: 22-23). But his revised formulation, while thus qualified, is not fundamentally changed.

> Essentially the difference is between judgment by an authorized third party, on the one hand, and negotiated agreement without judgment, on the other; that is, the difference between the presence or absence of overriding authority. . . .
>
> From this I would suggest the hypothesis that, on the whole, there is greater reliance on, appeal to and operation of rules, standards, and norms where adjudication rather than negotiation is the mode of dispute settlement (1969a: 17-18).

Indeed, he found substantial confirmation of the schema in subsequent fieldwork among the Ndendeuli, another Tanzania tribe which lacks even those institutionalized notables who in Arushaland are available to mediate, though not to decide, disputes.

> Obviously in a moot Ndendeuli do attempt to enunciate these expectations [concerning reasonable role performance], and they seek to measure a man's conduct against them. On the other hand, not only are the expectations rather indeterminate . . . but there is also no third party, no adjudicator, and no technique to determine specifically the acceptable, operative, reasonable expectations in the event of a particular dispute. And while men seek their own advantages and attempt to avoid what is disadvantageous, the process of settlement must depend also on other considerations not directly related to the merits of the matter in dispute: the strength with which a defendant can resist his claim, the degree to which a plaintiff can be persuaded to reduce his claim, the degree and kind of support each can obtain from other involved persons (1969b: 66).

Where Fallers and Gulliver concentrate upon defining the political process, Pospisil arrives at a similar view by identifying the other pole of the dichotomy, the judicial, with an attribute which he calls "the intention of universal application . . . the authority in making a decision intends it to be applied to all similar or 'identical' situations in the future" (1958: 262; *see also* Kawashima, 1963).

This typology is certainly not unfamiliar to lawyers. The judicial models described above clearly fulfill the lawyer's ideal of the rule of law. Lon Fuller has argued that adjudication, as an ideal type, is a process in which the parties present, and the judge is guided by, evidence and reasoned argument (n.d.: 29). And Herbert Wechsler, in advocating "neutral principles" as the only appropriate basis for judicial decision, employs a similar standard:

> A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved (1961: 27-28).[62]

If these models share a common core it would seem to lie

in the contrast between disputes which are governed by norms — especially those characterized as established, universal, general, or neutral — and controversies dominated by non-normative factors, such as "policy goals," the "immediate result," or the "relative strength" of a party calculated in terms of social support. It is no accident that lawyers and social scientists, starting from their very different perspectives, have converged upon the same distinction.[63] For the dichotomization of disputes into two exclusive categories is not merely an analytic device; it is the necessary, and sufficient, assumption from which legal scholarship and social science can divide the phenomena to be understood in such a way that each discipline reigns unchallenged in its own domain. If disputes are of two different kinds, they require distinct modes of understanding. The category of disputes governed by norms is obviously the domain of lawyers, who have elaborated highly sophisticated techniques for explaining those disputes in terms of the norms involved — the official substantive and procedural rules. Lawyers may differ as to the best mode of ascertaining the norms, and thus argue about what the norms really are, but they are agreed that any other explanation is impermissible.[64] Within the category of political disputes, on the other hand, norms are by definition of little relevance, and certainly cannot be a sufficient explanation for the behavioral patterns observed. Here lawyers gladly abdicate in favor of social scientists who can offer an explanation in terms of social factors other than norms. The distinction thus has profound consequences for scholarship.[65] Yet it seems to me to rest upon a fundamental fuzziness concerning what it means for a dispute to be "governed by norms." Let me consider the meanings suggested by the above quotations.[66]

(1) The disputants or other participants *think* they are acting in accordance with norms in urging a particular outcome. This appears to be Pospisil's usage when he speaks of an authority intending universal application. I do not believe that this is a fruitful sociological approach. The authority's intention at the time of deciding is singularly difficult, if not impossible, to ascertain, and Pospisil indicates no way of doing so.

(2) The participants in the dispute *invoke* norms in advancing a solution to the dispute. Fuller suggests this aspect in his emphasis on reasoned argument (n.d.: 20). As heirs of the legal realists we are not likely to confuse the invocation

of norms with their actual influence. But if normative language is no guarantee that norms govern, can we draw from their absence an inference that they are irrelevant? A number of writers, most recently Fallers, have observed that norms may play a major role in disputes without ever being mentioned explicitly by judge or litigant (1969: 320 ff.). Hence invocation as an index does not serve to create two categories of disputes, normative and normless.

(3) Norms *determine* the outcome of the dispute. Dworkin has analyzed this "model of rules" (1967: 36; *see also* Moore, 1970b: 323, 341) in depth, and agrees with, indeed trivializes, the insight of the legal realists that it is the rare norm which can or does dictate a decision,[67] and that much of the decision-making in many disputes falls beyond the purview of existing rules. From this standpoint very few of the cases tried by official courts are legal disputes. Are we to conclude that norms play no part in the remaining controversies? Emphatically not. A norm of a different kind, which Dworkin refers to as a standard, principle, or policy, "states a reason that argues in one direction . . . . [It] is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another" when we reach or surpass the penumbra of rules, or when they require change (1967: 26). Nevertheless, the applicability and relative weight of these standards are always to some degree uncertain, with the result that a full understanding of the course of a dispute can only be gained by looking, as well, at factors extrinsic to its normative content. Hence Fallers cannot readily discriminate on this basis between political disputes and lawsuits, and once again the simple dichotomy breaks down.

(4) If only a few rules unambiguously dictate a unique judgment, still the judicial process for dealing with disputes can be distinguished from other such processes by the fact that all the norms it employs possess the characteristic of neutrality. This proposition is obviously subject to the line of attack just outlined; indeed, it is particularly vulnerable since the very neutrality on which Wechsler insists increases the indeterminacy of outcome.[68] But, more importantly, the criterion of neutrality does not divide decisions into principled and unprincipled, for the degree of generality required of a norm is arbitrary and never adequately specified.[69]

It is not necessary to be entirely satisfied with this dis-

cussion of the troublesome issue of rule and discretion in order to respond to the problem which stimulated my excursus: In charting regularities in the dispute process is norm a variable that is necessary and sufficient to describe one category of disputes, while wholly irrelevant to the other? The first half of this question has been adequately answered in the negative if, indeed, it is not the straw man which Dworkin asserts it to be (1967: 16).[70] The other alternative can be disposed of more quickly. Is there a significant category of disputes at the "political" end of the spectrum, in which norms play no role whatsoever? It is difficult to imagine the assertion of a claim without an appeal, if only implicit, to some general societal evaluation of human conduct.[71] Gulliver, alone, has offered ethnographic evidence of disputes without normative content, and he has since disavowed that interpretation (1969a: 12; 1969b: 66 n.12).[72] It would seem sensible, therefore, to pursue our analysis in the expectation that norms will play *some* part in most disputes we encounter (Moore, 1970b: 330).

From that perspective, it may prove valuable to return to the distinctions just criticized for hints as to the ways in which norms may be involved in a dispute. Dworkin (1967: 25-29) demarcates rules from standards on the basis of two criteria: 1) rules either dictate a decision or are irrelevant; standards may argue for a decision without necessitating it; 2) standards have weight relative to one another; rules do not.[73] I do not think this dichotomy can be maintained either; most norms will function more like rules at one time, and more like standards at another.[74] But I believe the variables Dworkin employs in drawing his distinction are potentially useful: the degree of clarity with which a norm includes a fact situation, and points to an outcome, and the weight of the norm in competition with others. Similarly, while Wechsler fails to convince me that certain principles are neutral in any absolute sense, the generality of a norm may be an important variable.[75] And Fuller is certainly correct that the extent to which normative arguments are voiced and responded to by a judge, should also interest us (n.d.).[76] Other variables which overlap somewhat with those just discussed might be: the degree to which the norms are consistent or inconsistent,[77] vaguely or clearly defined (Gulliver, 1969a: 18-19), fixed or flexible,[78] and how far the universe of norms is open or closed.[79]

The dichotomy we have just rejected, however, borrows additional weight from a structural argument: although a

dispute may well involve norms, they will only influence the outcome if it is determined by an authoritative third-party adjudicator. Gulliver makes this equation explicit (1963: 297-98) but even others like Aubert (quoted in Nader, 1969c: 87) and Pospisil (1958: 258 ff.), who identify the authority of the adjudicator as an independent variable, associate that factor with normative decision making. Perhaps this conjunction is suggested by our everyday experience; certainly popular mythology attributes evenhandedness to the judge and selfishness to the parties. But for purposes of analysis these variables must be kept distinct. They belong to different orders of conceptualization: the way in which norms enter into a dispute is a processual variable; the presence of an authoritative third-party is a structural element.[80] Their correlation must therefore be made problematic.

If it is, the proposed hypothesis fails, both theoretically and empirically. Authoritative third-party decision-making is not necessary for norms to play a significant role in a dispute. Such a proposition would imply that the only possible source for the influence of norms upon disputants is the authority of a judge. But clearly there are other sources. One of the disputants may possess an authority to declare norms similar to that of the judge — think of quarrels between parents and children (Piaget, 1965: 107).[81] And quite apart from who *announces* them in the course of a dispute, the norms may themselves be endowed with legitimacy derived from tradition,[82] or created by mutual agreement, as where the players in a game follow the rules because of their desire to keep playing.[83]

Neither is the presence of an authoritative adjudicator a sufficient condition for the dominance of norms.[84] Just as the participants may adhere to norms for reasons other than the authority of the judge, so the judge is subjected to influences which are not exclusively normative. As Gulliver has now realized, the degree of insulation from such pressures is a continuum along which the judicial process is only marginally more sheltered than the political (1969a: 22). A striking instance of a dispute process constantly accommodating to relative power is the Lebanese *wasta* maker, described by Laura Nader (1965c; *see also* Hitchcock, 1960). An African example, however, may be more appropriate in the present context. J. A. Barnes has described disputes among the Ngoni, a Central African tribe endowed with a traditional hierarchy of authoritative courts, some of which were absorbed into the colonial legal system of

Northern Rhodesia in 1929 and given enhanced powers and more formalized procedures.

> Despite this measure of legal assimilation, the present actions of Ngoni Native Courts can be understood only in terms of their historical roots in Ngoni society prior to 1929, and of the contemporary political scene, as well as in terms of the British legal system. The county chief who presides in the Native Court is the political leader of his people and his actions as a judge are coloured by his political position. The Ngoni Paramount Chief is political head of the tribe, and in addition presides over the Ngoni court of appeal. There is then no clear separation of the courts from politics.... The Native Court is used to implement the policy of the Native Authority. A chief anxious to gain favour with the British Administration sees that his court enforces with substantial penalties the various regulations in which the Administration is interested for the time being. A chief who wishes to obstruct the Administration will neglect these regulations in his court....
>
> In the court the magnitude of the penalties imposed or damages awarded is influenced by political considerations, among others. Ngoni society is not egalitarian, and status differences are reflected in differences in penalties ... Political considerations of the moment show themselves when a chief or other court member obstructs a suit brought by a litigant he dislikes.... Missionaries endeavor to persuade chiefs not to grant divorces to their converts; Indian traders endeavour to get their disputes with Africans heard in Native Courts rather than in those of the Administration, as is required by the Ordinance on Native Courts; white farmers instruct Native Courts to deal promptly with cases involving their labourers (1961: 179-82).

Barnes concludes: "The legal system is not a kind of calculating machine, with an input of wrongs and an output of rights. It is part of the social process in which groups and individuals strive against one another and with one another for a variety of ends" (1961: 193).[85]

It should not be thought that only in the non-western world is the dispute process dissociated from its normative guidelines. It is now widely recognized that significant behavior occurring within our own institutions for handling disputes is only partly guided by official norms. We may distinguish three situations. Some instances of deviation are officially recognized and approved: the institution of the jury is the most prominent example;[86] the disposition of offenders is another.[87] Other forms are tolerated with greater ambivalence. Norms alone do not govern the decision by private individuals, or by the government, to assert a claim,[88] or to choose a particular forum, despite the occasional protestations of prosecutors that they pursue every infraction.[89] If the disputants avoid a court — and the vast majority do — there may be little pretense of adhering to the judicial model. Even if they initiate legal proceedings,

the definition of the claim and its later modification during pre-trial negotiation or plea bargaining may not be explicable in terms of the norms officially proclaimed; and many disputants reach an agreement at this stage with the acquiescence, indeed encouragement, of the court.[90] The outcome of the dispute process is itself a complex product of both normative and non-normative factors, a product we have recently been helped to understand by the investigations of political scientists into judicial background and ideology.[91] Finally, some factors continue to intrude in spite of the efforts to extirpate them or to deny their presence,[92] *e.g.,* corruption,[93] and inequalities among disputants.[94]

The section now concluded is offered as a justification for treating the significance of official norms within the dispute process as a variable, or rather a number of variables. This is a decision of no mean importance, for on it rests the possibility of a social theory of law distinct from legal theory or jurisprudence (*cf.* Aubert, 1969a: 10). In attempting to construct social theories about disputes I wish to emphasize that I am not dismissing legal theory as either superfluous or superficial, nor am I arguing for some form of sociological reductionism.[95] As I have tried to show above, the apparent contradiction between the two approaches is an outgrowth of ideologically biased misunderstanding of the actual course of disputes. If legal scholars persist in maintaining that they provide a complete explanation of "legal" disputes when they explicate the official norms involved, then any attempt by social scientists to offer another explanation will be seen as threatening and illegitimate.[96] It follows that the only possible accommodation between them is the recognition of a category of non-legal disputes. But the two disciplines can cooperate far more fruitfully if they will agree that norms are a significant factor affecting the course of disputes but rarely, if ever, the exclusive one. By no means do I wish to minimize the importance of the universe of norms: it may quickly foreclose the outcome of many disputes, and define the boundaries of what can be argued in others. Yet in all disputes there is a great deal of behavior which norms do not explain[97] — areas where the norms do not speak, where they are sufficiently flexible or inconsistent to allow freedom of action, or where they are overridden by more powerful forces. Only a composite of norms and other social factors can adequately portray the complexity of behavior in disputes.

III. THE FORM OF SOCIAL THEORY OF LAW

A. Construction of Ideal Types

Social science has long been discontent to stop at the mere description of variety, classifying phenomena according to some arbitrarily selected common trait (*see, e.g.,* Nader, 1969c: 99; Leach, 1961: 3; Southall, 1965). One means of advancing our understanding beyond this point is the construction of an ideal type, which Weber has defined as:

> the one-sided *accentuation* of one or more points of view and ... the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytic* construct (1968: 497; *see generally* Schweitzer, 1970).

I have already adverted to several ideal types of dispute: the dichotomy of legal and political was explicitly stated in this form, but most of the other processual variables identified above were also extracted from a typological construct. Thus we find repeated references in the literature to oppositions such as: mediator and adjudicator (Eckhoff, 1969; *see also* Aubert, quoted in Nader, 1969c: 87); legal and scientific decision-making (Aubert, 1963b); repressive and restitutive law (Durkheim, 1947); adjudication, negotiation and election (Fuller, n.d.); ancient (Maine, 1950), or primitive (Radcliffe-Brown, 1933a; *see also* Redfield, 1964; Diamond, 1971, and earlier writings cited therein), or tribal (Gluckman, 1965a, 1965b; *see also* Schapera, 1956; Carlston, 1968), or African (Allott, 1960; *see also* Elias, 1956; Driberg, 1934), or Indian (Cohn, 1967; *see also* Galanter, 1963), or Japanese law (Kawashima, 1963) on the one hand—and modern, or western, or Anglo-American law on the other. And of course Weber himself developed a typology of justice which is frequently imitated (1954: Ch. 4). Several factors may explain this predilection for ideal-typical thinking: residual ethnocentrism, a predominately pragmatic or ethical concern conjoined with theoretical immaturity, or the unavailability of data which would be required to test hypotheses.

Nevertheless, it is necessary to ask whether this approach is the best means of proceeding at the present time. The answer, as always, depends upon where we want to go. Weber argues:

> This procedure can be indispensable for heuristic as well as expository purposes. The ideal typical concept will help to develop our skill in imputation in *research*: it *is* no "hypothesis" but it offers guidance to the construction of hypotheses. It is not a *description* of reality but it aims to give an unambiguous means of expression to such a description (1968: 497).

We have confirmed this claim by extracting from the ideal types of others a number of significant variables, and possible linkages among them. But this mode of thinking may have serious drawbacks.[98] Weber was able to mobilize a vast number of highly diverse phenomena in constructing his typology; a less erudite theorist may rely upon the few societies of which he has personal experience,[99] or upon inaccurate descriptions more or less randomly chosen from limited reading or experience.[100] The qualities defining the type, being lumped together, are imprecisely specified. Dichotomies are common, almost universal, in sharp contrast to the multiplicity of types which Weber usually offered. The pairs of variables on which they are based may not lie on the same scale, or may fail to represent the extremes of that scale, and certain parameters may possess only a single value. What emerges is not an ideal type but a stereotype which, far from instructing the eye of the observer, blinds him to data not encompassed by the type, and also to the possibility of other types.

Perhaps my criticisms reduce to a fear that we know too little about relationships among the qualities of disputes to begin grouping them in this fashion. Let me use Laura Nader's recent typology to illustrate what, to me, is the arbitrariness of the conjunction; the example is chosen with deliberate unfairness, for hers is surely one of the most fruitful concepts in the literature.[101] Nader finds a style of court procedure among the Zapotec which resembles that of societies otherwise dissimilar in institutional framework and general political and economic conditions.

> The similarity is principally in the value placed on the minimax principle, rather than on the zero-sum game. From this principle follows a de-emphasis on establishing past fact; a prospectively oriented reasoning; and the use of proceedings as a technique for expression and for finding out what the trouble really is before reaching a settlement, even though this may be . . . an agreement to avoid a decision (1969c: 88).

The elements of this typology may be paraphrased as: 1) minimax vs. zero-sum; 2) prospective reasoning vs. emphasis upon past fact; 3) broad definition of the dispute vs. focus upon narrow, superficial issues; 4) settlement by agreed compromise vs. unilateral decision. Are these two styles so fundamental, and mutually exclusive, that we can usefully classify dispute processes according to whether they resemble one or the other? I think not.[102] No reason is offered by Nader for her assertion that the combination is a significant one, aside from its em-

pirical occurrence in a variety of societies. Yet it is not difficult to cite examples of other disputes which might well adhere to the "Zapotec" style in most respects, but deviate from it in one particular: 1) competitors disputing over some indivisible economic good, for instance a liquor license, would still be engaged in a zero-sum game; 2) a parent intervening in a quarrel between his children might choose to emphasize past behavior and its divergence from norms in order to internalize those norms; 3) a married couple quarreling over a minor irritant will often scrupulously avoid all the deeper issues;[103] 4) a parole board considering whether to release a prisoner certainly renders a unilateral decision.[104] Indeed, it is hard to believe that similar departures from the "Zapotec" style could not be found in the Zapotec courts themselves.[105]

One response to the discovery of such discordant data might be to multiply the number of ideal types.[106] This is clearly a process without end, and would deprive the typology of whatever heuristic value it possessed. An alternative might be to refine the construct; but the typologists offer no criteria by which we might choose among potential ingredients. I prefer to proceed differently and resolve each proposed type into its constituent variables, which can then form the ingredients for a different kind of generalization.[107]

B. Correlation of Variables

Another means of explaining the characteristics of the dispute process is to look for regular conjunctions with other social variables. These will be of the general form "if x, then y," where y, the dependent variable, is the quality of the dispute process to be explained. In order to narrow the independent variables to a number that can realistically be explored,[108] I will again employ the criteria invoked earlier: meaningfulness, universality, and continuity.

1. Separability. The selection of one variable imposes upon the other an additional constraint of independence or separability.[109] I have sought to satisfy this requirement by choosing my independent variables from among the structural characteristics of the dispute, as contrasted with the process itself: the *environment* in which the participants act as opposed to what they *do*. This distinction, however, is not as clear as one might like. True, extreme examples present no problem: the seating arrangement of participants discussing a dispute seems clearly structural when counterposed against the breadth of

issues ventilated. Within these constraints I will review existing theories about disputes for suggestions of variables that may prove significant, *i.e.*, that may be causally linked to the dispute process. Nevertheless, the labels are relative: the same physical setting might be seen as an event in the dispute process when set against a background of the social relationships which linked participants before the dispute arose; and the issues which are aired could be viewed as a structural dimension of the dispute which helps us to predict the kind of evidence offered. Because of this relativity, the designations become somewhat arbitrary when affixed to contiguous elements in the dispute, where structure and process merge. Are the choice of a forum and the definition of the claim asserted two variables which can meaningfully be correlated, or a single datum measurable in two ways? This is, of course, an empirical question which is not answered by calling one structural and the other processual.

Still, the categories may help us to evaluate alternative strategies for inquiry. As the variables approach each other, correlations between them become more likely, but also more commonplace; moreover, an asserted correlation may often turn out to be simply the discovery of identity. Choosing variables which are more dissimilar reduces the probability of identifying significant relationships; but any such finding will be less obvious, and thus a more substantial contribution to our knowledge, if also less precise and more subject to exceptions. Because there is no accepted criterion for deciding between these alternatives, I will consider variables falling everywhere along the spectrum from structure to process, trying to make explicit just how separate each structural quality is from the process it purports to explain.

2. Generality. Structure tells us the direction in which to look; the next question, therefore, is what structural elements to investigate. I argued earlier that social inquiry should focus upon disputes rather than law because of the greater universality of the former concept: the possibility of finding a referent in a wide variety of societies. The same consideration leads me to reject a structural unit too closely identified with any actual institutional framework for disputing. Structural concepts modelled upon western notions of a court inevitably incorporate idiosyncracies which hinder comparison, for exact counterparts can rarely be found in alien societies. Within our own society, indeed, excessive preoccupation with

the peculiarities of courts has long diverted legal scholars from the numerous non-judicial institutions which deal with the vast majority of disputes. Nor do the structures of other societies offer any better perspective for comparison; there are just as many obstructive singularities in such institutions as the leopard skin chief of the Nuer (Evans-Pritchard, 1940a: 152 ff.), the *tonowi* (rich one) of the Kapauku Papuans (Pospisil, 1958: 79 ff.), the group of *mbatarev* (lineage elders) of the Tiv (Bohannan, 1957: 11 ff.), the *mkutano* (meeting) of the Ndendeuli (Gulliver, 1971: Ch. 5), or the *kuta* (council) of the Lozi (Gluckman, 1955: 9 ff.). When efforts are made to compare such disparate structures, one or the other is usually distorted (van Velsen, 1969). And the attempt to construct a "neutral" concept at a level of complexity sufficient to account for the heterogeneity of actual institutions inevitably founders on objections of incompleteness and arbitrariness, colloquially phrased as: "with us, we do it differently."[110]

IV. CHOICE OF AN EXPLANATORY CONCEPT: THE ROLE OF THE INTERVENER

A. The Concept of Role

Many of these problems diminish or disappear if, for law, we substitute dispute and consider the structural components of *that* process rather than the social architecture of particular court-like institutions. My definition of a dispute as "the assertion of conflicting claims by two or more individuals" presupposes a minimum of two structural units: a person asserting a claim and another asserting a conflicting claim. These units are conveniently described in terms of the concept of role. Among the numerous definitions which sociologists have assigned to that concept,[111] many agree in conjoining characteristics of the person occupying the role with normative expectations about the behavior in which he will engage (Biddle and Thomas, 1966: 29-30). The role of participant is thus itself a composite of structure and process, nicely expressing the relativity of those two perspectives upon behavior, which I discussed above.

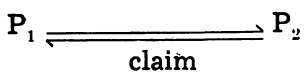
1. Description and prescription. Nevertheless, there are numerous ambiguities latent in the concept of role, two of which I must clarify at the outset. Behavior may be classified in many ways: I will do so in terms of process, and speak of participation in the dispute process. Roles will be further par-

titioned by function within that process, *e.g.*, asserting a claim, or listening to an assertion. More critical for the present study is the possibility of confusion between description and prescription. The concept of role can refer either to observable characteristics of person or behavior, or to social prescriptions concerning those characteristics. This ambiguity equally afflicts my definition of the dispute process, which may be studied in terms of either the actions of participants or the prescriptions for action. These elements diverge in all societies, but the schism is especially marked in colonial and post-colonial situations for a number of reasons: the radical transformation of behavioral patterns under the impact of changed social, economic and political conditions; the introduction or intensification of normative pluralism resulting from superimposition upon indigenous norms of alternatives promoted by the colonial administration, the missionary churches, and the settler population; and the incorporation of some of these alien norms into the legal system. Furthermore, because disputes represent a fundamental problem for social order, and therefore occupy such a central position in all legal systems, they are commonly the subject of extensive, explicit, official prescriptions concerning both structure and process. But although these dual perspectives of description and prescription are frequently noted, interest in their interrelationship has been directed almost exclusively towards ascertaining the conditions under which prescription is followed by action. Thus writers have asked: when is a law effective, and when nullified; what are the prerequisites for the penetration of a legal system, and what defects will relegate that system to mere formalism? (*See, e.g.,* materials contained in Friedman and Macaulay, 1969: Ch. 3.) One reason we have progressed so little beyond the platitudinous observation of ineffectiveness may be our failure to investigate other patterns of rule and act. Prescription which does not produce the result prescribed may yet lead to other actions or prescriptions: rent control legislation passed during a housing shortage is not "ineffective," even though rents continue to rise, if a landlord alters his behavior, a tenant initiates legal action, a judge decides a case differently, or any person invokes the norm proclaimed by the statute (Ball, 1960). Alternatively, the norm may be cited as precedent — good or bad — for an analogous norm, in other attempts to regulate the economy.[112] Action may lead to action (*e.g.*, increasing the salaries of judges may diminish the taking of bribes)[113] or to prescription (*e.g.*,

a judge chosen from outside the community he serves may be readier to depart from its norms in passing judgment).[114] Having learned not to expect a one-to-one correlation of these elements, it seems reasonable to look instead for a more complex relationship.[115] In what follows, I will consider the interaction among the *actual structure of disputes, e.g.,* the presence of a third party; *prescriptions about structure, e.g.,* that there should be a separation between administrative and judicial functions; *prescriptions concerning process, e.g.,* that evidence should only be received during the formal hearing of a dispute; and the *actual process, e.g.,* that the intervener in fact brings to bear considerable prior knowledge of the dispute. This should not lead to misunderstanding if we are careful to specify whether we are discussing description or prescription.[116]

2. The elementary structure of a dispute: the role of disputant. The field of inquiry demarcated by the criteria chosen thus far is still much too large for a single study. I can best explain the additional limitations I have adopted by means of a diagram of the dispute process. The simplest structure, in terms of the number of elements, is one in which each party performs the role of audience for the claims of the other.

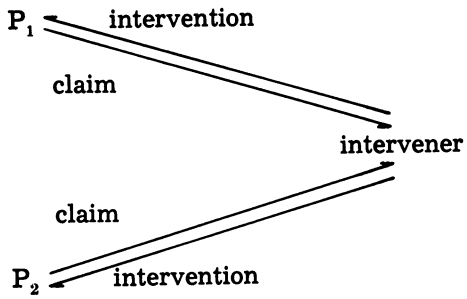
FIGURE 1



Here the investigator is effectively limited to studying the roles of the disputants, and their relation to each other. Even in the presence of a distinct audience these are obviously important facts, and a number of writers have profitably examined them. Gluckman has emphasized the way in which African social structure produces relationships between disputants different in kind from those typical of European societies, and the influence this has upon the dispute process (1965b: 5). Evans-Pritchard, in his classic study of the Nuer, demonstrated that the structural distance between particular disputants significantly affected the evolution of their dispute (1940a: 155; *see also* Colson, 1953; Middleton, 1960; Nadel, 1942: Ch. 10; Winans, 1962: Ch. 6; Gulliver, 1963: Ch. 10; Collier, 1973). More recently, Donald Black has shown the applicability of this hypothesis to the decision by urban Americans to invoke police intervention in their private quarrels (1971). And Phillip Gulliver has explored the unique historical relationship between disputants as an aid to understanding the dispute process (1969b: 60).

3. A more complex dispute structure: the role of intervener. Although this very fruitful approach should certainly be pursued further, I will not do so here.[117] Instead, I will examine a special instance of the dispute process, which can be diagrammed as follows:

FIGURE 2



The additional characteristics which define this situation are: an audience for the claims, other than the parties themselves, who hears their claims, and who intervenes in the dispute in some manner.[118] These limitations represent a somewhat arbitrary circumscription of a broader field for purposes of the present inquiry; I do not claim to have defined a significant type of dispute, much less one which is distinctively judicial. Nevertheless, the structure thus delimited seems to me worthy of analysis: disputants commonly do bring their claims to another person, and his response is rarely entirely passive.[119] Within this dispute structure, I will concentrate upon the role of "intervener in the dispute." I have deliberately adopted that ugly neologism because it is free of the connotations which attach to such alternatives as judge, mediator, or dispute settler; where those additional meanings are appropriate, I will revert to the more common terminology. My choice of the role of intervener was influenced by additional considerations which should be made explicit. Because so many disputes involve such a role, it offers a common denominator for comparison between governmental courts and unofficial dispute institutions. The intervener is, moreover, an appropriate fulcrum for those instrumentally interested in social change; since the role is played by a limited set of persons under circumstances of relative publicity, it is more readily controlled than are the roles of disputant or other participant in the dispute.[120] Finally, the historical evolution of the role offers a fertile source of empirical data since many developing countries, and especially Kenya, recognized its mutability as well as its focal position in

the legal process, and devoted considerable energy to transforming the indigenous intervener into a semblance of the European judge.[121]

B. Parameters for the Role of Intervener

Just as the minimal definition assigned to the dispute process required us to develop variables by which to describe its protean forms, so we must select parameters with which to analyze the role of intervener. Again I will review the literature, though more selectively, for suggestions of structural variables which may help to explain the dispute process.

1. Authority. As we saw in the distinctions drawn above between legal and political process, authority is often isolated as a critical causal factor. Fallers has argued: "there appears to be a quite clear correlation between the differentiation of the bench, in terms of authority, and the legalism of the proceedings . . ." (1969: 329). Without inquiring here just what Fallers means by legalism, it is easily recognizable as a processual variable which he relates to the structural element of "respect and authority" (1969: 328). Although the latter notion is never explicitly defined, its content is suggested by Fallers' comparison of several African legal systems, arranged in order of increasing legalism. Among the Arusha, those persons who intervened in a dispute possessed influence by reason of their personal qualities alone, but lacked institutionalized authority. The only other pressure upon the disputants was dispersed among the totality of participants and thus could only be effective where there was a clear consensus. Indigenous Tiv leaders possessed political authority by virtue of their positions at the apices of the segmentary lineage system; the colonial government conferred additional judicial responsibilities upon a chosen few by making them civil servant chiefs. Members of the Lozi *kuta* also combined adjudication with political and administrative tasks, but all these powers were derived from the traditional polity and merely recognized by European authorities. Soga judges, who otherwise resembled their Lozi counterparts, were barred from political activity under colonial rule. It is possible to isolate several variables of authority by means of these contrasts: influence/power; authority acquired by an individual/authority attached to an office; group authority/individual authority; authority endogenous to a society/authority imposed from outside; authority limited to disputes/authority exerted over a broad range of activity.

Pospisil also endows the term with a multiplicity of meanings. He notes that the authority of an individual, defined as the extent to which others follow his decisions (1958: 260-61),[122] varies in numerous ways, of which he singles out formality and absoluteness.[123] Authority is formal rather than informal if its exercise is circumscribed by norms and surrounded by ceremony and publicity. Authority is limited rather than absolute if it is shared with others, controlled by society, and if sanctions are imposed when its limits are exceeded. These analyses are a fertile source of ideas. But they should also teach us the folly of trying to subsume under the single concept of authority what is in fact a composite of rather heterogeneous qualities characterizing the structure of a dispute; clarity would be advanced by using distinct terms for the different variables involved.

2. Training. Weber followed a different tack entirely, perhaps because he was a lawyer reflecting upon legal systems which all seemed relatively authoritative, rather than an anthropologist studying those of Africa or Oceania. He took the extreme position that the nature of legal norms and the manner in which they are employed are primarily determined by the training required of legal specialists.

> [A] body of law can be "rationalized" in various ways and by no means necessarily in the direction of the development of its "juristic" qualities. The direction in which these formal qualities develop is, however, conditioned directly by "intrajuristic" conditions: the particular character of the individuals who are in a position to influence "professionally" the ways in which the law is shaped. Only indirectly is this development influenced, however, by general economic and social conditions. The prevailing type of legal education, *i.e.*, the mode of training of the practitioners of the law, has been more important than any other factor (1954: 97).

The significance of training may best be apprehended in situations where it influences the behavior of the intervener regardless of the amount of authority he possesses. Weber's own theory was undoubtedly affected by the extraordinary diffusion of "legalistic" thought among Continental legal scholars of the nineteenth century, who were wholly isolated from the direct exercise of decisional powers (Rheinstein, 1954: xliii ff.). The hypothesis gains further support from a contemporary example — the behavior of persons trained in another discipline, who are then elevated to a position of legal authority. The decision in *M'Naghten's Case* in 1843 required that the insanity of an accused, when raised as a defense in a criminal prosecution,

be determined by a typically dichotomous legal rule: that the accused did, or did not, know the nature and quality of his act; that he did, or did not, know that it was wrong. With the development of psychiatric knowledge during the past century and its gradual acceptance by the criminal law, psychiatrists have been asked for opinions about the insanity of an accused with increasing frequency, and these opinions have been accorded ever greater respect. The conflict between the psychiatric mode of assessment — employing a wide range of vaguely defined, highly abstract, partially inconsistent categories — and the legal rule became so acute that a choice between them was inevitable. But instead of judges rejecting psychiatric advice as incompatible with legal reasoning, psychiatrists had acquired such authority within the adjudicative process that their evaluations came to dominate the judicial determination of insanity without significant accommodation to the constraints of that process.[124] Hence psychiatric training better explains the process by which insanity is decided than does the presence of legal authority. However persuasive this illustration, Weber's claim for the centrality of training should not be accepted uncritically. My own observations about Kenya agree with Fallers' report on Uganda that the dispute process can alter significantly without the necessity for any change in the preparation required of the intervener. And there is also a great deal of evidence that training without more fails to alter performance.[125]

3. An alternative structural concept: role differentiation. The drawbacks identified in the use of these two concepts may serve to point us in a more fruitful direction. Each, although influencing process in significant ways, appears to provide only a partial explanation for the end result; each hints at other related concepts, and yet is not broad enough to incorporate them. I propose as an alternative a synthetic concept — role differentiation — an umbrella capable of sheltering a number of discrete variables, including both authority and training.[126] Catholicity inevitably carries a danger of vagueness. But this multifaceted nature is also what gives role differentiation the power to analyze highly disparate societies and yet to recognize complex and subtle differences among them. For this reason, the degree of role differentiation has frequently been made the foundation of overarching social typologies intended to explain all facets of society, including the dispute process.[127]

Durkheim's theory of the division of labor is undoubtedly

the best known example (1947). Durkheim was primarily concerned to show how the division of social roles, consequent upon an increase in "moral density" and population size, inevitably transmuted the cement of social integration from mechanical solidarity based on likeness into organic solidarity based on complementarity and cooperation. The social index he used to chart the progress of this transformation was the ratio of repressive to restitutive law. He found occasion, therefore, to comment briefly on the differentiation of the organs which administered that law.

> While repressive law tends to remain diffuse within society, restitutive law creates organs which are more and more specialized: consular tribunals, councils of arbitration, adminstrative tribunals of every sort. Even in its most general part, that which pertains to civil law, it is exercised only through particular functionaries: magistrates, lawyers, etc., who have become apt in this role because of very special training (1947: 113).

This theory of differentiation as a universal of social evolution of course had its predecessors (*e.g.*, H. Spencer, 1897-98), and has recently experienced a revival.[128] Aidan Southall has profitably applied the concept to study change in political roles in Africa, a subject closely related to our present concern (1965: 121, 125). And Richard Schwartz has stressed the differentiation of specialized roles for social control as a critical step in legal evolution (1954: 471).[129]

V. A THEORY OF THE DISPUTE PROCESS

I will examine changes in the role differentiation of the intervener as a possible explanation for the characteristics of the dispute process. My starting point is a highly abstract proposition presented by Fallers (1969: 329) as a paraphrase of Weber.

> Functionally differentiated groups tend to develop distinctive subcultures and to pursue "interests" defined by these subcultures, all the while further elaborating and refining ("rationalizing") them.

For the reasons given earlier, I will study the differentiation of the *role* of the intervener in disputes rather than that of the group of such persons; one significant variable, after all, is when and to what degree interveners begin to function as a group rather than as unrelated individuals. In order to clarify the presentation of this theory, I have consistently traced the ways in which increasing differentiation of the role of intervener may influence the way in which he handles disputes,

but I wish to stress that this is not the only possible relationship between these phenomena; structural change may also occur in the direction of lesser differentiation; and change in the dispute process may itself alter the structure of the institution in the direction of either greater or lesser differentiation.

The development of theories about how an institution handles disputes may proceed on many levels, from the most abstract and general to the most concrete and empirical. In this paper I have tried to advance our analytic capability on only a few of these levels. My general theories are largely an adaptation of the ideas of others, as the invocation of Weber and Fallers reveals.[130] I see my principal contribution as being rather to apply those theories to disputes by identifying a set of institutional attributes which can translate highly abstract concepts — such as differentiation on the one hand, and subculture or interest on the other — into variables at or near a level of specificity where they can be operationalized and studied empirically. Because the original stimulus for this exercise was the construction of a framework that would permit me to understand changes in Kenya, many of the variables are induced from unsystematic comparisons among the diverse institutions of that country, traditional and contemporary, indigenous and imposed. I hope to reverse that intellectual operation in future work, using the variables I have identified to compare institutions over time, or in different social units. Here, however, I have postponed that task in order to achieve wider applicability for the framework.[131] I have therefore not indicated the specific institutions in Kenya from which I derived the variables — each is, in fact, a composite of impressions; but I have sought to adapt those variables to account for the spectrum of dispute institutions described in the existing literature.[132]

The derivation of operational variables from general theory is not, of course, the end of the process; they must be combined into hypotheses that can be tested. Translation from the abstract to the concrete necessarily results in an enormous proliferation of variables, as will appear below. Hypotheses linking those variables then take the form:

> *If structural variables a, b, c . . . have values* a_1, b_1, c_1, *. . . then processual variables, A, B, C, . . . will have values* A_1, B_1, C_1 . . . .

This multiplicity of variables can be handled in several ways.

Many may quickly be discarded as irrelevant, poorly conceived, or difficult to operationalize; some may turn out to be substantially identical; others might be combined into more general concepts. If the remaining variables can be quantified, several constituents of structure and process can be related. Where this is not the case, all but one variable must be held constant for any correlation to be meaningful. Absent an experimental situation, that nearly impossible goal can only be approximated by choosing for comparison either two highly similar units or the same unit at slightly different points in time. Even these latter alternatives may not be available: judicial administrators, particularly in the developing nations, appear to have conceived their office as a license to engage in uncontrolled experimentation (Phillips, 1945: 3). Thus a hodgepodge of innovations may have been introduced simultaneously, no unit maintained as a control, and the results either not observed or recorded with insufficient accuracy (*cf.* Campbell, 1969). If the rigorous standards of scientific explanation cannot be met, the best these variables will permit us to achieve is what Merton calls post-factum sociological interpretation — an account of the observed data which makes sense but is not subject to falsification (Merton, 1967d: 147). At the least, this points the way toward plausible hypotheses for further investigation in situations which permit greater control of the other variables.[133] The precise use to which these variables can be put will obviously depend on the factual situation to be analyzed and the data available; accordingly, I have not proceeded any further in the construction of hypotheses.

A. Structural Differentiation

I will begin with the structural dimensions of dispute institutions, and elaborate the ways in which the concept of differentiation may be operationalized. (Structural variables will be numbered S1, S2, etc., to distinguish them from the processual variables, which are numbered P1, P2, etc., and are discussed in Part V.B.2 *infra*.)

1. Specialization. Analyses of the differentiation of a particular role generally stress the element of functional specialization.[134] The specialization of the intervener may be measured in several ways.

S1. Time devoted to performing the role.[135]

S1.1. Absolute: How much time does the role occupant (inter-

vener) devote to the specified function (intervening in disputes)? Performance may vary as the task is repeated.

S1.2. Proportional: What proportion of his time does the intervener devote to this task compared with the proportions he devotes to other tasks? In a society where most people allocate their time fairly equally among a large number of tasks, a slight increase in specialization in one of them may have significant consequences. Where some degree of specialization is common, only something approaching complete specialization may influence performance.

S1.3. Cumulative: For how many years does the role occupant perform that task, even if only sporadically?[136] Again, measures of both the absolute number of years and the proportion of the average life span may be significant.

S2. Role independence.

S2.1. Can the role be performed independently of other roles? To put it the other way round, are there other roles which the intervener is obligated to perform? How many roles are thus combined and what are they?[137] The mother who intervenes in a dispute between her children is obligated to perform a nurturant role as well; the policeman who intervenes in a family squabble must continue to play a law enforcement role;[138] but western judges are largely released from other role obligations.

S2.2. Does performance of the role *preclude* performance of any other roles?[139] which and how many? These are both aspects of one of the most common definitions of differentiation: the division of what was a single role into two roles which are, or can, or must,[140] be performed independently.[141] Prescriptions may be less important than socioeconomic conditions;[142] for instance, the role of judge cannot be disengaged from the role of subsistence farmer until the judge's salary permits him to forego the latter activity.

S3. Number of role occupants. What proportion of the population performs the role of intervener at all? A decline in numbers — absolute and proportional — is one possible consequence of increasing specialization;[143] it is also one prerequisite for the formation of a group of specialists.

S4. Specialization among interveners. Whereas the frame of reference above was intervening in a dispute vis-a-vis other functional roles in society, here it is the internal structure of the dispute institution. The modes of internal specialization

discussed below will have further consequences for the time spent in the sub-role, the independence of the sub-role, and the number of occupants in the sub-role.

S4.1. Is there functional specialization within the dispute process; *i.e.*, is each role assumed by every participant, or are different roles performed by certain individuals? (Biddle and Thomas, 1966: 34) The existence of an intervener distinct from the other participants is already a form of internal functional specialization. Western courts immediately suggest the roles of attorney or prosecutor as instances of further sub-specialization, but the presence of a bailiff or process-server may be equally important.[144]

S4.2. Does the intervener specialize in the kinds of disputes he entertains?[145] We are familiar with the concept of subject matter jurisdiction, which may admit only certain issues or otherwise exclude disputes by reason of the amount in controversy or the nature of the relief claimed.[146]

S4.3. Does the intervener specialize in hearing disputes only after they have been heard elsewhere? Appellate review is the most familiar example, but an intervener may also refuse to act until some other, often non-judicial, process has first been completed.[147]

These variables of specialization are frequently singled out for extensive discussion: they are unquestionably important, they are clearly distinct from process, and they allow of quantitative measurement. Fallers, however, appears to claim more — a causal relationship with respect to the entire culture of the dispute process (1969: 329). This strikes me as a dubious hypothesis. The role of intervener can be differentiated in many other ways; it is certainly possible that some such difference — for instance, an increase in the amount of remuneration — might lead to greater specialization, or to a change in performance without specialization. We clearly know too little at present about the interrelationship between functional specialization and other forms of role differentiation to assert that one is prior or more significant.

2. Differentiation. Nevertheless, we cannot investigate every difference among interveners in disputes. I tentatively suggest two categories of variables, related to those already discussed, which also appear to me to be significant for an understanding of process. The first I will call the social distance of the intervener, his remoteness from the disputants. The sec-

ond is the cultural differentiation of the intervener. In choosing the latter, I have transformed a dependent variable suggested by Fallers into an independent variable which explains the dispute process. Earlier I argued the relativity of the distinction between structural and processual variables. The subculture of the intervener can usefully be seen as a processual quality which develops with functional specialization; but that subculture, regardless of its origins, can also be treated as a structural property of the intervener which is responsible for other characteristics of his behavior in the dispute process. Both social distance and cultural differentiation are likely to be important variables in a developing society where stratification is replacing egalitarianism and traditional homogeneity giving way to cultural pluralism engendered by changes which are, or at least are seen to be, imitations of an alien competing ideology.[148]

As we saw above, specialization in the role of intervener could be measured with respect to two frames of reference: the larger society, and the dispute institution. Thus, the role of intervener may be functionally independent of other roles in the society, *e.g.,* the role of farmer — or of other roles within the dispute institution, *e.g.,* the role of recorder (secretary), or of enforcer (sheriff). Similarly, the social distance and cultural differentiation of the intervener may have meaning from each of these perspectives. With respect to a given social unit, an intervener who must be visited in a far-away capital will be socially more distant than one who travels to the unit to hear the dispute. With respect to the dispute institution itself, an intervener may be socially distanced from the other participants if he is given a distinctive physical location for the hearing, *e.g.,* a raised dias. Because the explanatory variables of role differentiation shade imperceptibly into the processual qualities I seek to explain, I will adopt the strategy proposed earlier of proceeding from the more to the less distinct. Where it is not otherwise clear from the context, I always describe differentiation as increasing.

S5. Physical locus of the intervener.

S5.1. Is the intervener peripatetic or fixed?[149]

S5.2. If peripatetic, is his location chosen to suit the disputants (*e.g.,* at one of their homes),[150] the subject of the dispute (*e.g.,* a contested boundary) (Holleman, 1952: 30) or the intervener (at his home or office)?

S5.3. If fixed, how convenient is it to the disputants, and how convenient to the intervener? This is a function of distance, population density, ease and expense of transportation. The poles might be represented by a judge from the provincial capital who periodically visits each local court on circuit and a judge who remains at the capital and must be visited by all disputants.

S6. Temporal scheduling of hearing by intervener. Variations in scheduling the airing of the dispute before the intervener might be analyzed in much the same way as variations in physical locus.[151]

S7. Physical environment of the dispute institution.[152]

S7.1. External environment. Are the physical surroundings or paraphernalia of the dispute institution distinctive? The distinguishing feature could be a tree under which the participants meet or stools on which they sit, or it could be the ornate courthouse they occupy; it might be significant whether the building is multi-purpose or single-purpose. Does the physical environment segregate the participants in the dispute from others, for instance by enclosing them in a house?[153] Does it force them to associate with strangers, by opening the hearing to a community alien to the disputants?

S7.2. Internal setting. Does the physical environment demarcate the intervener in any way? Does he sit in a circle with the other participants or does he face them; is he raised on a dias?[154]

S8. Community served by the intervener. The larger and more diverse the community, the more differentiated the intervener.[155] Beyond this, the way the community is defined may be important.[156]

S8.1. Are there limits[157] upon the persons who can use the dispute institution (personal jurisdiction)? These may be framed in terms of kinship (actual or fictive), membership in age-groups, religion, ethnicity, etc.[158] If an intervener operates across such categories, how heterogeneous is the population subject to his jurisdiction?

S8.2. Are there geographic boundaries circumscribing those who can use the dispute process (territorial jurisdiction)? How large is that unit? Physical size must be interpreted in the light of population density and ease of communication.[159]

S9. Social isolation of the participants.

S9.1. Some participants (the disputants, their witnesses and

supporters) may be socially isolated from others (casual observers, interveners) and from the community in which the dispute is heard, if the former travel outside their own community for the hearing.[160]

S9.2. The intervener may be isolated from the community in which he sits, and to which the other participants belong (whether that community is defined by kinship, territory, language, or culture) by being posted away from his home, rotated periodically,[161] and prevented from bringing his family with him.[162]

S10. Economics of the dispute institution.

S10.1. Is this institution distinguished from others, in terms of the costs to the participants or the requirement that costs be paid in money rather than in kind or in services?[163]

S10.2. Are there differential economic consequences for the participants in the dispute? Do both disputants pay the fees, or just one? In some cases, all participants may share the costs, including the intervener. Do all participants share equally in consuming the fees, for instance by feasting, or do only some benefit, for instance the intervener?[164] Is this intervener distinguished from others, and from the participants in the dispute, by the enhanced status which accompanies a cash salary in a semi-monetized economy and a high salary in any society? Do other perquisites attend the role, *e.g.*, housing, or a car, trips to the capital, or travel abroad? Does he receive remuneration directly from the disputants, or from another source?[165]

S11. Training for the role of intervener.

S11.1.a. Training may be inherent in the process of socialization experienced by all or a substantial segment of the population — through participation in disputes as well as in other ways.[166]

b. Beyond the acculturation common to society at large, additional educational qualifications may be demanded, which are acquired by only a few. In extreme situations, traditional acculturation may disbar one from the role.[167] If either education itself, or the money necessary to obtain it, is differentially distributed according to socioeconomic class, ethnic group, or religious or cultural background, incumbency in the role of intervener will be similarly restricted.

S11.2. Occupants of the role may receive further training which accentuates these differences.

S12. Authority.[168]

S12.1. Does this dispute institution possess significantly more authority than other social institutions? In the extreme situation, one institution or set of institutions may come to monopolize the authority to require certain acts and to inflict certain punishments,[169] or to alter status.[170]

S12.2. Within the dispute institution, is this authority shared among all the participants, or is it monopolized by the intervener?[171]

S13. Stratification between interveners and others. This concept, of course, is closely identified with social distance and a frequent concomitant of cultural differentiation. It is implied by the preceding five variables[172] and has consequences for the next three. Nevertheless, it may be useful to regroup these indices and ask explicitly whether the interveners come from a higher social stratum than the disputants, and if so, how much higher. Strata may be significant in terms of the economic resources they possess, the political authority they wield, or the prestige they receive. They may be distinguished from the rest of society by such marks as ethnicity, religion, sex, culture, age, etc.[173]

S14. Development of group cohesiveness among interveners. Do the interveners function in isolation from each other, or have they begun to cohere into a group with a distinct subculture? Group cohesiveness may be fostered by:

S14.1. Similar, distinctive social or cultural background (*i.e.*, stratification);

S14.2. Receiving apprenticeship or education under the same conditions, or as a group;[174]

S14.3. Long service in the role;

S14.4. Contact among role occupants as part of their role, in the course of business or by periodic meetings;[175]

S14.5. Communication among role occupants;[176]

S14.6. Exclusion of non-role occupants from the group;

S14.7. Internal organization of the group;

S14.8. Common political or economic interests.[177]

S15. Physical appearance of the participants.

S15.1. Do the participants in the dispute assume a different dress from their ordinary attire? We are accustomed to a certain formality of dress in western courtrooms.[178]

S15.2. Is the intervener so distinguished from other partici-

pants? The mark might be a mask (Harley, 1950), the staff or blanket of the African elder (Kenyatta, 1953: 201), or the wig and gown of the English judge, widely copied in colonial Africa.[179]

S16. Behavior of participants.[180]

S16.1 Do the participants behave in a characteristic manner during the dispute?[181] They may be more solemn, or riotous;[182] gestures may be exaggerated or subdued;[183] speech may be more or less eloquent, or employ a different vocabulary[184] or language.

S16.2. Does behavior during the dispute differentiate the intervener? He may himself act differently; for instance, he may be privileged to display emotion although others are not,[185] or compelled to hold aloof while the other participants socialize.[186] The others, too, may isolate him by their respectful demeanor or mode of address;[187] they may even be precluded from communicating with him at all.[188] The intervener may speak a different language from that of the other participants, or the same language with greater eloquence.[189]

3. Bureaucratization. The concept of differentiation, as applied to the dispute institution or to the role of intervener, does not entirely satisfy me. It can refer to any difference between or within institutions; as the miscellany of variables just discussed reveals, this amorphousness is not altogether eliminated by restricting our view to those differences I label social distance and subcultural variation. Is there another concept which will further select among differences and group them in some way? One possibility is suggested by Weber's theory of bureaucracy: the dispute process may change as the structure of the dispute, especially the role of intervener, becomes increasingly bureaucratized (Gerth and Mills, 1946: Ch. 8).[190] Many of the variables already discussed may be encompassed within the concept of bureaucracy. Indeed, functional specialization, social distance, subcultural differentiation, stratification, and bureaucratization all overlap considerably. Nevertheless, it will be helpful to discuss separately certain additional characteristics of the bureaucratic role.

S17. Criteria for selecting intervener.

S17.1. Are the relevant qualities ascribed (*e.g.*, age, sex, kinship, membership in some other group) or achieved (*e.g.*, experience, education)?[191]

S17.2. If ascribed, how large a proportion of the population possesses that quality? How many such qualities are considered in selection?

S17.3. If achieved, are they qualities which refer to the whole person (manliness, honesty, leadership) or are they narrowly defined technical skills of particular relevance for the performance of that function (literacy, esoteric knowledge)?

S18. Method of choosing the intervener.

S18.1. Does this occur by ascription, self-selection, election, or some combination of these, or is the intervener appointed by a superior or by his peers? This variable is obviously closely related to the preceding one.

S18.2. How is the intervener removed — by impeachment or recall, or by his superior or peers?[192]

S18.3. Is the intervener chosen anew to perform that role in each individual dispute,[193] or does he function in every case, or in a selection of cases chosen by some mechanical principle?[194]

S19. Training. Once the intervener is appointed on the basis of his achievements, training may emerge as an important prerequisite. Any training would differentiate the intervener from other roles which do not receive it; but with bureaucratization, the nature of the educational experience changes.

S19.1. Technical competence is emphasized rather than qualities of the whole man, such as sportsmanship or humanistic knowledge.

S19.2. This competence is acquired by formal training rather than apprenticeship.

S19.3. It is demonstrated by examination rather than by the accumulation of experience measured chronologically.

S20. Remuneration for performing the role.

S20.1. Is the amount variable or fixed?

S20.2. Is it based on the services rendered (in terms of quantity or quality),[195] or on rank within the bureaucratic hierarchy?[196]

S20.3. Is it paid out of the proceeds of the particular dispute (*i.e.*, the contributions of disputants and other participants), or from some other source, *e.g.*, a fund drawn from many disputants, many interveners, or even from other institutions?

S21. Occupation of the role as a career.

S21.1. Preparation becomes long, arduous and expensive; it must be commenced early in life; it is also constricting — transfer to another career is difficult or impossible.[197]

S21.2. The occupant progresses up a graduated hierarchy of ranks.

S21.3. Tenure in the role is relatively secure.[198]

S22. Social status conferred by role. Occupancy carries with it privileged social status, in part a concomitant of economic position but also following from the educational prerequisites of the role. This status may come to be associated with the role itself, independent of such other characteristics. In the extreme case, it may be guaranteed by express rule, enforced by sanctions. This complements my earlier suggestion that one way to differentiate the role was to draw occupants from a particular stratum of society; here I argue that bureaucratization of the role further differentiates that stratum.

S23. The role is defined by explicit prescriptions rather than implicit custom. These change from oral to written, vague to precise, partial and incomplete to exhaustive, few to numerous, hodge-podge to organized;[199] thus they become a form of esoteric knowledge possessed only by role occupants. The norms:

S23.1. Demarcate private life from official business, especially with regard to finances;[200]

S23.2. Demand full-time commitment to and regular performance of the role in place of activity which was part-time and erratic;

S23.3. Obligate the occupant to perform the role as a duty where previously he performed it of his own volition;

S23.4. Circumscribe the powers of the intervener;

S23.5. Regulate conduct within the dispute institution.

S24. Enforcement of role expectations. Adherence to these norms is enforced by external rather than wholly internalized sanctions.[201]

S24.1. Interveners act individually rather than collegially, and can be held personally responsible.

S24.2. These actions are recorded in writing in order to preserve them accurately.

S24.3. They are subject to review by a superior.

B. Process

What aspects of the dispute process will respond to changes

in the structure of the institution and the role of the intervener? The earlier review of process forewarned us that it is a highly variable phenomenon. In order to narrow the scope of our inquiry to a manageable set of parameters, I will begin by considering the mechanism by which differentiation affects process. H.L.A. Hart hints at such a connection in his search for "the key to the science of jurisprudence" (1961: 79). He postulates an imaginary society — "a small community closely knit by ties of kinship, common sentiment and belief, and placed in a stable environment"; "the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation" (1961: 89). The structural quality which characterizes this society is clearly its overall homogeneity, and the concomitant low differentiation of the institutional framework for social control and disputing, although these concepts are not made explicit. Hart contrasts this ideal "pre-legal" society with the truly legal world which develops with increasing differentiation of the dispute structure (1961: 91).[202] In the latter, primary rules of obligation are no longer sufficient, by themselves, to guarantee the regularity and predictability of behavior without which social life is impossible. Primary rules become inadequate in three respects, each remedied by a distinct category of secondary rules, which together are responsible for the characteristic process of the differentiated institution. First, uncertainty arises whether the institution will employ all the substantive behavioral rules of the larger society from which it is now differentiated — and only those rules — and whether it will modify them in any way; this dimension of choice is regulated by secondary rules of recognition (1961: 92-93). Second, differentiation of the institution insulates its primary rules from the gradual behavioral changes which constantly occur in the larger society; some new mechanisms are necessary to amend those primary rules, and these are the secondary rules of change (1961: 93-94). Finally, there is the question of how the institution is to regulate its own actions in handling disputes, since the larger society from which it springs contains no norms which speak directly to such novel behavior; secondary rules of adjudication serve this purpose (1961: 94-95). If these three kinds of rules constitute the essence of the more differentiated dispute process, they are an obvious focus for our study. However, where Hart is engaged in jurisprudence, and thus concerned exclusively with

the rules which should govern dispute institutions, I am trying to develop social theory, and therefore am equally interested in both the norms and praxis of those institutions.

1. Generalizations about processual change.

a. Rationalization. Can we generalize about the variation in the mode of choosing, modifying and applying norms in the course of handling disputes, which might follow from these structural changes? I will pursue Weber's suggestions concerning the consequences of increasing functional specialization, role differentiation, and bureaucratization. Fallers' paraphrase of Weber refers to the growth of a distinctive subculture and of certain interests. The subculture develops in the direction of greater rationalization, which Fallers interprets in the legal context as meaning greater "legalism" — an "ability of judges to deal with moral issues 'legalistically' — that is, to deal with 'artificially' narrow moral issues . . ." (1969: 17).

> A legal culture cuts into this complex "objective" moral reality in a highly "arbitrary" way. It is characteristic of the legal mode of social control that rules are used to arrive at simple dichotomous moral decisions - "yes" or "no" decisions that in other contexts would seem intolerably over-simplified morally. The legal process does not ask: What are all the rights and wrongs of this situation - on both sides? Rather, it asks: Is John Doe guilty as charged? (1969: 13).

Rationalization in law is thus identified with arbitrariness and artificiality, narrowness and over-simplification, and dichotomous decision-making. These qualities do appear to share a common core, but they are rather vague, and their connotation strongly pejorative; it is especially difficult to know what content to attribute to terms like "arbitrary" or "artificial."

Weber's own use of the concept of rationality as applied to law was very different, and considerably broader. Without exploring all the ramifications of this extremely complex idea,[203] it is sufficient here to observe that it can refer to logical or aesthetic form. Although all dispute processes will display some patterning of behavior,[204] and hence some kind of rationalization, the mode of rationalization will depend on the structure of the dispute institution. My expectation is that, as structural differentiation increases, the logic, the aesthetic of behavior within the dispute process will become more autonomous, internally coherent, and independent of patterns in the larger society.[205] One example of such a transformation might be the evolution Maine claimed to see in the outcomes of disputes,

from the isolated, unconnected *themistes* of early Roman law to the highly organized body of opinions in the later period (1950: Ch. 1). Once this coherence is achieved, Hart's secondary rules of change are essential to preserve that coherence in an unstable environment.

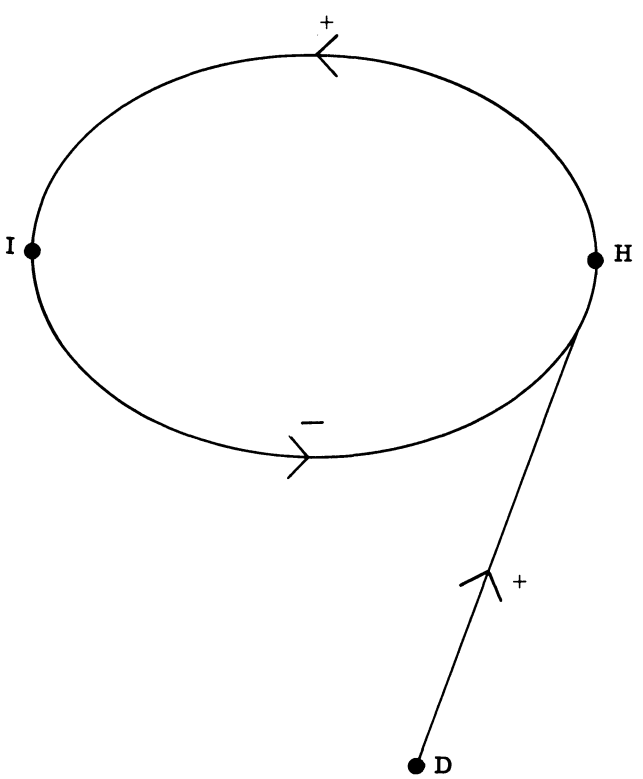
Process can become internally coherent only at the cost of turning away from the outside world. The institution develops a carapace, impermeable to external information, prescription, or influence.[206] Behavior grows introverted, preoccupied with its own norms and activities. The problems it handles are the problems defined by the institution, not the society;[207] the solutions it generates are solutions for the institution, not the society.[208] If carried to an extreme, the dispute process becomes wholly involuted, hermetical, the exclusive domain of specialists, and comprehensible to them alone.

b. Functional adaptation. We can also view structural differentiation in functional terms as redefining the environment within which the dispute process must be adaptive. Where the dispute institution is completely undifferentiated — where it is simply the whole society viewed from a particular perspective — it must respond to the demands of the society itself. But as the dispute institution is progressively differentiated, the constraints of the larger society are relaxed, allowing behavior within the institution to become internally adaptive, to develop in such a way that its consequences contribute to the smooth operation of the institution.

Functional interpretations of this sort have been repeatedly attacked on epistemological grounds (*see, e.g.,* Hempel, 1968; Rudner, 1966: Ch. 5), and the telic imagery in the preceding paragraph clearly creates serious theoretical difficulties. But many contemporary writers have insisted that these pitfalls can be avoided (*e.g.,* Rappaport, 1968). The final answers to these fundamental questions are not a prerequisite to our use of functional theory as a heuristic device for generating hypotheses which can then be tested empirically without reference to their theoretical origin. I will try to demonstrate this by constructing a model for the functional analysis of dispute institutions adapted from Stinchcombe (1968: 80-101). Let me begin by conceptualizing a society in which the dispute institution is wholly undifferentiated (Hart's pre-legal situation). In this society, as in every other, daily interaction is constantly generating new disputes and continuing, or elaborating, old

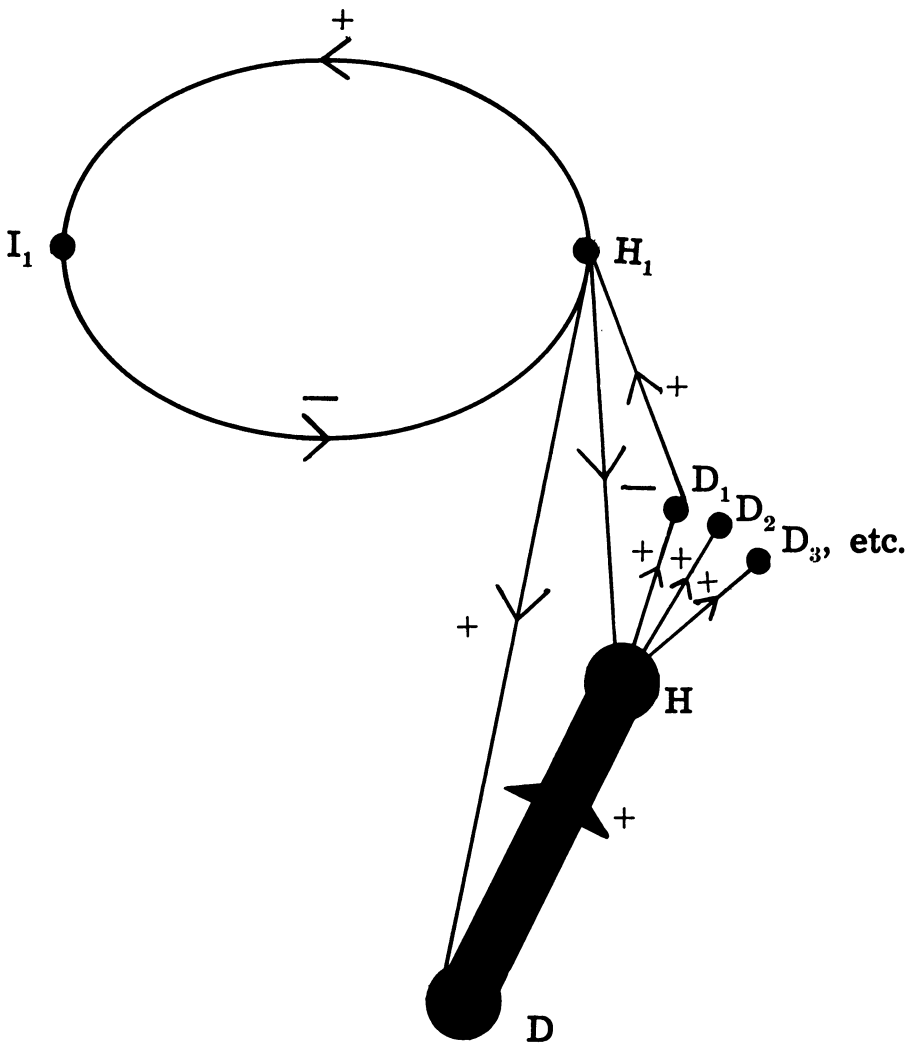
ones; I will call this category of disputatious behavior "D". At any given point in time this disputing has an aggregate level which I will call "H" because I believe it may be represented by a homeostatic variable.[209] By this I mean that the level tends to be relatively stable empirically; although there is a force (D) which constantly tends to disturb the level, H functions like a thermostat which, when disturbed, stimulates other activity which aids in restoring the pre-existing level of disputing.[210] This other activity is, of course, the behavior of the dispute institution (I). We can illustrate this sequence by a consciously simplistic anecdote: two individuals assert inconsistent claims to land (D), thereby increasing the level of disputing in the society (H+1); the entire society (I) meets to discuss those claims, and reaches an accommodation such that the parties cease to assert the inconsistent claims (H). This can be diagrammed as follows:

FIGURE 3: FUNCTIONAL ANALYSIS OF WHOLLY UNDIFFERENTIATED DISPUTE INSTITUTION



No actual society responds to disputes as a single, undifferentiated whole. Instead it has a set of dispute institutions (I_1, I_2, I_3 . . .) each of which is more or less differentiated from the society. Now when a new or revived controversy disturbs the level of disputing in the society, some of the disputes (D_1) are channeled to a particular differentiated dispute institution (I_1), disturbing the level of disputing within that institution (H_1). The increase in H_1 elicits a response within I_1 which tends to restore H_1 to its former level. But this response of the differentiated dispute institution can have either, or both, of two very different consequences for the larger society: it may reduce H; but it may not, and may instead contribute to disputatious behavior in the society (D). To illustrate again by a variation upon the anecdote above: two individuals assert inconsistent claims to land (D), thereby increasing the level of disputing in the society ($H+1$); this case (D_1) then goes to an official court (I_1), increasing the level of disputing within the court (H_1+1). The court may respond with an accommodation such that the parties cease to assert the inconsistent claims both inside the institution (H_1) and in the society at large (H). But the court may also respond that it has no jurisdiction over land disputes, and dismiss the case. This restores the original level of disputing within the court (H_1), but it may not affect the level of disputing within the society ($H+1$), and may actually contribute to further disputatious behavior (D). The relationship between the differentiated institution and the society can be diagrammed as in Figure 4.

FIGURE 4: FUNCTIONAL ANALYSIS OF DIFFERENTIATED DISPUTE INSTITUTION



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is not properly within the category D_1, that the institution therefore lacks jurisdiction, and thus decide to dismiss the case. I_1 may conclude that one or more of the parties or issues is not properly before it, and decline to address that party or issue. I_1 may refuse to hear proffered evidence. And, I_1 may deny a remedy requested. Each of these behaviors is comprehensible as a response to the disturbance in the level of disputing within the institution; this response serves to restore that level by deciding the dispute, or the issues, by replying to the parties, or dealing with the evidence, or by answering a request for relief. The response *may* also reduce the level of disputing in the larger society; but as the institution is progressively differentiated, that coincidence of result becomes less likely. Instead, the internal functional integration of the institution creates patterns of behavior which leave the level of disputing in the larger society (H+1) untouched, or even add to that disputing. Thus the differentiated dispute institution may become a complete inversion of its undifferentiated counterpart, aggravating disputes where the latter had pacified them.

c. Bureaucratization. Weber associates certain characteristics of process with a bureaucratic structure. These can be divided into two general categories, efficiency and certainty.[211] The efficiency of a dispute institution can be measured in terms of the time, expense, or effort[212] expended in disposing of a dispute. It is important to note that only costs internal to the institution are conserved — the time, etc., of the intervener and other specialists; the process does not minimize the expenses of disputants or other unofficial participants.[213] Indeed, dispute institutions may be found which represent the logical conclusion of this tendency, producing an operational surplus after the costs of the specialists have been defrayed out of the contributions of the other participants.[214] One source of efficiency is an emphasis on finality: economy is obviously advanced by refusing to entertain a dispute beyond a certain point.[215] Hart, it is interesting to observe, also claims the virtue of efficiency for his secondary rules of adjudication (1961: 94-95).

The other consequence of bureaucratization — certainty — is a commonplace in discussions of modern legal systems.[216] Weber asserts that bureaucratic processes raise to an optimum level such qualities as "precision . . . unambiguity, knowledge of files, continuity . . . strict subordination" and predictability (Gerth and Mills, 1946: 206-07). Again finality makes a significant contribution, insuring that a decision, once announced,

will not be altered. And here, too, there is a striking agreement with Hart's assertion that secondary rules of recognition dispel the uncertainty as to which social norms will be restated by the dispute process, and in what way they will be modified (1961: 92-93).

2. Operational indices of processual change. These general qualities — rationalization, logical or aesthetic coherence, functional adaptation, introversion or impermeability, efficiency, finality, and certainty—can be reduced to more precise measurements in numerous ways. The following is a tentative and very partial list. I have not stated explicitly how each specific measurement illustrates one of the general qualities because I believe the interconnection will be reasonably obvious. Often, moreover, a single operation lends weight to several of the abstractions, which overlap to a large extent; it may even be that some of the qualities are inseparable—different ways of stating the same thing. I have tried, whenever possible, to express each variable as a quality which increases with specialization, differentiation and bureaucratization. Where this is intolerably awkward I have instead defined the polar extremes, pole "a" being the process associated with an undifferentiated, non-bureaucratic structure, and "b" being its opposite; there is, of course, a continuum between them. For clarity of exposition I have organized this discussion of the dispute into stages which are roughly chronological. (Processual variables are numbered P1, P2, etc., to distinguish them from the structural variables, numbered S1, S2, etc., which were discussed in Part V.A. *supra.*)

a. Initiative and control in the dispute.

P1. Where the intervener was proactive, he becomes reactive.[217]

a. The intervener actively seeks out conflict in the society and channels it into a dispute; he collects information about disputes and intervenes on his own initiative.[218]

b. The burden rests on the disputants to transform conflict into dispute and to present that dispute to the intervener.[219]

This contrast between activity and passivity characterizes the behavior of the intervener throughout the dispute process—in the definition of issues, mobilization of evidence, etc. — as will be seen below.[220]

P2. At the same time, however, a good deal of control over the course of the dispute shifts from the disputants to the inter-

vener — control not only over outcome, but over every step of the process.[221]

P3. The conjunction of these two factors determines the peculiar attitude of the intervener towards a settlement arrived at by the parties.

P3.1. Because the intervener seeks control over behavior within the dispute institution, neither one party alone, nor the two parties in concert,[222] can withdraw the dispute from the institution without his approval.

P3.2. But because the intervener seeks to minimize his activity, he encourages parties to reach a settlement between themselves.

P3.3. The net result is a variety of devices designed to facilitate settlement between the parties after they have invoked the dispute institution,[223] while allowing the intervener a right to disapprove the settlement: such devices as plea bargaining, and pre-trial conference. With increasing differentiation, this right becomes a mere formality, and is exercised less often.[224]

b. Concept of wrong.

P4. The universe of substantive norms involved in the dispute process diverges from that employed by the society at large; law is distinguished from other norms — habit, custom, morality.[225]

P4.1. Not all social norms are recognized in the dispute process and the fraction so recognized continuously decreases.[226] At the same time, the process increasingly develops norms peculiar to itself; as a consequence the total corpus of norms expands. These two tendencies combine to produce an esoteric body of norms, known only to interveners and other specialists.

P.4.2. The content of each norm, which had been flexible and adaptable to the peculiarities of the case, becomes fixed in the form of a general rule applicable to all "like" cases. The number of cases which are seen to be alike, and thus governed by the same norm, increases.[227]

P4.3. Norms which were oral and vague are defined in writing with great precision.[228] When the undifferentiated institution must handle precise, written norms, it treats them as custom, without much attention to their exact wording,[229] the differentiated institution, on its own, rephrases custom in the language of statutes.[230] The criminal statute or administrative regulation displaces the proverb as archetype for all norms. This not only furthers certainty and ease of adjudication, but relieves the

intervener of having to exercise a discretion which might lead to a reprimand.[231]

P4.4. Uncertainty whether a given norm will be recognized also decreases as the body of norms is more clearly circumscribed.[232]

P4.5. The body of norms is elaborated so that it becomes exhaustive, and organized according to some logical schema. The codification or restatement becomes the paradigm of a normative system.[233]

P5. The appropriate concepts of wrong had emerged piecemeal from a discussion of the dispute among the participants, to which all had contributed. Now the burden is placed on each party to invoke the norms on which he relies, offensively or defensively, at the outset of the dispute. An error in the selection of a norm will have increasingly serious consequences — ranging from additional expense up to and including loss of the dispute — and rectification of error becomes more difficult, even impossible.[234]

c. Definition of issues.

P6. Because the normative universe has changed, certain of the issues on which the outcome depends will also be unique to the institution. It has been said, for instance, that the concept of *mens rea* only appears in more differentiated systems (*e.g.*, Driberg, 1934: 235; Hopkins, 1962: 2-3).

P7. The number of substantive issues entertained by the intervener declines;[235] only those issues essential to a decision are treated (*see generally* Bickel, 1962).

P8. Individual issues are defined more narrowly and precisely.[236] The criminal charge enumerating a clearly circumscribed list of elements, and the refinements of civil pleading, are the models (*cf.* Pound, 1928).

P9. Multiple issues are joined only if the proponent can demonstrate a close relationship between them.

P10. The intervener responds only to issues placed before him by the parties, even if those are superficial; he will not, sua sponte, seek to uncover more fundamental issues which may underlie the dispute.[237]

P11. Procedural issues tend to replace substantive; interest shifts from the outside world to the dispute institution itself.[238]

P12. The range of issues is defined early in the dispute process and cannot easily be expanded thereafter, nor can the parties contract the issues unilaterally.

d. Participation of disputants.

P13. The parties will be limited in number, usually to two. Additional parties will only be allowed to participate if they are closely related to those already involved.[239] Groups cannot dispute; they must identify representatives to act for them.[240]

P14. The disputants no longer play interchangeable roles. The roles of plaintiff and defendant become demarcated, fixed, and clearly defined. A defendant will not be allowed to assert an independent claim and thus reverse those roles.[241]

P15. The definition of who is a proper party to a dispute will change. Persons perceived by society as aggrieved will not be permitted to appear in the dispute.[242] Actions brought in a representative capacity are discouraged; in order to reduce the scope of the dispute, the person who has been injured becomes the sole party in interest.[243] However, representation by a professional, who is an official or quasi-official member of the institution, increases the control of the institution over the dispute and is therefore encouraged.[244] The most striking instance, of course, is the development of a notion of crime out of a notion of civil wrong:[245] the differentiation of a single injury into two distinct injuries, one to the victim, the other to a larger collectivity, each of which may be redressed in different ways. At the extreme, the institution creates parties who have no existence outside it.[246]

e. Temporal limitation.

P16. Delay by a disputant in presenting his grievance to the dispute institution comes to affect the outcome regardless of whether or not the delay has had consequences outside the institution, *e.g.*, injurious reliance by an adversary or by another person.

P17. What constitutes a significant time period is calculated in terms of simple chronology rather than determined by the course of events.

P18. The period becomes shorter.

P19. The period loses its flexibility and becomes fixed.

P20. Delay is no longer merely a datum, from which inferences

may be drawn about the unavailability of evidence, or the invalidity of the claim (A.L. Epstein, 1954: 14) — and which therefore may be possible to explain away — but becomes an ultimate fact determining outcome.

P21. The limitation may bar uncontroverted as well as controverted claims.

a. The intervener will refuse to consider stale claims only when liability itself is in issue.

b. The intervener will also reject claims in which liability is admitted and the only issues are the magnitude of the acknowledged obligation and the extent to which it may have been fulfilled.

P22. Even if a disputant presents a timely claim to the institution, the intervener may later dismiss it if the disputant does not press the claim with sufficient energy, whether or not his adversary raises an objection of dilatoriness.[247]

f. Attendance by the disputants.

P23. a. The intervener will not proceed in the absence of any of the disputants.

b. The intervener will still try to reach the merits of the dispute although a party is missing (A.L. Epstein, 1952: 7); as the structure is further differentiated he may ultimately decide against the absent party by reason of his absence alone,[248] or have him brought to the forum by force.[249]

P24. The converse of proposition P23 is also true.

a. The intervener will always hear a dispute if the disputants are present.

b. The intervener may not act despite their presence, for reasons of his own (the press of business, the absence of key witnesses, etc.).

P25. In order to set aside an *ex parte* judgment, a disputant will have to expend more time and money, and substantiate one among a limited number of weighty excuses.[250]

g. Reception of evidence.

P26. a. Evidence may affect a dispute without being formally admitted, *i.e.*, the intervener may act upon prior knowledge, or on information he obtains outside his role as intervener in the dispute institution. Indeed, the less differentiated the institution, the more information the intervener is likely to have.

b. The intervener may only receive evidence while occupying his role within the dispute institution, and may not consider evidence obtained in other capacities.[251] This is insured by increasingly formal constraints upon the reception of evidence: by noting the names of witnesses, recording the content of testimony, and reading it back to them for ratification; by prohibiting one party from addressing the intervener in the absence of the other; by insuring that the intervener is ignorant of the dispute at the inception of the hearing and thereafter controlling the information he receives.[252]

P27. The standard of what is relevant to resolve a controverted issue becomes increasingly narrow.[253] The intervener is less receptive to circumstantial evidence which can only be connected to the point at issue by a lengthy set of inferences;[254] he prefers eye-witness testimony about the ultimate fact. Where circumstantial evidence is allowed, the chain of reasoning is rigid and divorced from the thought patterns of non-specialists.[255]

P28. The standard of what is admissible also becomes increasingly stringent.

P28.1. Certain evidence, otherwise material and relevant, may be excluded precisely because it offers a foundation for inferences common outside the dispute institution, but which the institution has foreclosed as impermissible,[256] or because it leads to factual conclusions which the institution has rejected as irrelevant.[257]

P28.2. Certain evidence may be excluded upon the rationale that, by doing so, the dispute institution advances other substantive goals.[258]

P29. Certain ultimate facts come to *require* the proof of certain proximate facts; other evidence, no matter how persuasive, is simply insufficient.[259] Thus treason requires two eye-witnesses; homicide, a corpus delicti; and rape, corroboration of the victim's testimony.

P30. The order in which evidence is received grows in importance,[260] to the point where certain evidence will not be heard until other evidence has been presented.

P31. Limits are placed on the quantity of evidence which will be received; repetition is discouraged.

P32. Participation in a dispute before an undifferentiated institution is governed by the same constraints as would influence behavior occurring outside the institution. As the institution is

differentiated, participation is shielded from some of these constraints and subjected to others peculiar to the institution.

P32.1. a. Presenting evidence to the intervener is a voluntary act which a person performs out of self-interest or a sense of loyalty to the party he is supporting; equally, a witness may decline to testify out of a sense of loyalty or for other reasons. Consequently, a party calls witnesses partial to him, and does not call a hostile witness.[261]

b. Presenting evidence becomes a duty owed to the institution; it can and will be compelled.[262] Parties do call hostile witnesses; on the other hand, a witness may be barred from testifying because of his bias in favor of a party (*see, e.g.,* Fisher, 1971: 737).

P32.2. a. Because of the publicity of the proceedings, a witness who testifies before the intervener will suffer the same social consequences as he would had he discussed those issues outside the dispute structure: namely, the diffuse informal sanctions of public opinion.

b. The differentiated institution protects a witness from the ordinary consequences of testifying, by a grant of privilege among other things.[263] Less publicity attends the hearing which may, occasionally, be held *in camera.*[264]

h. Evaluation of evidence.

h.1. Kinds of evidence.

P33. A preference for real evidence[265] is superseded by a preference for testimonial. Instead of objects from the outside world entering the dispute institution or being viewed by the intervener *in situ* (as in land disputes), parties and witnesses tell the intervener about these things.[266]

P34. Written evidence becomes more persuasive than testimony.[267]

P35. There is increasing reliance on expert evidence in place of lay testimony;[268] ultimately, expert testimony may be essential to prove certain issues. Experts frequently become assimilated to the body of officials within the dispute institution.[269]

P36. a. Acts and statements which occur during normal social intercourse outside the dispute institution are accorded greater weight.[270] Testimony before the intervener is discounted by reason of the substantial temptation to perjure oneself in the heat of controversy. For example, in order to prove that *C* is the thief, *B* says to the intervener: "*A* told me yesterday [*i.e.,*

outside the dispute institution] that he saw *C* hide the stolen goods." The intervener will tend to believe that he has criteria, drawn from ordinary social intercourse, by which to evaluate the truth of *A*'s alleged statement; but these criteria do not apply to *B*'s accusation within the dispute institution, about which he will be more dubious.

b. Statements made within the dispute institution acquire greater significance because of the opportunity for the intervener to evaluate them himself. Because the intervener in the above example has heard *B*'s accusation himself, he believes he is able to evaluate its veracity. But he has not heard *A*'s alleged assertion, nor do the standards of the dispute institution govern statements made outside it; therefore he will tend to feel disabled from passing upon the content of that assertion. Ultimately, this disability will lead him to exclude evidence concerning statements made outside the dispute institution when those statements are offered to prove the truth of the matter asserted — as required by the hearsay rule.[271]

h.2. Standard of veracity.

P37. The norm itself changes.

a. The obligation to tell the truth during the hearing of the dispute does not differ significantly from expectations about veracity in other social situations (A.L. Epstein, 1954: 16). The value of truthfulness is only one among a number of competing influences, and may bow before personal loyalty to one disputant or spite towards another, the desire to curry favor or repay a debt.

b. The demand for truthful testimony becomes more explicit and more absolute; falsehood within the dispute institution is transformed from a moral infraction into a crime — perjury.[272]

P38. The means of insuring veracity change.

a. Primary reliance is upon norms of truthfulness, internalized during socialization and later reinforced by diffuse social sanctions. With increasing differentiation, supernatural sanctions may be superimposed, though only infrequently, in important and difficult cases where the evidence is inconclusive; they are invoked by oath or actually inflicted by ordeal, only on the parties themselves. Though they may be administered by the intervener, the outcome is frequently beyond his control[273] and occurs after the formal hearing has concluded and the disputants have passed out of his jurisdiction.

b. The dispute institution develops its own distinctive mechanisms for insuring veracity. Every participant — witnesses as well as parties[274] — takes an oath to tell the truth in every case. Breach of that oath is no longer left to supernatural punishment. Rather, perjury is deterred by the same sanctions which the dispute process imposes for substantive offenses.[275] At first, the intervener punishes perjury as it occurs during the hearing; but as the institution is further differentiated, the issue of perjury becomes a separate dispute, to be heard and disposed of by an independent intervener.

h.3. Means of evaluation.

P39. The burden of proof becomes increasingly rigid.[276]

P39.1. a. Every participant in the dispute, including the intervener, shares an equal obligation to contribute information relevant to the dispute.

b. This obligation is placed wholly on one of the disputants with respect to every material issue.

P39.2. The demands of the burden are more clearly defined.

P39.3. The amount of evidence required to satisfy it is greater.

P39.4. The burden of proof as a statement of probabilities about what occurred:

a. The party arguing the less probable chain of events — *i.e.,* the one more contrary to ordinary expectations — bears the onus of convincing the intervener that his version is correct.

b. The probabilistic origin is progressively forgotten. The party advancing a contention, whether common-sensical or extraordinary, must prove it. Expectations develop within the institution concerning who will advance evidence; these become demands which cannot be satisfied simply by showing that the proponent is favored by probabilities.

P39.5. The burden of proof as a statement of probabilities about who is more likely to have the evidence:

a. Failure to produce evidence which a disputant is believed likely to possess may be the basis for a circumstantial inference that the evidence is unfavorable.

b. Failure can no longer be excused by showing that the disputant lacks the evidence for good reason.[277]

P39.6. The burden of proof is more frequently based on ease of access to the information (P39.5, *supra*)—a consideration

wholly internal to the dispute institution — than on the probability of events in the outside world (P39.4, *supra*).[278]

P39.7. Thus the burden of proof is transformed from a mode of inferential reasoning which interprets the presence or absence of evidence as suggesting certain other facts, into a mechanism for deciding the entire dispute.

P40. When the evidence is inconclusive because wholly absent or equally persuasive either way:

a. The intervener refers the dispute to the supernatural, abandoning control over the outcome (*see, e.g.*, J. Roberts, 1965; Middleton, 1966).

b. The dispute is decided by the burden of proof, a rule internal to the process.

P41. There is a shift in the frame of reference used to evaluate testimony, from a referent external to the dispute institution to an internal referent.

a. Testimony about behavior is compared with commonly held expectations about modal behavior which would occur in similar circumstances in the outside world.[279]

b. Expectations are still used to evaluate testimony, but now they are expectations concerning modal behavior *within* the dispute process:[280] the demeanor of a witness is compared with that of the modal affiant in order to determine veracity. Furthermore, the totality of statements made to the intervener about a given issue is carefully scrutinized for internal consistency. Where testimony presented to the intervener contradicts statements made outside the dispute institution, the former receive greater credence. Ultimately, the intervener may disregard evidence from a disputant or his witness which controverts testimony presented earlier to the same intervener, or even to another within the same system.[281]

P42. When expectations about behavior occurring outside the institution are used to evaluate testimony, those expectations are peculiar to the institution: the inferences are substantively different, and also more rigid.[282]

P43. a. The intervener actively seeks to assess truth and falsity.

b. The intervener is passive. He relies on the disputants to adduce all the evidence, and evaluate their *efforts* (*i.e.*, behavior inside the dispute institution), rather than the evidence itself, using criteria internal to the dispute institution, such as burden of proof, estoppel, and presumptions.

P44. If the intervener determines that certain evidence is false, by any of the methods just discussed, the consequences he imposes are increasingly serious. These develop in the following sequence: the intervener seeks to persuade the party to admit his falsehood and concur in the truth (*see, e.g.,* A.L. Epstein, 1954: 11); the evidence is simply disregarded; an inference is drawn that the witness (and perhaps the party for whom he testifies) is generally untrustworthy, which affects the weight of other evidence;[283] a judgment is expressed about the affiant which, if he is a party, may influence the outcome; sanctions are imposed on the affiant in a separate proceeding (perjury or contempt).

45. One might summarize the changes described in the preceding section (h.3.) in the following abstract formula:

a. Data external to the dispute institution are used to make judgments within it.

b. Data internal to the dispute institutions are used to make judgments outside it.

i. Significance of prior decisions of fact.

P46. As the scope of each dispute narrows, so will the breadth of its impact upon future cases. Thus a dispute between two parties will not affect a third; the resolution of one issue will not influence the outcome of another.

P47. However, the demand for consistency, narrowly construed, will increase, *i.e.,* what happens within the dispute institution becomes more important than what happened outside it.

P47.1. It will be increasingly difficult to persuade the same intervener to reconsider a dispute if the parties and issues are identical.

P47.2. Other interveners within a widening ambit will be similarly disinclined to re-hear the dispute.[284]

j. Application of norms to facts.

P.48. As the scope of the dispute narrows, the number of norms invoked declines.

a. The intervener bolsters his decision with a large number of norms bearing little relationship to one another, and often having only peripheral significance for the controversy itself.[285]

b. The intervener affirms only those norms essential to reaching a decision; he may even explicitly disclaim any position with regard to other norms cited by the disputants.

P49. There is greater demand for consistency of norms, just as there was for consistency in decisions of fact.[286]

P49.1. Concomitantly, and perhaps as a necessary prerequisite, there is a narrowing in the definition of what must be consistent with what. Not only is the original intervener *presented* with fewer parties, issues, and facts to be adjudicated, not only does he limit the breadth of what he decides *himself*, but subsequent interveners use the distinction between holding and dictum to constrict still further what he *could have* decided.

P49.2. The intervener responds less to the peculiarities of the instant case[287] and more to the attainment of harmony with other cases. The notion of what is normatively harmonious develops a logic peculiar to the institution and divorced from common sense categories — what we call legal reasoning (Levi, 1948). The purview of what is similar expands. The function of accommodating norms to the idiosyncratic facts of the case may be delegated to a distinct institution.[288]

P49.3. In order to achieve this consistency, the intervener must construct levels of norms intermediate between the general standards adapted from the society and the specificity of the disputes he handles.[289] As the institution is progressively differentiated, he first does this himself, by means of precedents.[290] But with increasing differentiation, this function may be delegated to other more specialized institutions — legislatures[291] (and still later subdivided between them and administrative bodies) and legal scholars.[292]

P49.4. Norms at varying levels of generality are organized in hierarchical fashion (Moore, 1969).

P49.5. Whereas the general standards overlapped and contradicted each other, the more restricted norms tend to be distinct and compatible.

P50. These developments affect the way in which norms are changed.

P50.1. a. As long as norms are abstract, vaguely defined, unorganized, overlapping, and mutually inconsistent, the dispute institution can engage in gradual, implicit, limited normative change by means of choice and interpretation.[293]

b. A norm with a narrow, ascertainable content, unqualified by any competing norm, resists change. As a result, there will be a tendency to distinguish the tasks of articulating norms and changing them. The latter function will come to be governed by its own clearly defined explicit rules.[294] Alternatively,

the dispute institution may even lose that function altogether — as have those English courts which claim to be bound by their own precedents, or our own trial courts; instead, it will be delegated to another institution which specializes in normative change — appellate courts, courts of equity, or the legislature. These institutions will perform that function differently, often declaring radical, abrupt, comprehensive, explicit change.[295]

P50.2. Flexible norms facilitate change through reasoning by analogy; fixed norms demand the use of fictions.[296]

P51. As a result of propositions P49 and P50, the normative system becomes esoteric (Epstein, 1954: 7).

P52. For all these reasons, the logic necessary to apply norms to facts and to change norms — a logic which had been implicit — must become explicit.[297]

P53. As a further consequence, the dispute process, which had been entirely fact-minded (*see, e.g.,* Fallers, 1969; Nekam, 1967; A.L. Epstein, 1954: 6), devotes increasing attention to norms,[298] although it never becomes norm-minded.[299] In part, this development occurs in emulation of other institutions, as discussed below.

k. Remedies.

P54. There is increasing use of remedies that advance the certainty and finality of a decision, *e.g.*:

P54.1. An act which can be performed within the institution rather than one which must be performed outside;[300]

P54.2. A single act rather than a course of conduct;[301]

P54.3. The transfer of property in substitution for the performance of an act;

P54.4. Fungible property (*i.e.,* money) rather than unique property.[302]

P55. Where the intervener would previously have sought to persuade the disputants themselves to agree to accept the remedy, and would have modified it to secure their concurrence, he now frames it to meet criteria internal to the institution, without regard for the views of the disputants.[303]

P56. The remedy, like the norm it subserves, is precisely defined and fixed;[304] the range of available remedies narrows; consistency of remedy is emphasized.

P57. The remedy is a response to the dispute as narrowed by the process described above, not to the original dispute (Golding, 1969: 88 ff.).[305]

P58. The remedy becomes increasingly severe.[306] One reason for this is a shift from special to general deterrence.

a. The institution is primarily concerned with the instant dispute. The remedies it employs are effective only between the disputants involved. They are sufficiently mild to encourage disputants to submit to the process.

b. The institution is concerned to anticipate future disputes of the same kind.[307] This is possible only if remedies are consistent, so that they serve as a warning to all those who may engage in similar conduct. The infrequency with which the remedy is inflicted is compensated by draconian rigor.[308]

P59. Coercion rather than persuasion secures compliance with the decision. The means of coercion become increasingly effective in the individual case.[309] Ultimately the dispute process will not only overcome resistance but also punish it.[310]

l. Review.

P60. Many of the above variables can also serve to analyze subsequent hearings of the same dispute by another intervener. The mere existence of institutions for review distinct from those which handle the dispute in the first instance is an example of internal specialization and differentiation within the dispute institution.[311] Consequently I would expect the dispute process conducted by a reviewer to differ from that of the initial intervener in the same ways, and to the same degree, as that of the intervener in a differentiated institution differed from that of his counterpart in an undifferentiated institution.

P61. a. Review occurred at the instance of one, and often both parties, who were dissatisfied with the earlier decision.

b. Review is frequently initiated by a superior of the intervener (revision).[312]

P62. The review process is progressively differentiated from a trial.[313]

P62.1. Preoccupation with facts is replaced by a concern for the content of norms. At the extreme, the first intervener can only decide the facts, and the second can only interpret the law.

P62.2. Instead of reconsidering the issues decided by the trial, review considers errors in the conduct of the trial.[314]

P62.3. The reviewer will progressively narrow the scope of the evidence he will entertain:

a. He will conduct a hearing de novo (Fisher, 1971: 741-42).

b. He will scrutinize the record of the earlier hearing and reach his own conclusions, but will only receive additional evidence for good cause (Smith, 1968: 75).

c. He will decline to re-evaluate the evidence below, and will examine the record to detect egregious error.

P62.4. a. No greater weight is attributed to the outcome below than is accorded any other opinion on the dispute.

b. The decision of the first intervener is granted increasing weight, to the point where it may be practically unalterable on some issues.

P62.5. The response of the reviewer to perceived error below develops in the following sequence: he adjudicates the dispute on the merits; he corrects any error; he orders a new trial by the first intervener or another of like rank; he punishes the first intervener.[315] (He may, of course, do several of these.)

P63. The outcome of the review is communicated more widely. Whereas the initial decision is heard only by the disputants and other participants, the reviewer communicates to interveners: intially to the one he is reviewing, then to others of similar rank within his jurisdiction, and ultimately to all.[316] He may do so instead of communicating with the parties.

VI. DISPUTE INSTITUTIONS IN SOCIETY

This completes my elaboration of one possible microsocial theory of the dispute process, a theory which attempts to explain behavior within a given institution by means of certain antecedent behavior which I have demarcated as the structure of the institution. But that theory does not tell us which institutions we will find in a society. It is to this question that I now turn. My discussion will be shorter, more general, and more speculative; the full development of a macrosocial theory would require another essay.

I would like to caution at the outset against confusing microsocial and macrosocial theory.[317] I have thus far only offered an explanation for behavior within a single dispute institution. But every society will have a number of dispute institutions, which will display a range of values with respect to the structural and processual variables outlined above. A different kind of explanation will be necessary to account for the distribution of institutions across these variables within the society.

To begin with, the social environment confines these vari-

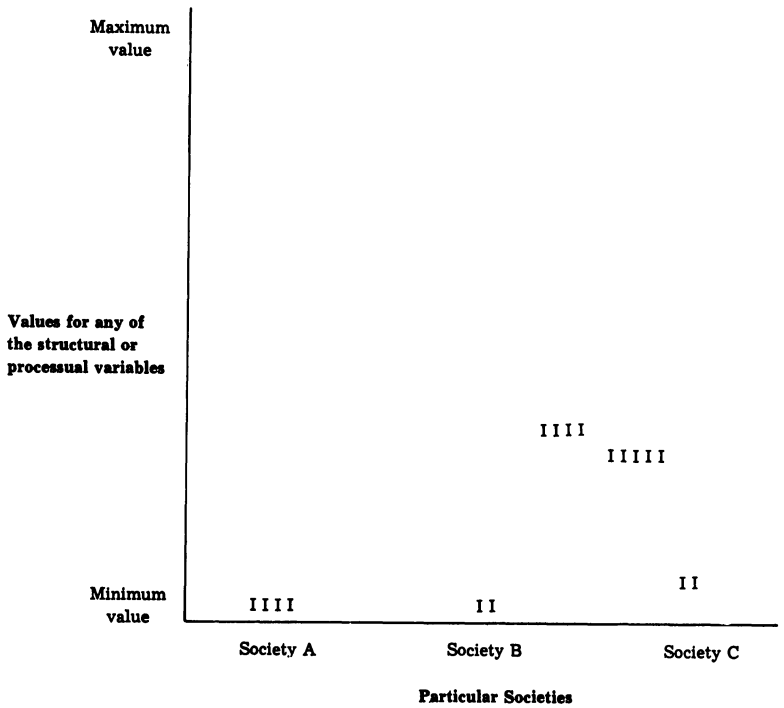
ables within fairly narrow limits. This may be seen most clearly with respect to the structural variable of functional specialization. There are few behavioral items which are performed without any specialization at all. True, in most societies, there is some behavior which approaches this extreme; the exchange of greetings demanded by ordinary courtesy may be an example. Yet even here, children are often excepted from social expectations;[318] furthermore, some societies exhibit substantial variation in the degree of specialization in even such commonplace behavior, as exemplified in the roles of recluse and politician. At the other extreme of the scale, complete specialization in a given function is always limited by competing biological and social demands; even the politician must eat and sleep, and perform other social tasks. Hence in all societies every task will be performed with varying degrees of specialization, ranging from something approaching non-specialization to an upper limit peculiar to the particular society, but always less than total specialization.

These limitations obviously apply to roles within dispute institutions. There is always some variation in the degree of specialization in any of those roles. For instance, some people dispute more than others — perhaps adults more than children, or men more than women; in our own society, the role of disputant reaches extremes of specialization — as in the prosecutor, or the insurance company. The same observations are true for the role of intervener. In all societies many disputes proceed without the aid of an intervener; nevertheless, I believe that the role will be found in some disputes in every society.[319] It may be performed with minimal specialization: most people intervene in disputes at least occasionally — in their families, among their friends, or in other social units; yet even in these situations some intervene more than others, and some not at all. At the other extreme, intervention appears to be a role which permits of, indeed encourages, a high degree of specialization; yet again there are upper limits. Similar constraints limit the range of other structural and processual variables, as a more extended analysis could demonstrate.

The situation we have to explain, then, can be presented schematically as in Figure 5 (I represents a dispute institution): The questions I wish to answer are:

1. What social factors determine the upper and lower limits of variation in the kind of intervener that will be found in a society?

FIGURE 5: DISTRIBUTION OF DISPUTE INSTITUTIONS (I) IN DIFFERENT SOCIETIES



2. Within those limits, what social factors influence where the interveners will be grouped along those variables?

There is no reason to assume that dispute institutions are merely a passive reflection of society; rather, they exert a reciprocal influence. I therefore want to know:

3. What are the consequences for society of having certain kinds of dispute institutions?

Finally, we must not ignore the possibility of conscious attempts to shape the characteristics of some or all of the dispute institutions in a society:

4. If an attempt is made to change the qualities of dispute institutions by deliberate planning, what can we expect to happen?

In answering these questions, I will begin by considering dispute institutions at the upper ranges of specialization, differ-

entiation and bureaucratization, and thereafter turn to examine the lower ranges.

A. Dispute Institutions at the Upper Ranges of Specialization, Differentiation and Bureaucratization.

1. What social conditions produce such institutions? It is abundantly clear that social factors influence both the upper boundaries of these variables, and the extent to which institutions will be found near these boundaries. Institutions which appear to contradict the generalizations advanced below — for instance, a European court operating in an African tribal setting — can be explained as the product of what is actually a composite society — an amalgam of tribes under European colonial rule; this situation will be discussed as an example of conscious planning.

Dispute institutions are connected to society in two distinct ways. First, as an element of that society, the institution is influenced by the structure of society, and of other social institutions, and by the cultural values which accompany those structures. Second, because any given dispute institution represents only one way of handling a dispute among numerous alternatives, the shape of an institution, indeed, its continued existence, will be influenced by disputant choice. A society will be characterized by certain kinds of social relations, which generate certain kinds of disputes; as a result, disputants will prefer certain solutions, and choose those institutions whose processes are most desirable.

a. Dispute institutions as a product of the social structure and culture of other institutions.

(1) Social density. The central theorem of Durkheim's classic work is that "the division of labor in any society is in direct ratio to the moral or dynamic density of society" (1947: 257). I understand the latter concept (which I call social density) to include such factors as the boundaries within which physical contact occurs, the physical proximity of individuals, and the likelihood that physical contact will result in meaningful social interaction. An increase in social density will tend to produce an increase in social interaction,[320] and hence an increase in the number of disputes.[321] Unless the number of dispute institutions expands proportionately, each will have to handle more disputes; increasing caseload is an important factor in bureaucratizing an institution.

(2) Functional specialization. This is another response to

increased caseload; cases, like widgets, can be processed more efficiently if they, or their elements, are treated as being identical. Specialization in different functional tasks is also mutually reinforcing: to the extent that *A* assumes more of function *x,* he frees *B* from having to perform it; moreover, *A* is now less able to perform function *y,* the burden of which is cast upon *B* (the actual development of functional specialization is obviously much more complicated than this). As a result of both of these tendencies, specialization is endowed with positive value; specialists are believed to perform the task with greater competence, and are correspondingly rewarded with higher status, more money, etc. This motivates every functionary to specialize further.[322]

(3) Social differentiation. An increase in the size of the social unit will tend to be accompanied by an increase in social differentiation (Kaplan, 1965: 93). Any increase in differentiation within the society — whether vertical socioeconomic stratification, or ethnic or religious heterogeneity — will tend to increase differentiation *of* the dispute institution and *within* the institution. The institution will be differentiated from the society because its personnel will tend to be drawn disproportionately from one segment of the differentiated society.[323] The intervener will be differentiated, among other ways, by acquiring greater power; power is now necessary in handling disputes because the intervener has lost some of the authority he possessed in the more homogeneous society (Nisbet, 1966: Ch. 4); at the same time, greater social heterogeneity makes power available to him (Fried, 1967).

Social differentiation increases the complexity of behavioral patterns and norms, as well as the rate of change in each. Furthermore, social heterogeneity compels the development of more abstract, more universal norms capable of reconciling the values of different segments of the population. The task of handling disputes becomes more difficult, and requires special training. These factors together — specialization, social differentiation, enhanced power, the development of universal norms, training — contribute to the bureaucratization of the institution. In turn, bureaucratic patterns of behavior come to be valued, and are eventually identified with justice itself.

b. Dispute institutions as a product of disputant choice. Every society will display certain characteristic forms of social relationship, and will generate certain kinds of dispute; persons

involved in these relationships should have preferences about the way their disputes should be handled. I would expect the following kinds of social relationship to produce the accompanying preference for a dispute process.

(4) Social relations which fulfill a single, narrowly defined, purpose, as opposed to those which are multiplex and broadly defined (Gluckman, 1965b: Ch. 1): a dispute process in which factual inquiry is severely restricted in scope.

(5) Social relations which are instrumental, oriented toward other goals, as opposed to those which are affectual, goals in themselves: a dispute process in which the outcome is certain and predictable.

(6) Social relations which are transitory, dispensable, as opposed to those which are enduring, irreplacable: a dispute process in which the outcome is final.

2. What are the consequences for society of having such dispute institutions?

a. For the structure and culture of other social institutions?

(1) The social unit increases in size, because the dispute institution successfully handles new kinds, and larger numbers, of disputes, thereby avoiding secession, fission and fighting — alternative responses to conflict which diminish the size of the social unit.

(2) The social unit is further differentiated, partly because of the increase in size, but also directly as a result of the dispute institution (Etzioni, 1963). By handling disputes between socially distant, culturally differentiated individuals, it permits social contact to ripen into social interaction. In the course of handling these disputes, it creates new, abstract norms, thus enhancing overall cultural differentiation.

At the same time, the institution contributes to stratification. It becomes more costly: as it is specialized, differentiated and bureaucratized; as the number of institutions decreases and they are geographically centralized; as the possible levels of appeal proliferate, etc. In an economically stratified society, the rich have substantially better access to the institution than the poor. It is also socially and culturally more distant from some segments of the population than from others. Because the institution now has more power at its disposal, and greater control over economic resources, those segments of the population with greater economic, social and cultural access are able

to use the institution to improve further their position in society (Galanter, 1972b).

(3) The value of specialization, differentiation and bureaucratization for other social institutions is elevated. Every institution engages in a process of self-justification; but the consequences of that process are far more profound where the institution is seen as embodying a fundamental social value — in this case, justice.

b. What are the consequences for the quality of social relations? The impact of the dispute institution here is much more restricted. In those disputes which it actually handles, it may transform relations between disputants from multiplex, affectual and enduring to single-purpose, instrumental and transitory. Beyond this, the few people who expect to dispute may structure their relationships so as to make them amenable to the dispute process.[324] Others, who have not done so, may nevertheless anticipate that outcome by simply terminating the conflicted relationship on the most advantageous terms possible. But no institution and no dispute process has a monopoly over disputes; consequently, most disputes involving the vast majority of social relationships will simply be untouched by the more differentiated institution; the disputants will never approach it, either because they dislike the process it offers, or because the institution is inaccessible to them.[325]

3. Planned change in dispute institutions. The propositions advanced above assume gradual, evolutionary change in dispute institution and society. At least until the mid-eighteenth century, and with the exception of colonial situations, such change may have been the rule.[326] But in recent history it has certainly become the exception. This is most obviously demonstrated by the colonial experience of non-western nations, a major element of which has been the substitution of western dispute institutions for indigenous institutions, producing radical change in the directions sketched above. Moreover, political independence, rather than halting this process, has accelerated it.

Theories about the interrelationship between dispute institutions and society may therefore be less useful in predicting what changes will occur without deliberate intervention, than in revealing structural limitations upon planned change. In analyzing these limitations, it will again be useful to distinguish between changes in the dispute institution itself — its

structure and culture — and changes in the social relationships among potential disputants.

The theory developed above, confirmed by the experience of numerous societies, explains why planned institutional change is not only possible but self-reinforcing. Indeed, such change, by its very nature, becomes progressively easier: specialization, differentiation, and bureaucratization mean a loosening of the interdependency between the institution and society (*see* Mayhew, 1971; Galanter, 1972a: 66). Furthermore, they decrease the number of professional actors involved, and hence require only limited expenditures of resources; as many countries have discovered, the reform of legal institutions is relatively cheap, sometimes even costless.

Yet such reforms may be self-defeating if the larger purpose is to effect change in the society as well. By the very fact of their differentiation, such dispute institutions handle relatively few disputes; where they are deliberately differentiated in advance of other social changes, even fewer potential disputants will be linked by social relationships which permit of intervention by those institutions. The institutional isolation which is an inevitable concomitant of differentiation will be compounded by the mechanism of disputant choice.

B. Dispute Institutions at the Lower Ranges of Specialization, Differentiation and Bureaucratization.

If the above analysis were a complete picture of the social forces influencing the development of dispute institutions we might expect, in time, to find all such institutions grouped at the upper limits of those structural variables. These forces are, after all, pervasive in contemporary western society; even in many of the developing nations, where they are still weak, western institutions serve as models to be emulated; and social and institutional changes appear to be mutually reinforcing.

Contemporary theories of social change are in part responsible for the tendency to accept this analysis as adequate and comprehensive. More than a century after Darwin, sociological thought still reflects the enormous impact of evolutionary biology, although analogies between organism and society are now much more sophisticated.[327] Social theories of law are no exception. If few assert that all legal systems must pass through fixed identifiable stages, many still rank known societies according to a chosen variable, thereby suggesting a unidirectional and inevitable progression from one end of the continuum to the

other.[328] Durkheim believed that the forms of social organization he identified represented points in a historical progression. Aidan Southall, writing recently, appears to be no less certain with respect to one of the structural variables which I have selected for emphasis.[329]

> No doubt empirical instances could be found in which the role structure of a society changes through roles becoming more generalized, diffuse, broad in definition, and fewer in number. But such instances seem somewhat rare.... none of these instances exemplifies a process of role generalization within a society such as to contrast with the opposite internal process of role differentiation, which has occurred so very frequently in time and space....
>
> This prompts the conclusion that societies which persist through time without violent intervention from without either have been relatively stagnant, as in the case of numerous but very small and isolated nonliterate societies in many parts of the world, or else have exhibited a continuous process of role differentiation (1959: 20-21).

Yet we know that every society, no matter how differentiated some, or even many, of its dispute institutions may be, will still possess others at the opposite end of the spectrum. The theory must therefore be incomplete; the following are some suggestions about social forces which tend to preserve, or to produce, relatively undifferentiated dispute institutions.

1. Dispute institutions as a product of social environment.

a. As a product of the social structure and culture of other institutions.

(1) Functional generalization. There appears to be a discernible movement toward functional generalization, even if it is not yet as pronounced as the movement toward specialization which began more than a century ago. In part this may be a long range consequence of economic forces; where, for example, the early stages of industrialization demanded that the husband be employed full time outside the house, and the wife assume all household tasks in order to permit this, later stages may increase the leisure of both, permitting a convergence of spousal roles (in other social classes, unemployment may have the same consequence). In part, the trend may be an expression of cultural revulsion against specialization, most explicitly displayed by contemporary intentional communities, [330] but also visible in more established institutions. Where these developments are occurring, we can expect to find the role of intervener recombined with other functions.

(2) Levelling of social and cultural differences. This has, of course, been a persistent and potent force in many societies, including those displaying the greatest tendencies toward differentiation, where it has perhaps been most pronounced. Whether one views egalitarian demands as an expression of class struggle, or as an ideology divorced from social class, their power is undeniable. We can expect such demands to be directed with special force at those institutions which are possessed of substantial authority, and endowed with symbolic significance by the society[331]—among which dispute institutions are a prominent example. Where the demands are not satisfied, we can expect to find them transmuted into pressures for the dismantling of the institution — perhaps altogether, perhaps into a number of institutions functioning within sub-units of the society, from which each is less differentiated.[332]

(3) Reducing bureaucratic autonomy. Just as egalitarianism opposes differentiation, so democracy opposes bureaucratic tendencies (Fogelson, n.d.). Again, we can expect this ideology to be directed with particular urgency against dispute institutions, where it will affect such matters as the choice and tenure of personnel, the separation of powers, modes of review, etc.[333] Furthermore, to the extent that pressures for greater equality lead to a fragmentation of the heterogeneous society into sub-units that are internally homogeneous, the demand for universal norms applicable to the total society — one of the *raisons d'etre* of bureaucracy — loses its cogency. Thus the cluster of values epitomized by the undifferentiated institution — functional generalism, egalitarianism, democracy — are mutually reinforcing. And just as highly differentiated dispute institutions find an exemplar to imitate (perhaps the United States Supreme Court, or the High Court of England or of other common law countries) so there are powerful models for the undifferentiated institution (the family court idea in America, perhaps, or an idealization of tribal institutions).

b. Patterns of social relationship which affect disputant choice. Despite the tendencies described above, many societies have been able to create and maintain highly differentiated dispute institutions. But there are additional factors which affect the extent to which those institutions will be used, and by this means influence which will survive and flourish, and which will decline and disappear. These factors are the kinds of relationships prevailing in the society — a variable far more re-

sistant to change than the shape of any particular institution. I would argue that in every society many social relationships — indeed, the vast majority — tend to be multiplex, affectual and enduring. This may have been obscured by nineteenth century social theorists who first perceived departures from that model, and consequently stressed their importance out of all proportion; Maine's influential dictum about the movement from status to contract (1950: Ch. 5) is only the most famous example of a pervasive attitude (*see* Nisbet, 1966: Ch. 5). More recently, however, observers have corrected this mistaken emphasis, recognizing that status relationships persist alongside contractual, that the latter often become the former, and that there may even be an equivalent, opposite movement from contract to status.[334]

What, then, are the consequences of the persistence of status relationships for disputant choice?

(4) Where social relations serve a multiplicity of purposes, broadly defined, disputants will seek an airing of a wide range of issues, involving numerous participants.[335]

(5) Where social relations are affectual, disputants will seek to maintain control of the dispute, avoiding external coercion, and subordinating abstract norms to the idiosyncratic situation.

(6) Where social relations are enduring and irreplaceable, disputants will seek to avoid finality, or a decision which favors one party to the exclusion of the others.

Yet even were these linkages to be substantiated, the consequences of disputant preference for the structure of dispute institutions would remain highly uncertain. Let us assume that disputants will seek to avoid an institution whose processual characteristics might be damaging to their pre-existing relationships. This might lead to a decline in litigation between private disputants in highly differentiated institutions; indeed, there is considerable evidence of such a decline in the courts of many different societies, although it is not yet fully documented.[336] A reduced caseload could have considerable significance for such institutions; among other things, it would diminish one of the pressures for bureaucratization. Courts might also respond to the loss of function — and also of prestige — by striving to alter their processual characteristics:[337] the replacement of rigid rules by more flexible standards in commercial law, or divorce, may be examples. On the other hand, disputant

preference may be a less potent force than I have suggested. Highly differentiated institutions tend to possess a monopoly of many powers: for instance, in many societies it is not possible to obtain a divorce, and the concomitant right to remarry, except from an official court; disputing spouses who want that remedy cannot avoid the court, no matter how repugnant its process.[338] Furthermore, courts have found that any space in their dockets is more than filled by a variety of quasi-administrative duties.[339]

Avoidance of highly differentiated institutions might also lead to a preference for less differentiated institutions, or pressure to institutionalize such dispute processes: resort to private family counselling, or the development of commercial arbitration may be examples. But these outcomes seem even more problematic. Intervention of any kind does not exhaust the range of responses available to potential disputants. If existing institutions seem undesirable, a disputant may choose to internalize the conflict, and thus deny that it, or the dispute, exists; or he may choose to "lump it," thereby terminating the relationship in much the same fashion as the dispute institution would do.[340] It may be that both of these responses are, in the long run, unsatisfactory, and lead to an increase in "anomie" and pressure for the creation of institutions which will handle the dispute differently; but we certainly have no evidence that such is the case.

2. What are the consequences for society of having such dispute institutions? Our evolutionary, ethnocentric biases lead us to think that such institutions merely contribute to the maintenance of the status quo, and may actually inhibit change. Here I will try to show that they can be a force for social change as well.

a. What are the consequences for the structure and culture of other institutions?

(1) Increase the homogeneity and coherence of smaller social units, and thus their social significance. The relatively undifferentiated dispute institution, by definition, serves a smaller social unit. Smallness by itself increases homogeneity and coherence. The significance of a social unit for its members is always enhanced when it performs crucial social functions. But beyond this, dispute institutions make a special contribution to social solidarity. Disputing is itself an important form of social interaction.[341] More people participate in the undifferen-

tiated institution; ultimately everyone is involved. Because the normative system of the institution comes to approximate that of the society, "justice is not only done, it is seen to be done" — a catchphrase which British colonial administrators frequently proclaimed, but could only subvert. Furthermore, the institution serves to foster a common normative system within the society. Economic stratification is diminished because everyone has equal, and total, access to the institution. Political disparities tend to be eliminated in the same way; furthermore, the institution does not create its own inequities. The egalitarianism of the dispute institution reinforces the sway of that value in society.

(2) Decrease specialization and bureaucratization. Because participation in the dispute institution becomes the duty of every citizen — and an increasingly time-consuming one — it interferes with specialization in other functional tasks.[342] Moreover, political and social engagement become higher values than specialized technical proficiency. Because the dispute institution is non-bureaucratic, it inhibits bureaucratic tendencies in other areas of social behavior; the uncertainty and lack of predictability of outcome make rational planning increasingly difficult.[343] The dispute institution itself symbolizes other values: democratic control and the achievement of substantive goals rather than bureaucratic rationality.

b. What are the consequences of such dispute institutions for the nature of social relations? We know from numerous studies of tribal societies that undifferentiated dispute institutions tend to preserve and strengthen multiplex, affectual, enduring social relations. Can they have similar consequences within the subunits of a more heterogeneous society? Obviously, they must first handle disputes before they can bring to light latent multiplicity and affect in social relations, thus making those relations more enduring. But here the characteristics of the undifferentiated dispute institution render it a more potent influence than its differentiated counterpart. It is accessible and non-threatening; it is proactive, seeking disputes in which to intervene; it symbolizes values which come to be strongly held by society. Finally, it contributes to the development of a cohesive, homogeneous society in which individuals no longer possess the isolation and privacy necessary to conceal their disputes.

3. Planned change in dispute institutions. Planned change

is frequently thought to be synonymous with increases in specialization, differentiation and bureaucratization. Yet conscious attempts to diminish such qualities are no less interesting or important, if they have been relatively uncommon.[344] Innovation has occurred under three divergent historical situations. Radical transformations have been deduced from a revolutionary ideology and accompanied by thoroughgoing social revolution: examples might include the Napoleonic codification following the French Revolution (Merryman, 1969: Ch. 5); the establishment of popular tribunals in communist countries such as Russia (Berman and Spindler, 1963), parts of Eastern Europe (Podgorecki, 1969), and China (Lubman, 1967); and similar experiments under an umbrella of socialism in such members of the third world as Cuba (Berman, 1969), Chile (Presidential Message, 1971), Sri Lanka (Goonesekere and Metzger, 1970), Burma (Tun, 1972), and Tanzania (Georges, 1967). Conservative ideologies have been the inspiration for equally far-reaching changes: the efforts to revive traditional institutions under indirect rule in colonial Africa, and now in contemporary Rhodesia;[345] the aborted restoration of *panchayats* in India (Galanter, 1972a); recent increases in the power of tribal authorities in Malawi.[346] In most western nations, by contrast, the impulse has been reformist, and the changes more limited. American legal history offers numerous examples: the Field Codes[347] and the movement for election and recall of judges in the nineteenth century; legal aid, small claims, juvenile and family courts at the beginning of the twentieth century; and most recently the OEO legal services program, and the advocacy of "de-legalization."

This incomplete enumeration answers the threshhold question: it is certainly possible to effect such structural changes in dispute institutions. A detailed examination of the historical evidence, which would be necessary to determine the success and failure of particular experiments, is beyond the scope of this paper. But it may be instructive to compare the environment in which such changes are now being attempted with the environment in which colonial and post-colonial governments have sought to foster the "modernization" of their legal systems, for such a comparison may permit us to generalize about the factors that inhibit change.

Colonial governments frequently had to overcome the resistance of the population to changes in their dispute institutions; but that resistance, by its very nature, tended to be unorganized and inarticulate — antipathy could only be expressed

by avoiding the new institutions. Contemporary governments advocating "popular tribunals" may be able to generate substantial enthusiasm,[348] but this is likely to be as ineffective in support as in opposition; people may use the institution once it is created, but there is little, short of revolution, that they can contribute to its creation.

The attitude of elites seems to be much more significant, especially the disposition of those who are, or may become, professional or quasi-professional participants in the dispute institution. In the colonial situation, two kinds of elites must be distinguished. Traditional elites — those with an economic or political stake in existing institutions — may oppose governmental innovation; however, such opposition can often be avoided by a policy of indirect rule which preserves — indeed, mummifies — traditional institutions while creating competing institutions alongside them. Modernizing elites — those who adopt the metropolitan culture and obtain western education — tend to be predisposed toward the new institutions (indeed, they are frequently more vehement in their advocacy than the colonial authorities themselves); any reluctance can generally be overcome by the offer of a position within the new institution, or an explanation of the advantages which may accrue from using the new institution. By contrast, the contemporary government, western or westernized, which seeks to implement the reverse changes will find the elite unanimously, and strongly, opposed.[349] This elite, especially the legal professionals, now possesses substantial political, economic, and cultural power — all of which is threatened by the proposed changes. The new institutions offer legal professionals nothing which might compensate them for that loss; the very qualities of the new institutions exclude them from positions of influence and insure that they would not, in any case, want such positions.

We may be aided in comprehending the significance of elite opposition by a brief review of some of the aborted reforms:

(a) If new or reformed institutions are merely added to the established institutional structure, the former are likely to come to resemble the latter. Established institutions continue to symbolize the way disputes ought to be handled. They receive the major allocation of societal resources.[350] Officials who staff them remain at the top of the status hierarchy within the profession. Juvenile courts were intended to offer a procedure radically different from the criminal courts in which

juveniles had been tried; but the differences between the two have long been diminishing.[351]

(b) If dispute institutions are reformed without commensurate change in society, they may serve to perpetuate or even aggravate existing social conditions. Reform of the small claims court was diverted not so much by the aversion of the judges as by the activities of quasi-professional disputants: large institutional creditors, collection agencies, etc.[352] Furthermore, the dispute institution will only be able to handle existing inequities in political and economic power if it is endowed with considerable power itself, and imbued with a strong revolutionary ideology — both of which characteristics contribute to the differentiation of that institution.

(c) If innovative dispute institutions do not assimilate to more established structures, and if they are not captured by their more powerful clients, I suspect that they will frequently turn out to be a nullity. Social relations must to some degree antedate the institution if it is to have any disputes to handle. Were a tribal moot to be transposed to an urban American neighborhood, as has occasionally been proposed, I would not expect many people to use it. Extreme social differentiation — especially of work and home—drastically simplifies relationships; social heterogeneity and hostility inhibit affect; physical isolation and frequent moves readily interrupt those few, limited relationships that are formed. The marginality of Workers' Courts in Poland (Podgorecki, 1969), or the judicial *panchayats* in India (Galanter, 1972a), may be explained in some such terms.

These limitations upon gradual change do not necessarily apply to revolutionary situations; indeed, they may contribute to the creation of revolutionary situations. There, the opposition of the elite to any change may fuel popular discontent with established institutions. Popular discontent may initiate change, and not simply adapt to changes initiated above. Competing models may be eliminated, inequalities levelled, and the social relations which demand such institutions may be born.

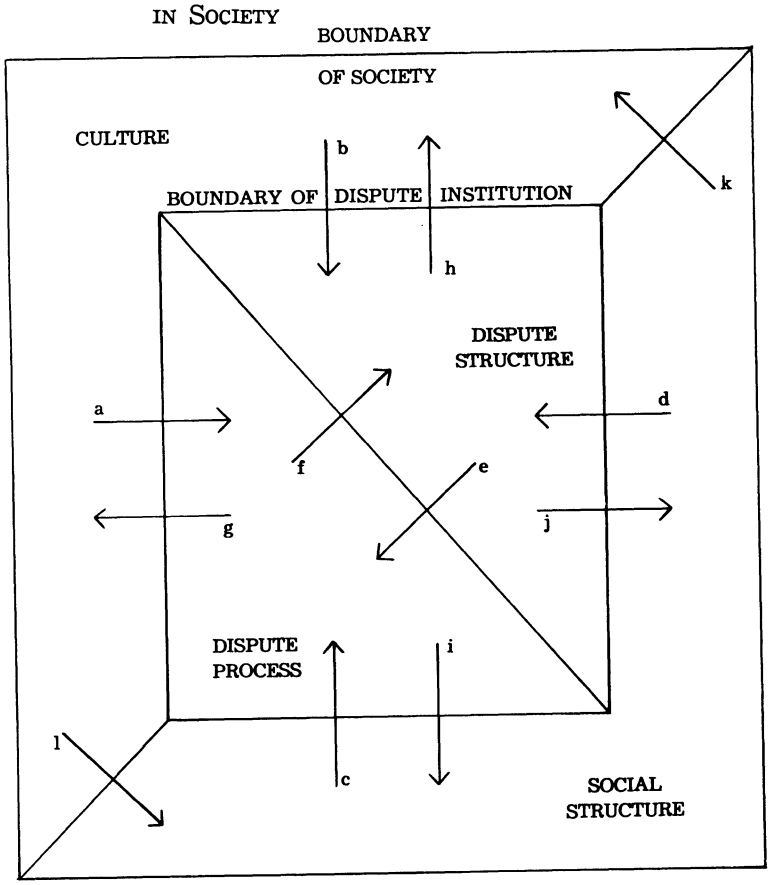
C. An Overview of Dispute Institutions in Society

These observations allow us to begin to construct an explanation for stability and change in the dispute institutions of a society. I think we now have some insight into the way in which social factors influence the distribution of dispute institutions along the structural variables I have identified, and consequently some understanding of why this overall distribution is fairly stable. Each society has its characteristic, rather

inflexible, limits for the values which those structural variables may assume for dispute institutions, or indeed for any institution. At the same time, it may be that the global changes subsumed under the notion of "modernization" are causing the limits in every society to come to resemble each other more closely; for instance, a supreme court has become as essential a symbol of nationhood as a flag, or membership in the United Nations. Yet while every nation may now have the capacity to support a supreme court, the total distribution of dispute institutions will still reflect more fundamental qualities of the society. The pinnacle of a judicial hierarchy, after all, is numerically insignificant when compared with the base; and the base of most such hierarchies will continue to be a wide variety of undifferentiated institutions serving families, groups with a quasi-familial structure, and other social subunits. Because of these interrelationships between society and institution, efforts at purposive change in the latter are likely to have little impact on the aggregate distribution of dispute institutions unless accompanied by other, equally radical social changes, such as have occurred under the influence of technological development, colonialism, or social revolution.

But stability in the total configuration of institutions should not be construed as implying the stability of each constituent institution. Indeed, the contrary is, and must be, true. Overall stability is the result of a composite of those forces which tend to produce high specialization, differentiation, and bureaucratization, and those which tend to produce low values for these variables. But these dissonant forces do not act disjunctively upon separate institutions; they act conjunctively upon each and every dispute institution in the society. The preceding discussion has identified many such influences: some are cultural values, others inhere in the social structure; some operate directly upon the dispute institution, others exert influence through disputant choice among available processes; some are evolutionary and unconscious, others the result of purposive planning. It is inevitable that there will always be contradictions among these factors, between each and the resultant dispute institution, and within the dispute institution. These contradictions cannot but lead to continuous pressures for change in both dispute institution and society.[353] I can best illustrate this perspective by means of a diagram which consciously reifies the elements of dispute institution and environing society.

FIGURE 6: A MODEL FOR THE ANALYSIS OF DISPUTE INSTITUTIONS IN SOCIETY



Let us look at the possible consequences of incongruence between these elements (the letter introducing each paragraph refers to the arrow indicating that strain in the model):

(1) Contradictions between society and the dispute institution may produce large scale changes in the institution.

(a) Culture/dispute process, *e.g.*, contemporary western culture attaches great value to the preservation of the marriage relationship; this value may lead to an insistence that any institution which handles disputes involving the relationship engage in a thorough inquiry into the fundamental causes of the dispute.[354]

(b) Culture/dispute structure, *e.g.*, an emphasis on the autonomy of the local unit — especially a unit that contains a homogeneous population which differs significantly from its surroundings — may lead to pressure for the decentralization of dispute institutions, *e.g.*, the police and the courts.[355]

(c) Social structure/dispute process, *e.g.*, the growth of instrumental social relations may lead to a demand for more predictable outcomes;[356] on the other hand, the growth of enduring relationships, especially between large social units like labor unions and major industries, may lead to pressure for a mode of dispute processing closer to arbitration than adjudication.[357]

(d) Social structure/dispute structure, *e.g.*, increases in social stratification will inevitably lead to an increase in the stratification between interveners and the population they serve; yet when coupled with a culture that values social equality, this in turn may lead to pressures to select interveners from unrepresented strata of the society.[358]

(2) The differential impact of social structure and culture on the dispute institution will produce contradictions within that institution which give rise to pressures for small scale institutional adjustments.

(e) Dispute structure/dispute process. Part V of this essay is an exhaustive analysis of the way in which changes in dispute structure can lead to changes in dispute process.

(f) Dispute process/dispute structure. This reciprocal influence clearly occurs, if it is less obvious.[359] The demand for a change in process may lead to pressure for a change in personnel.[360] Disputant pressures for a fuller exploration of the issues may lead to a decrease in the differentiation and bureaucratization of the intervener.[361] Perhaps most dramatically, if the dispute itself is eliminated, as has happened in uncontested divorces, the dispute institution may be transformed into an administrative agency.[362] Alternatively, what had been an administrative agency — the small claims court, or the lower criminal court — may be transformed into a dispute institution when defendants are represented by counsel who promote their interests aggressively.[363]

(3) Changes in the dispute institution which result from the contradictions just discussed do not, of course, lead to harmony, but to new contradictions, which exert pressure for change in the environing culture and social structure.

(g) Dispute process/culture, *e.g.*, the internal coherence which characterizes the decisional process of some higher appellate courts may be elevated into an ideology as the rule of law, which in turn exerts pressure upon other dispute insti-

tutions to conform their behavior to the criteria of procedural due process.[364]

(h) Dispute structure/culture, *e.g.,* qualities of roles within the dispute institution, such as specialization, differentiation, and bureaucratization, become elevated into a value of professionalism.[365]

(i) Dispute process/social structure, *e.g.,* the dispute process will influence the nature of relationships within the society, reinforcing either those that are multiplex, enduring and affective, or those that are single-purpose, transitory, and instrumental.[366]

(j) Dispute structure/social structure, *e.g.,* dispute institutions become more expensive as they are specialized, differentiated, bureaucratized, thus rendering them differentially accessible to a stratified population; this differential access tends to increase that stratification.[367]

(4) Culture and social structure change in different ways in response to these pressures, creating tensions between them.

(k) Social structure/culture, *e.g.,* as social relations are transformed from multiplex, enduring and affective to single-purpose, transitory and instrumental, there is pressure for greater cultural valuation of individualism, self-sufficiency.[368]

(*l*) Culture/social structure, *e.g.,* values derived from the dispute institution, such as professionalism, or the rule of law, become part of the culture, and are generalized to other institutions; many social relationships approach the model of professional-layman; all authority tends to claim legitimation in terms of general rules.[369]

Nor does the process stop here. Having arrived at new configurations for each of the elements of the model, we find the appearance of new contradictions, which continue the endless pressure for further change.

VII. CONCLUSION

In a sense, then, my analysis has brought us to a conclusion anticipated by both sociology and jurisprudence. Weber observed long ago that "all [authorities] are confronted by the inevitable conflict between an abstract formalism of legal certainty and their desire to realize substantive goals" (1954: 226). And Pound perceived that the result of this tension was a "continual movement in legal history back and forth between justice without law, as it were, and justice according to law" (1922: 54). Yet I hope my analysis has not been entirely re-

dundant. I have tried to show why we cannot eliminate either of these poles, or end the fluctuation between them. More importantly, I have tried to understand why our dispute institutions have the characteristics they do, so that we may shape them according to our values, and thus to some degree influence the society in which we live.

NOTES

[1] This burgeoning field can be sampled through collections of essays, such as Nader (1965b); Bohannan (1967a); and Nader (1969a); as well as synthetic works such as Nader (1965a); Moore (1970a); Pospisil (1971); Nader and Yngvesson (1973). Many of the above contain extensive bibliographies. In addition, *see* Nader, Koch, and Cox (1966).

[2] Two recent sourcebooks surveying the literature are Friedman and Macaulay (1969) and Schwartz and Skolnick (1970).

[3] The anthropological equivalent of what Mills criticized as abstracted empiricism among sociologists (1959: Ch. 3).

[4] The task that Merton urges (1967a) and accomplishes (1967b).

[5] The immaturity of the social theory of law is evidenced in other ways. One is its continued subordination to traditional legal scholarship - from which it still derives its vocabulary. Another is its preoccupation with the selection, definition, and refinement of concepts, of which this article is an example.

[6] This preference inevitably raises the problems of crosscultural comparison. The controversy concerning the possibility of such comparison, and the method by which it should be conducted, is long and passionate. To paraphrase Winch - the problem of understanding another society seems to me no different, in either kind or degree of difficulty, from the problem of understanding another person (1958; 1964: 322-24). Arguments over the means have centered around the choice of a terminology - whether to draw it from the society being studied or from the society of the student, or to develop a logical meta-language independent of both. This, I believe, is one root of the Gluckman-Bohannan controversy—*see* notes 10, 21, *infra*. (Jane Collier has suggested that differences between American cultural and British social anthropology are another source.)

Another problem of this terminological strategy is the tendency of concepts to lose their content as they become more universal (Geertz, 1965: 101). I attempt to meet some of these problems below.

[7] In urging that we try to construct variables that may be scaled continuously, as against those that alternate between polar values, I do not want to be doctrinaire. Dichotomies are often a necessary preliminary in the conceptualization of variation, and may persist as a convenient shorthand thereafter (*see* Part V.B.2).

[8] The discovery that a significant phenomenon, *e.g.*, law, appears to be absent from a society could lead to a search for other phenomena which serve as functional equivalents. Implicit in such a search, however, is the notion of something which the societies have in common, if with substantial variations. I believe it is better to try to formulate the common ground at the outset and then look for the range of variation.

[9] The same difficulty confronts all concepts at a similar level of abstraction - for instance, the family, religion, language, justice.

[10] See, for instance, the works cited in note 1. The publication of every major essay and monograph has been met with criticism largely directed toward the choice of concepts, and particularly toward the definition of law. *See, e.g.*, Gluckman's reply to his critics (1967), or Bohannan's reply to his (1968b). Every major conference on legal anthropology seems to get bogged down over this issue. *See, e.g.*, Nader, 1969b (report of the Burg Wartenstein conference of 1966).

[11] Bohannan introduced this concept into legal anthropology (1957: 4 ff.). He has since argued that neither the folk nor the analytic models of a given society are appropriate for cross-cultural comparison and that a meta-language must be developed (1969). No one has yet done so.

[12] There is scarcely an anthropologist or lawyer (with the exception of Malinowski, discussed below) who has not adhered to the fundamental

thrust of that definition. *See, e.g.*, Hoebel (1954); Pospisil (1958); Gluckman (1955); Elias (1956).

[13] Such a process of concept formation has been advocated by both philosophers and sociologists, even those from oppcsite schools of thought. *See, e.g.*, Winch (1964: 317-18); Merton (1967d: 143-47); Stinchcombe (1968: 38-40).

[14] Gluckman has observed the same development among other writers (1965a: 181).

[15] Not everyone has accepted the broader perspective. P.P. Howell, an administrative officer with anthropological training working among the Nuer nearly two decades later, could write:

> The term "law" is sometimes used of all processes of social control, and by this definition any of the obligations, customary actions, and conventions inherent in any social system might be described as law. It is less confusing to adopt the hypothesis that the extent of the law is limited to social control which is maintained by organized legal sanctions applied by some form of organized political mechanism. By this definition, the Nuer had no law . . . (1954: 225).

However, Howell could take some satisfaction in the fact that since the time of Evans-Pritchard's fieldwork the British had successfully introduced organized government to the Nuer, thus conferring on them the benefit of law.

[16] Anthropologists are frequently subject to the seductions of negative enthnocentrism. Indeed, it is difficult to survive the anthropological *rite de passage* of up to two years in the field without becoming partially converted to the outlook of the people one is studying. However, in the interdisciplinary field of legal anthropology, anthropologists have tended to borrow the analytic framework of lawyers with practically no exchange in the other direction (Twining, 1968). For an example of a lawyer rejecting the approach of anthropology, *see* Allott (1953). There are several pcssible reasons for this: law is a highly technical subject possessed of high status in the academic marketplace and a vocabulary incomprehensible to the uninitiated; perhaps as a result many of the anthropologists who ventured upon such uncertain ground have had some training in law, or have collaborated with lawyers (Llewellyn and Hoebel, Malinowski himself, Gluckman, Epstein, Pospisil, S. Moore, D. Metzger). Lawyers, unlike anthropologists, are not so readily attracted to the culture they are studying since they do not generally engage in extensive fieldwork and have no professional aversion to ethnocentrism.

[17] For a thorough discussion of Malinowski's theories of law, as well as a comprehensive bibliography, *see* Schapera (1957a).

[18] Indeed, the positions of the two antagonists are really complementary. This can be suggested by the following list of dichotomous qualities which indicate the opposing emphases.

Radcliffe-Brown	**Malinowski**
1. negative sanctions	positive sanctions
2. sanctions subsequent to act	sanctions antecedent
3. emphasis on law in the breach	law as observed
4. mandatory law	facilitative law
5. mechanical solidarity	organic solidarity
6. externalized sanctions	internalized sanctions

All societies, of course, fall somewhere between the poles. However, it is unfortunate that Malinowski's viewpoint has generally been slighted in favor of Radcliffe-Brown's.

[19] Malinowski might legitimately reply that he was offering a definition of *primitive* law which obviously does not apply to Anglo-American common law. (I am grateful to Richard Lempert for this observation.) However, even primitive law contains torts, as *Crime and Custom in Savage Society* amply demonstrates. Moreover, we would be left with a definition of law for *all* societies as a class of rules which are not enforced by religious sanctions, goodwill, or an abstract agency; I hardly think this is any more useful.

This over-readiness to generalize all facets of Trobriand society constantly reappears in his writing: "I venture to foretell that wherever careful inquiry be made, symmetry of structure will be found in every savage society, as the indispensable basis of reciprocal obligation" (1926: 25).

[20] Another is Hogbin (1961), with an introduction by Malinowski (1961).

[21] On Gluckman's side, *see* 1955; 1962; 1965a; 1965c; 1967; 1969; and Allott, Epstein and Gluckman (1969). On Bohannan's side, *see* 1957; 1965; 1967b; 1968a; 1968b; 1969.

Others have chimed in (*see, e.g.,* the bibliography in Gluckman, 1967: 417). According to Laura Nader, the Burg Wartenstein conference in 1966 resolved this issue:

> The question of anthropological use of jurisprudential terminology basic to an earlier disagreement between Max Gluckman and Paul Bohannan, was discussed and summarized at this conference. Intellectual agreement between Bohannan and Gluckman was arrived at by Professor Hoebel's skillful statement of the question . . . and the group expressed the belief that the argument had now been dissolved and need no longer occupy the attention and energies of scholars interested in law (1969b: 4).

A reading of the exchanges between the principal adversaries, contained in the same volume, suggests that the resolution was not so successful.

[22] So have Mair (1962: 19) and Goldschmidt (1967: 2-3). Some political scientists have recently set a salutary example by resolving to put aside, at least for the moment, their equivalent shibboleth, "the state." *See, e.g.,* Easton (1953: 108); Swartz, Turner and Tuden (1966); *but see* Fried (1967: 1, 227).

[23] Aubert notes that it is one of the few meeting places between the sociology and the anthropology of law (1969a: 12).

[24] Impact studies - which explore the relationship between norms and behavior - have been a mainstay of American legal sociology. They have been conspicuously absent in legal anthropology in general, and in Africa in particular. The reason may be related to policies of indirect rule (*see* note 28 *infra*) under which some colonial regimes maintained traditional substantive rules. Where independent governments have enacted legislation mandating radical behavioral reform, the reaction of most western scholars has been skepticism. Arthur Schiller quite early coined the phrase "fantasy law" (1965), and most writers appear to agree with him (Verhelst, 1963; Fisher, 1971).

[25] Under the title of "judicial process" this has, of course, been a favorite starting point for lawyers speculating about the law. But these speculations, though dressed in social scientific language, have only been supported by theory and empirical research in the last decade. *See, e.g.,* Kalven and Zeisel (1966).

[26] Legal realism appears to have had considerable influence upon the development of legal anthropology. Karl Llewellyn, certainly a leader of that movement, was also co-author of one of the first substantial monographs devoted entirely to law (Llewellyn and Hoebel, 1941). But there were other reasons as well. Anthropology in the 1950's and 1960's - when interest first turned towards law - was ripe for such a focus. The study of social structure and especially kinship relations, which derived from Radcliffe-Brown and which might have led legal anthropologists to emphasize substantive rules, seemed to have reached a point of diminishing returns. The watchword of the past decade has been process, as explored by the extended-case method (A.L. Epstein, 1967a; 1967b). Gluckman's writings and the work of his pupils - a force sufficiently potent to be termed the Manchester "School" - has carried this approach to such disparate subjects as ritual and symbolism, politics, and law. The relationship may be even more direct. Gluckman's first major work in legal anthropology (1955) was clearly modelled upon Cardozo (1921). It may be significant that the growth of legal anthropology coincided with the rise of Americans to increasing prominence in international anthropology following the Second World War. American social scientists interested in law can hardly escape the reach of legal realism. See, for instance, the substantial reliance by Lloyd Fallers (1969) on Edward Levi (1948). English and continental scholars, on the other hand, may be partial to a more rule-oriented jurisprudence, as were those rare American anthropologists whose interest in law antedated legal realism (*e.g.,* Barton, 1919).

[27] The legal realists were fully aware of this, and offered their own explanations (*e.g.,* Frank, 1931; Arnold, 1935). Aubert has noted it recently (1969a: 13); so must any lawyer or social scientist who seeks to engage in interdisciplinary work. Whatever the reasons for the sentiment, it helps to explain why, after more than fifty years, legal realism remains a program, to be discovered and proclaimed anew by every generation of students, rather than an accomplishment.

[28] It is interesting to note that scholars from France and Belgium, whose colonial policies tended more toward direct rule, showed considerably less interest in indigenous societies generally, and in indigenous judicial institutions in particular. On the other hand, they were more interested in the substantive legal rules of those societies, since colonial officials were expected to administer them. *See* Salacuse (1969).

[29] Innumerable colonial administrators produced admirable studies of such institutions. In Africa *see, e.g.,* Lambert (1947), Phillips (1945); in India *see, e.g.,* Rattigan (1953). Henry Morris (1970: 16) suggests that the interest of colonial officials in traditional judicial institutions was stimulated by a recognition that they offered the best source of information about the indigenous populations which those officials sought to control.

[30] This seems the counterpart, perhaps even a reflection, of the nostalgia for a vanishing social order which attracted the attention, and sympathies, of the classical nineteenth century social theorists (*see* Nisbet, 1966).

[31] Margaret Mead, in her recent autobiography, indicates this was the reason why she became an anthropologist (1972: 291 ff.).

[32] I see no reason why the analytic scheme I develop could not be applied to disputes between groups. For the sake of simplicity, however, I shall speak of the disputants as though they were individuals.

[33] I am here distinguishing conflicts of interest from controversies over ascertainable fact and conflicts over values (*see* Aubert, 1963a).

[34] It is thus sufficient for a dispute that the inconsistency be *asserted.* I am thereby including both what Simmel termed realistic and what he termed unrealistic conflict (1955). I have deliberately chosen an objective definition in terms of observable behavior so as to avoid the necessity of having to plumb the actual mental states of the claimants. The assertion of a claim need not be verbal. One response to the dispute, of course, may be to persuade the claimants that the inconsistency does not exist.

Even this definition retains a grey area in which each claimant communicates his claim to a different person (for instance, his wife), and no further confrontation develops. Hence dispute is a concept of which there can be more or less.

[35] I am following Gluckman's helpful reminder about the multi-vocality of our more common concepts, and the desirability of developing our existing vocabulary of similar words in order to stress certain elements of a concept (1962: 19 ff.; 1965b).

[36] The stage of conflict, as I have defined it, appears to require a subjective mental element in the definition of the phenomenon. It therefore seems more amenable to psychological inquiry, whereas dispute lends itself to sociological analysis.

[37] This term was suggested to me by William Felstiner.

[38] These concepts have been almost inescapable in the literature of legal anthropology and sociology. There is, of course, a *Journal of Conflict Resolution.* Recent collections in these fields have used those concepts as organizing principles. *See* Aubert (1969b: Ch. 4); Nader (1969b); Gulliver (1969a). Bohannan, who eschews the term in his collection, *Law and Warfare: studies in the anthropology of conflict* (1967), offers a possible reason for this bias in his preface:

> In Western society — and perhaps in most others, but that is beside our immediate point—conflict is unequivocally "a *bad* thing." It is typical that Western society tends to moralize about bad things — and, having salved its collective conscience, do nothing else (Id. at xi.).

It may be that we are now beginning to come to terms with this fear.

[39] *See, e.g.,* Driberg (1934); Holleman (1950). Lawyers have made the same observation, *e.g.,* Elias (1956), as have colonial administrators, *e.g.,* Dundas (1915).

[40] For a recent criticism of this approach, see Tanner (1970).

[41] Anthropologists also appear to have confused native rationalizations of behavior with objective description. Holleman quotes the Hera proverb: "'To disturb water is to make it calm again' . . . it is sometimes necessary to face trouble in order to get things straightened out" (1952:36). But a reading of the dispute in which this proverb is invoked leads me to conclude that the trouble was by no means straightened out. Nader, similarly, has entitled an essay: "Styles of Court Procedure: To Make the Balance" (1969c), translating the Zapotec value of "hacer el balance." Yet a close study of the five cases she analyzes again leaves me with the feeling that no balance was achieved in fact, and the disputes continued to simmer on.

[42] This is obvious, in a crude form, to anyone who has practiced in American trial courts. Lawrence Friedman is engaged in a careful study to document the extent to which it is so, and to explain why.

[43] This lends support to Marc Galanter's important suggestion that legal categories may not be useful starting points for organizing social research (1973: 16).

[44] I have relied heavily on Dahrendorf's analysis of this concept (1968a).

[45] This is one reason why police so dislike intervening in marital disputes — behavior appears to be random, and they cannot know what to expect. The training of a specialized Family Crisis Intervention Unit can be seen as an attempt to institutionalize these disputes (Bard, 1970). An example of highly successful institutionalization is the development of machinery for, and patterns of, labor disputes during the last century (Dahrendorf, 1959: Ch. 7).

[46] My model here is an analysis of the origins of disputes (Mack and Snyder, 1957).

[47] Compare Dahrendorf's definition (1959: 209).

[48] Michael Saltman has conducted a carefully controlled comparison of the content of disputes in three Kipsigis communities in Kenya, which differ primarily in the extent to which their economic organization has been affected by contacts with the larger society. He found that increasing modernization is closely correlated with a shift in the objects of dispute from cattle to land to money (1971).

[49] *See, e.g.,* LeVine (1960) (comparison of Gusii of Kenya and Nuer of Sudan); *see generally* Mead (1961). For examples of societies which appear to encourage such repression, *see, e.g.,* Thubten and Turnbull (1968) (Tibet); Marshall (1961) (!Kung Bushman of Kalahari Desert, South Africa).

[50] *See, e.g.,* Gulliver, 1955; for a general discussion of the alternatives to dispute, *see* Fürer-Haimendorf (1967) (a comparison of several Asian societies). Up to a point, this alternative becomes less available as population density increases. But with the quantum jump to an urban setting migration — whether physical or simply social withdrawal — becomes an important, perhaps even the most important, solution to conflict. Collier clearly delineates the consequences for Zinacanteco conflict of the proximity of the town of San Cristobal (1973).

[51] The eschatological beliefs of many versions of Christianity encourage this approach.

[52] Lon Fuller has emphasized the fact that a *party* initiates the dispute process by asserting his claim; he sees this as one of the essential features of adjudication, which differentiates it from other kinds of processes, such as economic negotiation and political election (n.d.: 54). I find this observation valuable in suggesting the identity of the initiator of a dispute as a variable, and in drawing attention to the possibility that a non-party may initiate. However, I believe the effort to establish ideal types of process to be misguided, and the normative overtones of labelling one of these "adjudication" to be fundamentally antiscientific.

[53] The numerous sociological studies of the legal profession point to the importance of this variable. *See, e.g.,* those collected in Aubert (1969b), or *Lawyers in Developing Societies, with particular reference to India* (1968-69).

[54] This has been one of the theoretical foci of the Berkeley Comparative Village Law Project *(see* Yngvesson, 1971: 4), as is amply demonstrated by many of the studies produced by members of the project (*e.g.,* Nader, 1965c; Starr, 1969; Yngvesson, 1970).

[55] *See also* Yngvesson (n.d.). This contrast between styles can only be accepted with the caution that we make explicit whether we are using folk definitions of what is superficial or fundamental, or analytic definitions. I suspect that it would be very difficult to construct the latter.

[56] Lon Fuller argues that bicentric and polycentric disputes are different in kind, and that only the former is appropriate for adjudication (n.d.: 74); *see also* Howard (1969: 347).

[57] Although I believe that Aubert's perception is well founded and useful, I am not sure that his use of the adjectives "legal" and "scientific" to describe the two approaches is justified. From my own experience of the process of family disputes in American courts, I would argue that lawyers and other legal professionals (judges, clerks, social workers) take what Aubert calls a scientific approach, and the parties, and their non-pro-

fessional relatives, friends and supporters, follow what he calls a legal approach.

[58] Eckoff (1969); Gulliver (1969a: 18-19). Lloyd Fallers devotes much of the analysis in his book to the problem of explicitness of normative argument (1969). Lon Fuller asserts that *explicit* normative argument is another identifying characteristic of adjudication (n.d.: 69); *see also* Howard (1969: 349).

[59] Students of African law have been struck by the contrasting attitudes of African and English tribunals towards the importance of finality, and the tendency of that value to be emphasized with the Europeanization of the court structure. *See, e.g.,* Lambert (1947: 8); A. L. Epstein (1952: 8); *see also* Howard (1969: 354).

[60] Aubert (1963a); Cohn (1967: 156); Nader (1969c: 88). I believe Nader is in error in contrasting a zero-sum game with the minimax principle. The latter applies equally in zero-sum games. I think the contrast she identifies is one between dichotomous either/or decisions, and compromise decisions. The former is extremely rare in any legal system.

[61] The growing sociological literature of "impact studies" deals with this problem. *See, e.g.,* Nagel (1971).

[62] The problem with using such analyses for sociological purposes is, of course, that both Fuller and Wechsler are offering normative judgments, not descriptive statements.

[63] This convergence may be due to the fact that the "rule of law" is a central concept in the American legal and political folk systems. The work of Philip Selznick and his associates at the Center for the Study of Law and Society, at Berkeley, consists in part of an attempt to give this folk system a definite analytic content. But the difficulty with such borrowings is that the folk concept can never be completely freed of the freight of emotional and ideological connotation which is an essential attribute of everyday language.

This approach also appears to be predicated on a causal sequence which is the reverse of that commonly used by the sociologists and anthropologists surveyed above (with the possible exception of Bohannan). They, by and large, examine the structure of a dispute to understand how it determines process. The neo-natural law school studies the way in which a concept of the dispute process determines its structure. See the controversy between Selznick and his critics reproduced in Friedman and Macaulay (1969: 1-34). For a recent example of this natural law approach, *see* Selznick (1969); *and see* Golding (1969).

[64] This may explain the vehement, and almost uniform, criticism of judicial behaviorism by legal scholars, who disparaged it as "the breakfast school of jurisprudence."

[65] The consequences of the paradigm extend beyond scholarship to the world of action. Legal scholars who embrace the notion of the rule of law urge that judicial institutions abstain from action where norms, or certain kinds of norms, do not decide the dispute. And judges, equally anxious to avoid the taint of non-normative influence, often follow their advice.

[66] I am here concerned with what it *means* for a norm to govern a dispute. Later I will consider the conditions necessary for a norm to govern a dispute.

[67] To ask the question — when do norms determine the outcome of a dispute — is of ccurse to choose a level of analysis at which norms are the significant variable. Recent political science and legal history have preferred to treat other variables as determinative of norms and outcomes. *See, e.g.,* Hurst (1964); Friedman (1965); Macaulay (1966); Tushnet (1972); Horwitz (1973).

[68] Wechsler would almost certainly agree, and reply that his statement is meant to be critical and not descriptive.

[69] This is, of course, the criticism offered by Jan Deutsch.

> Adequate generality in a judicial decision — neutrality, if you will — is, therefore, that degree of generality perceived as adequate by the very society that imposes the requirement of adequate generality to begin with . . . (1968: 195).

[70] It would of course be possible, after the dispute, to review events and find some norms which appear to describe what happened—*e.g.,* plaintiffs wearing striped ties should win cases on November 7, 1972 — and this is, to a large extent, what legal professionals (including scholars) do. But this is not what they mean by norms governing disputes.

[71] A norm, in this sense, may be simply the generalization of the demand beyond the fact situation of the instant dispute to some inclusive fact situation, to which positive value is attributed. Children below a certain age may not be able to proceed beyond "I want." But the capacity to verbalize a demand is very soon followed by the capacity to justify it: "I want because I like." And although absolute power may lead a man to regress to infantile demands, as Camus suggests of Caligula, anything less does not have that result; nations are constantly appealing to norms, and so are dictators.

[72] Gluckman had anticipated this by interpreting Gulliver's Arusha cases as displaying the presence and influence of powerful norms (1965c).

[73] This distinction has been criticized by others, *e.g.*, Raz (1972), and further refined by Dworkin (1972). For an attempt to reconcile the two, *see Yale Law Journal* [Note] (1972).

[74] The most noteworthy instance in which a standard became a rule, and then a standard again, is the "stop-look-and-listen" cases. The common law norm of behavior at level railroad crossings had been reasonable care. In *Baltimore & Ohio Ry. v. Goodman* (1927), Justice Holmes sought to "lay down a standard [sic — a rule in this context] once for all" — a rule which would require the driver of a car to stop, look and listen before proceeding through a level railroad crossing, and if his view was obstructed, to get out of the car. This rule had operated for only seven years when Justice Cardozo felt compelled to overrule it in *Pokora v. Wabash Ry.* (1934), writing: "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law."

Recently we have seen numerous instances of standards being construed in an increasingly rule-like manner, *e.g.*, the Equal Protection Clause as applied to school desegregation, to reapportionment, and, as interpreted by state courts, to school financing. At the same time, there are probably a greater number of examples of rules becoming standards: precise grounds for divorce interpreted as equivalent to marriage breakdown; rules governing commercial transactions becoming standards of accepted business practice.

A more interesting question, therefore, is why a particular normative idea is formulated as a rule, or as a standard, and when it will be transformed from one into the other.

[75] A. L. Epstein observed an increase in the level of abstraction of the norms invoked by courts on the Copperbelt over the course of time (1951: 34). Kawashima uses the Parsonian pattern variable — particularity/universality — to describe changing patterns in legal reasoning in Japan (1963).

[76] An increase in explicit argument might, for instance, be correlated with rapid social change, with an increase in cultural heterogeneity, or with an increasing reliance on rational authority rather than traditional or charismatic.

[77] Both Tanner (1970) and Collier (1973) emphasize this variable; it may be significant that both worked in societies that had been pluralist for a long time (Indonesia), and had a long history of colonialism (Indonesia and Mexico).

[78] It may be, for instance, that every dispute process requires elements of both flexibility and fixity, so that when substantive norms become fixed, procedures become more flexible, and vice versa. Eckhoff notes that flexibility of norms may inhere in political ideology in much the same way as formality of procedure is mandated by the western concept of the rule of law. "[Confucius'] teaching that the parties tending to assert their rights must be dampened, so that one could get them to compromise, has left deep marks in the East-Asiatic ideology of conflict-resolution" (1969: 173 n.1).

[79] Simon Roberts has given us an excellent analysis of the extent to which traditional Kgatla law is presently open to new norms, often drawn from western legal systems (1971).

[80] Nader has made this explicit (1969c: 88), as has Marc Galanter (1972b). Eckhoff notes that the influence of norms can derive from a wide variety of sources, such as political power, tradition, ethics, etc. (1969: 176-77), and further that the same individual may alternate between adjudication and mediation in coping with a dispute, even though his quantum of authority does not change (1969: 180-81). Weber, of course, has conducted the most extensive inquiry into the relation between the nature of authority and the nature of norms (1954).

The tendency of the concepts I seek to correlate to merge into an indivisible unity becomes acute at this point, and the causal direction of their relationship becomes obscure. Do authority or the relevant norms antedate the dispute; do they arise as a result of the dispute? The problem is that both statements are true, and the attempt to explain one by the other is necessarily arbitrary to some degree.

[81] This may be considered a special case of Weber's concept of charismatic authority.

[82] This is an instance of Weber's concept of traditional authority.

[83] Eckhoff gives the example of chess-players (1969: 177); Piaget finds similar instances among children (1965: Ch. 1), and Malinowski among the Trobriand Islanders (1926: 22 and *passim*). We can all think of examples from our own experience. This may be generalized as Weber's concept of rational authority.

[84] Many authoritative decision-makers function largely without reference to norms. Weber's ideal-type of *kadi* justice (1954: 63) and Maine's picture of the paterfamilias issuing *themistes* (1950: Ch. 1) may be examples. Even those decision-makers whose behavior can, in some degree, be explained by norms engage in considerable activity which cannot be so explained.

[85] Compare Tanner (1970), and Collier's use (1973) of Barkun's definition of law (1968: 92, 151). Marshall and May put this nicely in their study of the divorce court in Ohio:

> The substantive law of divorce is merely the terrain on which the battle of the divorce court is waged. As a manual for the training of American infantry officers says,
>
> > The terrain exercises a controlling influence on all military operations. Properly utilized it is frequently the decisive factor. The elements of the terrain are the concealment, cover, facilities for movement, and opportunities for observation and fire which it affords, and the obstacles it interposes to fire and movement.
>
> The procedural rules in divorce actions are, therefore, what a military strategist would call "the utilization of the terrain" (1933: 211).

[86] This is, of course, a commonplace among practicing lawyers. Indeed, there are manuals which instruct the practitioner in how to control for jury prejudice (Garry, 1969). But if the legal system does not actively seek to conceal the irrationality of the jury, it is sufficiently ambivalent about that factor to resist academic investigation and publicity. *See* Strodtbeck (1962: 151 n. 8).

[87] *See, e.g.*, R. Dawson (1969); Hood (1962); Frankel (1973); Seymour (1973). Most criminal dispositional systems, in addition, make explicit provision for the exercise of executive clemency, which is intentionally a deviation from the norms. There is considerable uncertainty over the extent to which norms do, and should, govern this behavior, as the recent Watergate scandal indicates.

[88] The discretion allowed private individuals in initiating civil litigation is so obvous that, unfortunately, it has never been studied; von Jhering is almost unique in his speculations (1915). *See also* Black (1973). This has, however, formed a principal concern of the sociology of criminal law. *See, e.g.*, J. Goldstein (1960); Skolnick (1966); LaFave (1965); Black (1971).

[89] *See* Miller (1969). Compare the criticism of Adam Walinsky, then candidate for New York State Attorney General, when he announced that if elected he would not devote his primary efforts to the prosecution of flag burners (*New York Times*, August 15, 1970; August 21, 1970), with the claim by the then Attorney General Louis Lefkowitz (who was seeking re-election) that he prosecuted all offenses brought to his attention. Whenever such discretion is made explicit there are cries of outrage. See the attempt by referendum in Berkeley to regulate the discretion of the police to make arrests for the possession of marijuana. Although the referendum was successful, it has since been declared unconstitutional by a court. The Watergate scandal is in part a controversy over the factors that should affect the decision to prosecute.

[90] Newman (1966); Howard (1969); Jones (1969); Ross (1970). My own experience in practice in New Haven confirms these observations. Not only does the judge accept uncritically almost any agreement between counsel, but he will frequently refuse to hear counsel argue when they

wish to do so, and instead send them out of the courtroom to negotiate a settlement.

[91] The controversy stimulated by President Nixon's recent successful and unsuccessful nominations to the Supreme Court, and by the change in judicial ideology and decision which those appointments have produced, is contemporary evidence of the importance of these factors.

[92] O'Gorman (1963: 21), following Merton (1967b: 126 ff.), has argued that such disparities between norm and behavior should provide a stimulus for social analysis, not just moral reprobation: "Norms, legal or otherwise, are not evaded without reason. When evasion becomes common practice among large numbers of law-abiding citizens, the determinants of such evasion are to be found . . . in institutional inconsistencies rather than in individual morality. . . . patterns of evasive behavior have developed by which the law is obeyed in theory and denied in fact. To paraphrase Merton's analysis of political machines, the functional deficiencies of the law generate an alternative method to fulfill social demands somewhat more effectively."

[93] *E.g.,* the scandal concerning Justice Mitchell Schweitzer (*New York Times,* August 3, 4, 6, 7, 14, 1971).

[94] The O.E.O. Legal Services program was developed largely in response to a recognition of these disparities, and the literature which led to its creation, and which evaluates its success, is replete with data. *See, e.g., Harvard Law Review* [Note] (1967); Galanter (1972b).

[95] Gusfield deals at some length with the problem of explaining behavior, which is explicitly justified in normative terms, by means of other social factors (1963: 57-60).

[96] Aubert has noted that "a touchiness often arises because of a certain ambivalence in the foundation of the relationship. Lawyers are the subject of sociologists, but they are simultaneously collaborators . . ." (1969a: 13-14).

[97] O'Gorman's study (1963) of lawyers who handle matrimonial cases offers excellent insights into the complementary influence of official rules, and of other structural and cultural factors, upon the behavior of each of the actors in those cases. Throughout the book he presents instances of behavior which cannot be explained by official norms alone. For instance, the decision by a resident of New York to seek his divorce in another jurisdiction is best explained by the socio-economic status of the petitioner, and by the nature of his lawyer's practice (1963: 77-80).

[98] *See* Stinchcombe's analysis of the use of type concepts (1968: 43-47).

[99] Malinowski, of course, is the extreme example of this. But many anthropologists have difficulty breaking out of the framework of the first society they study — which is often the last.

[100] It is striking that anthropologists who engage in extensive fieldwork in tribal societies often fail to carry out comparable research in their own. Instead, they rely on popular literature, or even the anecdotal experiences of themselves or their friends. *See, e.g.,* Bohannan (1970). On the other hand, practicing lawyers — certainly participant observers of their own legal system — make the opposite mistake.

[101] Yet even it reveals the dangers of this method. Jane Collier's attempt to apply the Zapotec model to her Zinacantan material seems to me to distort the latter, not to illuminate it (1973: 105-6).

[102] An interesting example of a zero-sum game which included some of the features of Nader's model, but not others, was the experiment of a history department in an American university in allocating by vote the total sum of money available for faculty raises for the entire department among each of its members. The focus of inquiry tended to be prospective rather than retrospective, but discussion was limited to superficial issues.

[103] On the other hand, the Bakongo explore all the issues, and yet have no belief in the value of compromise, or the impossibility of an unambiguous attribution of praise or blame (MacGaffey, 1970: 183).

[104] American courts impose compromise all the time (*see* Coons, 1964). Every jury verdict for the plaintiff in a negligence case is a compromise between the victim's claims and the defendant's contentions.

[105] I would suggest, as a hypothesis, that such a departure might be found where the Zapotec court was confronted with a dispute which contained a suspicion of witchcraft; I would be very surprised if such a suspicion was made public, and openly and fully explored.

[106] Weber, himself, would choose another course. He would seek further

insight from the departure of data from ideal type (1968: 506). Brodbeck has criticized this approach as circular (1968: 459-60).

[107] This is another reason why I reject the attempt to divide disputes into normative and non-normative, a division which creates two ideal types.

[108] One reason why anthropology has not proceeded much beyond the classification of traits may be the insidious influence of functionalism. If, as Malinowski in particular proclaimed, everything in a society is related to everything else, the only possible explanation is a holistic description. This was undoubtedly a fruitful doctrine in the early study of tribal society, and a valuable caution for those who would blindly study single traits in isolation. But taken to its logical extreme, it leads to a mindless gathering of data in the vain hope of understanding the society as a whole.

[109] Nadel (1951:407). Much of the work of the culture and personality school of American anthropology is vitiated by the failure to use separate indices for culture and personality. James Gibbs commits the same error in his recent study of the dispute process among the Kpelle, but he is clearly conscious of the problem and has conducted, though not yet analyzed, a separate inquiry into personality traits (1969: 185).

[110] This has also been called the "Zanzibar syndrome" in a probably apocryphal story about a Zanzibari student at Yale who confounded his professor by demurring to every generalization offered on the ground that it did not apply to Zanzibar. Of course, he was right — Zanzibar is special — but so is every other concrete instance.

[111] For critical discussions of the definitional problems, *see* Dahrendorf (1968a); Southall (1959).

[112] The Supreme Court's decision in *Brown v. Bd. of Educ.* (1954) may not have been "effective" to integrate the schools, but it contributed in some degree to later legislation which asserted the principle of desegregation in other social activities.

[113] At least this was the hope of the numerous colonial administrators who recommended that remedy. *See* Phillips (1945: 168).

[114] Kenya has consciously adopted a policy of stationing judges outside their localities in order to promote the development of national norms.

[115] An excellent example of sophisticated analysis of this more complex relationship is Aubert (1966).

[116] Even in this somewhat more sophisticated form, my essay is still an "impact study." Among the many reasons why that format is so pervasive in the sociology of law, two predominate. First, contemporary western politics is built on an assumption that law should be effective. Second, all scholars are swayed by their value preferences in choosing problems for study. Because these are often unstated, they are rarely subjected to analysis. In those circumstances, official statements of value — embodied in law — offer a convenient and acceptable starting point. I have discussed this point at greater length in a review essay (1973).

[117] I have done so to a limited extent elsewhere (1970), and am in the process of expanding that analysis.

[118] Each of these defining criteria allows of variation, so that the dispute with an intervener merges imperceptibly with the dispute which lacks one. Thus the intervener need not be addressed directly by the parties, but may hear of their claims through intermediaries. And he need not issue a unilateral decision; indeed, inaction may be a form of intervention if action is customary.

[119] It appears to be a norm of almost universal provenance that someone, at least, should intervene in every dispute. This may explain the widespread repugnance expressed when *no one* does so, whether in New York City — as in the Kitty Genovese incident — or in Uganda, among the Ik, as described by Colin Turnbull (1972). New Yorkers have recently taken heart from the renewed willingness of their fellow citizens to intervene. *See, e.g., New York Times,* July 23, 1973, p. 1.

[120] The relative capacity to do something about the role may explain why so much sociological attention has focussed on the legal professional, whether lawyer or judge, and so little on the litigant, whether actual or potential.

[121] Among the numerous examples are: Kenya — Abel (1969a; n.d.b); Uganda—Russell (1971); Zambia—Spalding, Hoover and Piper (1970), and the extensive references cited therein.

[122] There are several problems with this definition. How do we know whether

a disputant is following the decision of an intervener? If we use an objective criterion — conduct which appears to an external observer to be in conformity with the decision — we include conduct which is merely fortuitously conformable. *See* Weber (1947: Ch. 1). On the other hand, a subjective definition introduces all the problems of measurement and proof. Furthermore it creates a circularity of definition: authority is measured by conformity, and conformity by submission to authority.

123 Pospisil's purpose here is to distinguish law from custom. He does not explain why he chooses these two qualities, nor how they are related to each other, if they are.

124 *See Durham v. United States* (1954). It is possible that psychiatrists, habituated to the exercise of absolute authority, come to behave in a more legalistic fashion, *e.g.*, in determining commitment to or release from large state mental institutions, or in deciding to grant or deny parole. *Cf.* A. Goldstein (1967). Aubert makes a similar point (1936b: 19).

125 The enthusiasm with which American foundations poured money into higher education in general, and legal education in particular, in Africa and Latin America, is testimony to the pervasive belief in the capacity of training, even at a relatively late stage of a person's intellectual career, to effect change in him and in society. The results have not met the expectations.

126 By including authority and training under this umbrella, I do not mean to suggest that role differentiation captures all that is significant about those two concepts; rather, it abstracts their bare bones. I am here concerned whether the intervener possesses more authority or training than other interveners, not with the content of that authority or training. The latter will undoubtedly also influence the intervener to act in certain ways.

127 *See, e.g.*, Toennies (1957); Sorokin (1937-41). Here, as in my analysis of process, I reject the typological approach but use the types posited to furnish variables.

128 In anthropology, *e.g.*, White (1959); Steward (1955); Sahlins and Service (1960); Fried (1967). In sociology, *e.g.*, Parsons (1966); Eisenstadt (1964). For additional references, see my bibliography on "Evolutionary Theories of Law in Society" (n.d.a: 8-11).

129 *See also* Schwartz and Miller (1964); Nagel (1962). Lubman has used the same variable to explain the differences in functioning among urban, industrial and rural mediators in contemporary China (1967: 1330, 1337).

130 I am compelled to accept Robert Nisbet's contention that much of twentieth century sociology is a reworking of the ideas of nineteenth century ancestors (1966: *passim*).

131 The task itself is somewhat daunting. The available material on Kenya, published and unpublished, is considerable. *See* Abel (1969b). In addition, I collected cases, disputes processed out of court, descriptions of and prescriptions for courts by administrative officers, and statistics about litigation.

132 Yet my purpose has not been an exhaustive survey and synthesis of the growing literature on dispute settlement. I am seeking, rather, to elaborate some general theories in such a way that they can be tested. I think the reader who continues with this essay will agree that I have derived more than enough concrete conclusions for this purpose; further proliferation of examples would be unproductive at this stage, since they would not offer evidence for or against the theory. The one bias that may prove serious is my familiarity with Anglo-American legal systems, and my ignorance of their Continental counterparts.

133 It may well be that our own society is the best place to test many of the hypotheses formulated by means of research in the developing countries. Not only are some of the ethical problems of research and experimentation mitigated, but controlled reform may be more practicable than in societies where rapid social change is a paramount objective.

134 Functional specialization, in the sense of role independence, variable S2, *infra*, has strong normative overtones as well. The separation of powers is an axiom of the political ideology of western Europe and America. European observers invariably noted the commingling of powers in African polities, and generally criticized it. Colonial governments often made an attempt to restructure African governments along European lines. *See, e.g.*, the "Bushe" Report (1934); Spalding, Hoover and Piper (1970: 59-69). But these attempts have been of only limited success, even today. Fallers writes that Soga chiefs, who participated in pro-

mulgating legislation and administering the affairs of government, were also the courts until 1941, and continued to dominate the judiciary at the time of his fieldwork in 1950 (1969: 59). Indeed, in a case heard in 1950, the defendant seemed wholly ignorant of the distinction between a subcounty chief acting in his administrative capacity and the same individual performing the role of judge (1969: 165). (I found instances of similar confusion about the headman's *korti* in Kenya in 1967-68.) But not only did the judges perform other governmental functions, they frequently owed allegiance to persons and groups as a result of their positions in the traditional state structure. Fallers has devoted a whole book to describing the "strain" to which an individual is subjected when he is the focal point of such poorly integrated institutions asserting inconsistent expectations about his behavior (1965).

[135] The definition of what it means to perform a function will clearly cause serious difficulties when we come to measure this variable, and I am grateful to Roberto Unger for pointing them out. What is intervention? Is it sitting in the presence of the disputants? even if the intervener is thinking about something else? What if, despite his efforts, the dispute is stalemated? An intervener may be specialized in the sense that he is physically in his office, but nevertheless be diversified in the functions he performs.

[136] *See* Biddle and Thomas (1966: 34). Compare, for instance, the Continental tradition of a career judiciary (Merryman, 1969: 34 ff.) with the American practice of appointing men to the bench late in life, some of whom (*e.g.*, Supreme Court appointees), while qualified as lawyers, may have had little contact with the law for many years. Contrast with both of these the situation in some traditional African societies, where men may qualify to adjudicate by attaining a senior age-grade, prior to which point they have performed that function only within their families, if at all. *See, e.g.*, Lambert (1956: 107 ff.). Given the limited life expectancy, most will function as judges for a very short period, both absolute and relative.

[137] Biddle and Thomas (1966: 59) (concept of repertoire extensiveness).

[138] The combination of roles may be as much the product of conscious decision as the division of roles. In New York's experiment with the Family Crisis Intervention Unit it was decided that those patrolmen who received special training, and responded to *all* family quarrels, would continue their regular patrol work (Bard, 1970). One reason may have been the lower status associated with specialization in that role. A similar reason may explain the uniform opposition of the Connecticut bench to a specialized domestic relations section in place of the present practice of rotating most judges through the domestic relations calendar for a limited period of time.

[139] Again, societies may consciously make the opposite decision, requiring interveners to perform other roles, and the occupants of other roles to intervene. Chinese mediation is an example (Lubman, 1967: 307-08 n. 94).

[140] This can go far beyond provisions designed to prevent a conflict of material interests — *e.g.*, that a judge divest himself of stocks, or recuse himself in a particular case. One response to the Warren Commission's investigation was a demand that judges be precluded from acting in such a capacity in the future. Ironically, the very specialization of judges in the United States contributes to their status, which leads to pressures upon them to accept other roles.

[141] *See, e.g.*, Smelser (1964: 261): "Simply defined, differentiation refers to the evolution from a multi-functional role structure to several more specialized structures."

[142] Merton has demonstrated this convincingly with regard to intermarriage in America (1941).

[143] Compare, for instance, the High Court of England (whose justices constitute .00012% of the population) with the lay magistracy (which constitutes a percentage 300 times larger) or with the mediation committees of China which, even within that much larger population, constitute a percentage 200 times as great. *See* Abel-Smith and Stevens (1969: 459 ff.); Cohen (1966: 1202).

[144] It should not be thought that African dispute institutions lack this form of internal specialization. Akan courts possessed spokesmen, messengers, and criers, as well as chiefly judges (Mensah-Brown, 1970: 128). But the fact that society recognizes such roles does not mean that they are

always performed. Ethiopian litigants tended to shun the amateur lawyers who were available (Fisher, 1971: 733).

145 Spalding, Hoover and Piper see this as an important theme in judicial development in Africa (1970: 52-59).

146 Tribal courts generally had unlimited subject matter jurisdiction. The change under colonial rule was abrupt. Those that were recognized were hedged in on every side: forbidden to hear cases involving marriages celebrated under certain ordinances, denied statutory jurisdiction, restricted in cases where death had occurred, or where severe penalties might be required. With independence these restrictions have been relaxed. But there is reason to expect an increase in specialization along the lines of recent western judicial history. *See* Abel-Smith and Stevens (1969).

147 The American doctrines of exhaustion of administrative remedies and abstention by the federal courts are extreme refinements of this. But Chinese judges, too, scrupulously observe the requirement that a couple submit to mediation before the hearing of a contested divorce (Lubman, 1967: 1327-28).

148 Conversely, social revolution may constitute a conscious attempt to diminish social distance and cultural differentiation, especially as these variables characterize judicial institutions. *See* Lubman's discussion of Maoist strategy as early as 1946 (1967: 1306-09).

149 I wish to distinguish here between two kinds of peripatetic disputing. In the first, modelled upon some African societies, the intervener accommodates to the dispute, holding the hearing where the disputants, their witnesses, or the objects of the dispute are located. I would view this as relatively undifferentiated. However, Duncan Kennedy has suggested to me that a central government may send out interveners to hear disputes locally in order to enforce its rule more effectively. I would treat this as a situation of high differentiation because the intervener comes from the capital and presumably is endowed with some of the other qualities discussed below. Appeal courts in Kenya travelled on circuit; so did those of Tanzania (Kaplan, 1965: 85).

150 Lubman notes that Chinese mediators visited the disputants individually in their homes (1967: 1298, 1307).

151 African dispute institutions accommodated to disputants here, too. Margery Perham notes of Ethiopia: "Parties in civil and even minor criminal disputes would call upon a passerby to decide the issue between them under a tree. These informal roadside courts might last for hours, to the deep interest of the spectators. . . . Judges thus conscripted were expected to accept their duties" (1948: 144-45, quoted in Fisher, 1971: 729). Collier reports instances of the Zinacanteco *presidente* being awakened at night, or cornered at his home early in the morning (1973: 30). Even after the hearing had begun, it might be adjourned to permit parties to call missing witnesses (A. L. Epstein, 1954: 16; Holleman, 1952: 30). By contrast, the status of legal specialist — whether lawyer or judge — like that of the medical specialist, is often defined by how many people he has waiting for him, and how long each of them has to wait. An excellent empirical study of the Magistrates' Courts in England observes: "It is certain that the convenience and feelings of litigants have hardly ever been considered in the administration of this branch of summary justice. Such details as the opening hours of collecting offices or the willingness of court staff to save a woman the loss of a half day's earnings by giving her information over the telephone seem too trivial to be considered in legal discussion of the jurisdiction. But these are the sort of trivia that mean for the mostly very poor and unhappy citizens who meet family law in the magistrates' courts, the difference between dignity and humiliation, between decency and squalor" (McGregor, Blom-Cooper and Gibson, 1971: 122).

Attempts to reform modern legal systems often attack this phenomenon: Chinese mediators and the first American juvenile court both met during leisure hours so that parties would not have to miss work (Lubman, 1967: 1318; Juvenile Court of the City and County of Denver, 1904: 85).

152 This factor has been unduly neglected, and only a few studies give us any data on, much less analysis of, judicial architecture. *See, e.g.,* Hazard (1962); Bedford (1961); Moley (1932); Collier (1973); Spalding, Hoover and Piper (1970: 161 ff.); Virtue (1956).

153 An Ibo proverb perfectly expresses one extreme of this variable: "A

case forbids no one" (Elias, 1956: 239, quoted in Fisher, 1971: 731). A public setting may permit other members of the community to participate, as in Ethiopia (Fisher, 1971: 732) or Tanzania (Kaplan, 1965: 84).

154 When Judge Benjamin Lindsey, moving spirit behind the highly innovative Denver Juvenile and Family Relations Court, was replaced by a much more traditional judge, he wrote of his successor: "The bench itself he finds too low to meet the requirements of judicial dignity — according to the press he will 'raise it 18 inches'! And in an expansive moment he confides: 'I will say . . . that my idea of the court is to make it as nearly like other courts of record in the state as it is possible under the law'" (Lindsey and Borough, 1931: 296).

We have recently witnessed other developments in the physical environment of American courts which, though introduced for different reasons, appear to have the consequence of further increasing the social distance between intervener and disputants. Dismayed by the amount — and kind — of defendant participation in recent criminal trials, judges have resorted to a variety of devices, one of which—approved by the Supreme Court — has been to remove the defendant from the courtroom and allow him to watch the proceedings by closed circuit television. The same technology has been used in reverse: in order to protect the jury from hearing inadmissible evidence, the trial has been videotaped, cut, and then presented to the jury on television. *See New York Times,* June 23, 1973, p. 32.

155 The difference between traditional African institutions and those established by colonial rule was immense. Further change has occurred more gradually as a result of administrative consolidation and population growth. Kaplan notes an increase in the size of Chagga chieftaincies between c. 1900 and 1952 from 5,000-15,000 to 10,000-30,000 (1965: 82-83). Prior to the judicial reorganization of 1930 there were approximately 400 primary courts in Kenya serving a population of 4,000,000; in 1970 there were about 100 such courts serving a population of more than 10,000,000, roughly a tenfold increase in the population per court.

156 Maine stressed the importance of a transformation of the concept of jurisdiction from one based on kinship (personal) to one based on territory (geographic) (1950: Ch. 5). Barton found empirical confirmation of this hypothesis in the Philippines (1949).

157 The recognition and definition of limits may also be viewed as a concomitant of bureaucratization (*see* Part V.A.3 *infra.*). Lubman describes the jurisdiction of mediators in industrial settings in China as being very flexible and indefinite (1967: 1333).

158 Henry Morris describes the gradual expansion of the personal jurisdiction of primary courts in Africa — from Africans of the local area, to Africans of the tribe, to Africans of the territory, to all Africans (1970: 14). Since independence there has been a general rejection of the concept of personal jurisdiction, which is seen as repugnant to contemporary ideals of equality and nationalism.

159 The increase in the size of the geographic unit served by the primary courts in Kenya has been more than matched by an improvement in roads and bus transport. *See* Barnett (1965: 44). This is true for much, though not all, of Africa.

160 This consequence of the colonial system of criminal justice was often the subject of concern. *See, e.g.,* the "Bushe" Report (1934: 13-16, 23).

161 That this is often done from very different motives — *e.g.,* to promote a spirit of national unity, or to limit corruption — does not alter the consequences.

162 Marc Galanter tells me that a civil servant in India was expected to resign from his club when appointed a judge. Celibacy may have similar consequences for another profession.

163 The inflexibility of the costs may also be an index of bureaucratization. Holleman indicates that customary gifts made in Hera courts were highly flexible: goods could substitute for cash, partial payment would be accepted as a token of good faith intent to pay the rest, and full payment was often neither demanded nor made (1952: 31).

164 As Fisher describes the criminal investigation in Ethiopia, it was an occasion for feasting by the local officials, and an economic disaster to the inhabitants (1971: 719).

165 I would expect remuneration from another source to result in greater differentiation of the intervener for two reasons: the economic nexus is eliminated, thus permitting the intervener to remain more aloof from

the disputants, who no longer pay him for his services; the amount of the remuneration can be greater since it need not come from the disputants alone. With respect to the former difference, compare the legal or medical professional, who avoids discussing payment with his client and sends a bill after the service is rendered, with the storekeeper, who shows no such embarrassment.

166 Even in the most egalitarian societies, women are commonly excluded from participation in disputes, or relegated to a largely passive role as audience. They are thereby deprived of the training required to perform the role of intervener.

167 The opposite may also be true; Chinese mediators were frequently illiterate — certainly not by chance (Lubman, 1967: 1323).

168 I am using this in Weber's sense of "the probability that a command with a given specific content will be obeyed by a given group of persons" (1947: 152). Although authority certainly can serve to differentiate the institution or intervener, I am not clear in my own mind whether its effect is commensurate with that of the other variables, or whether it has consequences that differ in kind.

169 At the same time that colonial governments recognized certain traditional African dispute institutions, they generally granted them a monopoly of authority to decide disputes, and imposed criminal penalties on other traditional institutions which continued to perform the same function. *See, e.g.*, Native Tribunals Ord., No. 39 of 1930, s. 26 (Kenya); and the description of prosecutions in Meru District in Phillips (1945: 82 ff.).

170 State monopoly of the power to change status is a very recent phenomenon, and still incomplete even in western countries; consider the history of such statuses as adoption, marriage, and divorce, where "common law" (*i.e.*, private) practices persist. For the change in Africa, *see* A. L. Epstein (1952: 7).

171 The literature on tribal dispute settlement is replete with instances in which authority is very widely distributed among participants. This variable may be especially useful for comparing dispute institutions in chiefly and acephalous societies.

172 Dahrendorf sees "the unequal distribution of political authority over persons as incumbents of positions" as the critical element in a meaningful concept of social stratification (1959: 292, and Ch. 8 *passim; see also* 1968b; 1968c).

173 Efforts are often made to reduce the social distance between interveners and the rest of society, *e.g.*, the requirement that races be represented on a jury in proportion to their representation in the population, or the recent California experiment of having juveniles act as a jury in the juvenile court — presently one of the most extreme instances of social distance between party and intervener, measured in terms of age. Although interveners in African dispute institutions generally were socially proximate to the disputants along most of these variables, they were often socially distant in terms of age and sex, being staffed exclusively by male elders. Yet women and youths might have their own institutions for internal disputes, and some tribes (*e.g.*, the Meru of Kenya) institutionalized the representation of several age grades among the interveners.

174 Dahrendorf has shown how this can contribute to a distinct social stratum even when the members are originally drawn from quite diverse strata (1964).

175 Such meetings are beginning to occur among primary court judges in Africa. *See* Kaplan (1965: 85); Georges (1968). English High Court judges have opposed decentralization of the judiciary on the ground that judges situated outside London would be "cut off . . . from the intellectual stimulation of the inns of Court." (Abel-Smith and Stevens, 1969: 289).

176 The reporting of judicial decisions can serve this function, where there is an effective mechanism for circulating those reports. This is not true in most African nations. In Kenya, for instance, each High Court judge determines whether his decisions shall be made available, and some are apparently reluctant to submit them to the scrutiny of their peers.

177 Such issues can divide as well as unite the judicial corps (Moriondo, 1969).

178 The norms regarding proper appearance in a judicial setting appear to be widely disseminated in American society, and finely graded. Youths

summoned before the juvenile court are aware that its proceedings are supposed to be informal, and that they can wear street dress for the initial hearing. But they also know that, as they return as multiple offenders, they are treated more harshly and formally and may be sent to reform school. At this point they cut their hair and put on ties.

[179] The attempt to alter this highly impractical dress in Nigeria met with furious resistance, and was defeated (Cottrell, n.d.). On the other hand, the Zinacanteco *presidente*, who ordinarily wore Ladino attire, put on Indian dress when he heard cases at the Town Hall (Collier, 1973: 81).

[180] Jane Collier has used an idiom drawn from Goffman to illuminate the behavior occuring during a dispute (1973: Ch. 3). In doing so, she reveals the importance of developing concepts for analyzing the structure underlying such behavior. In the absence of such concepts, there is a real danger that the social theory of law will reduce to mere ideographic description as our interest moves from the analysis of structure to the analysis of process.

[181] At the extreme of non-differentiation, there may be no behavior that is distinctive of the dispute institution. *See* Holleman (1952: 33).

[182] We are accustomed to thinking of judicial deliberations as solemn proceedings. But this is not always true even in our own courts (*see* Moley, 1932), and other societies may institutionalize different kinds of behavior, as in the Eskimo song duel (Hoebel, 1954: Ch. 5; *compare* Fisher, 1971: 733).

[183] For instance, contrast the behavior of our more notorious trial lawyers in front of a jury with argument before the Supreme Court.

[184] *See, e.g.*, Messenger (1959). Paul Bohannan, a highly skilled fieldworker, wrote of his own difficulties:

> When I first went to Tivland in 1949, I was invited by chiefs and elders to attend court sessions. I scon gave them up. I knew their importance, and knew that they formed a late stage in fieldwork, when my knowledge of language and culture was fuller. Most of my case material, then, comes from my third tour in Tivland, in 1952-53. My own knowledge of the language was such at that time that I cculd understand most court cases easily as they proceeded. I was never able to understand all of them easily or probably any of them fully, for the Tiv language — like all African languages — is highly allusive and its perfect understanding demands not only a thorough knowledge of its idiom and of its myths and stock metaphors, but also of the incidents which have occurred in the specific neighborhood in the last forty or fifty years (1957: xii).

[185] This mode of differentiation has recently become a source of tension in the American judicial process. See the extensive literature on the Chicago conspiracy trial, *e.g.*, Dellinger (n.d.); Lukas (1970); J. Epstein (1970); *see also* Rosenblum (1971).

[186] The structure of the American courtroom typically insures this. Not only is the judge elevated on a bench, and segregated from lawyers by the bar, but he enters and leaves the courtroom from chambers by means of a door restricted to him alone.

[187] Holleman describes the way in which Hera litigants must "climb up" to the judge, who is physically situated at a higher level, by means of token gifts whose vernacular name means "to climb up" (1952: 28, 30). Lubman quotes a revealing incident in which a Chinese judge and an American diplomat clashed over whether a Chinese employee of the U.S. Consulate, who had been summoned to testify, would kneel in traditional Chinese fashion. Needless to say, the American won (1967: 1296 n. 42). Yet American courts are hardly that different. The Superior Court for New Haven County employs a sheriff for each courtroom whose functions appear to be practically limited to ordering all present to rise at each entry and departure of the judge, and admonishing witnesses not to chew gum, or put their hands in their pockets, or walk in front of the (empty) jury box. And I find it interesting that this mandated deference extends outside the courtroom. An American judge is almost always referred to as "Judge" in social relations outside the court, even after his retirement, sometimes even by his most intimate friends. This is true of only a few other honorific titles, *e.g.*, Senator, General.

[188] Among the Barotse, the king or member of the ruling family is *ex officio* the head of the *kuta*. However, Gluckman writes:

> Usually the ruler does not attend the hearings of cases, though

> the kuta's judgment is referred to him for confirmation. Even if the ruler chooses to sit in the kuta while a case is being tried, it proceeds as if he were not there. He takes no part in the hearing, and the facts and judgments in the case are referred to him as if he had not heard them (1955: 9).

See also Mensah-Brown (1970: 128) (Akan).

189 Observers of traditional African dispute institutions have often remarked on the eloquence of many participants, which seems to be scarcely less than that of the elders who are hearing the dispute. In American courtrooms, by contrast, the difference between the fluency of the legal professionals and the inarticulateness of parties and witnesses could not be more pronounced. If the records of local court cases in Kenya are a fair rendering of the actual interchange, litigants have become more tongue-tied as these courts have evolved toward a European model. When offered an opportunity to cross-examine an adversary or hostile witness, parties often express an inability to do so. The judge then takes over the task—usually with considerable skill.

190 This is in part an academic euphemism for the concept of "professionalization." The latter is frequently demanded today as a solution to almost any imaginable misbehavior—compare the schemes for professionalization of the police with those for the professionalization of various forms of psychotherapy. Professionalization has also been a constant theme in the transformation of traditional dispute institutions in Africa and elsewhere (Spalding, Hoover and Piper, 1970: 36-52).

191 As noted above, a quality that is apparently achieved may in fact be restricted to an ascribed group if the educational or experiental prerequisites are not generally available.

192 The notion of the complete "autonomy" of the judiciary was successfully championed by the Italian Associzione Nazionale Magistrati (Moriondo, 1969: 311).

193 This was commonly the case in traditional African dispute institutions. *See, e.g.,* Fisher (1971: 732); Gulliver (1963: *passim*).

194 Both innovations were introduced in Kenya: a regular panel of judges, from whom the bench for a particular case was chosen at random (Phillips, 1945: 182).

195 In societies where the intervener is paid only for services rendered, he will naturally seek customers. If jurisdictional boundaries are unclear, or overlap, he will in effect be selling the service of intervention in a buyer's market. The history of dispute institutions is replete with interveners who have tailored their activities with this in mind (Collier, 1973: 73-74). Some have gone so far as to stir up disputes to handle (Cohen, 1966: 1221). This kind of competition is antipathetic to bureaucracy, and is abolished as jurisdiction is rationalized, and certain institutions obtain a monopoly over disputes.

196 Weber himself is not clear whether it is more bureaucratic to promote on the basis of the quality of task performance, or on the basis of length of service. The former is the distinctively bureaucratic criterion for appointment; the latter might be viewed as the routinization of bureaucracy. Accordingly, the two may be combined within a single institution: skill, measured by examination or performance, being the criterion for appointment and major promotions between ranks; seniority being the criterion for salary increases and other perquisites within the rank—as in the federal civil service.

197 Interestingly, this criterion does not distinguish sharply between traditional African elders and contemporary Continental career judges, except for the fact that only the latter are restricted from other activities by being a judge. *See, e.g.,* such Kenya tribes as the Meru (Lambert, 1947; Bernardi, 1959), the Kikuyu (Lambert, 1956; Kenyatta, 1953), or the Embu (Saberwal, 1970). Of course, this does not mean that those institutions are identical in other respects, nor that the concept of bureaucracy is useless in distinguishing them.

198 Akan judges could be removed by a higher chief, or by the people—and often were (Mensah-Brown, 1970; 128).

199 Many industrious colonial administrators felt compelled to produce a handbook of rules for local court procedure. *See, e.g.,* the "Guide and Instruction to Native Tribunals," prepared by Wyn Harris, District Commissioner of Nyeri, in 1943, and described by Phillips as "a cloth-bound volume of 41 foolscap pages of typescript (with space for additions and amendments). It is in English and each tribunal has been supplied with a copy of it." *And see* the similar "Guide to Native

Tribunals—Kiambu District" prepared by H. E. Lambert at the same time (Phillips, 1945: 43-44, 65).

200 The confusion of public and private finances becomes a matter of concern to a bureaucracy, and is given the name corruption. Judicial administrators in colonial societies are frequently preoccupied with this subject. *See, e.g.,* Phillips (1945: Ch. 13).

201 This is in part a consequence of the fact that bureaucratization of the role has often occurred under colonial rule. Where these norms are new, and derived from an alien culture, it is hardly surprising that the superiors who represent this culture use external sanctions to obtain compliance. It is not clear to me that these sanctions cannot be largely internalized. Here, as elsewhere in this paper, it is hard to avoid mistaking the concrete historical situation in which these changes took place for valid cross-cultural generalization. It seems to me that other authors have fallen into this error, *e.g.,* Tanner (1970) and Collier (1973) mistaking the cultural pluralism and social stratification which characterize contemporary Indonesia and Mexico for universal conditions, and therefore unduly generalizing from those legal systems. Yet in doing so, they are also correcting the errors of earlier writers, who tended to generalize from the legal systems of small, homogeneous tribal societies.

202 It is interesting that this precisely parallels the distinction between law and convention offered by Weber.

> A system of order will be called *convention* so far as its validity is externally guaranteed by the probability that deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval. Such an order will be called *law* when conformity with it is upheld by the probability that deviant action will be met by physical or psychic sanctions aimed to compel conformity or to punish disobedience, *and applied by a group of men especially empowered to carry out this function* (this last emphasis added) (1947: 127).

203 For explications of Weber's notions of rationalization in law, *see* Trubek (1972a); Friedman (1966); C. Morris (1958); Rheinstein (1954). One of the problems with understanding Weber is that the English terminology into which he has been rendered carries strong connotations of value: rationality is a "good" kind of ordering, perhaps even the only proper kind; rationalization is a false, or hypocritical ordering. This is not entirely the fault of translation; Weber's original conceptual scheme undoubtedly expressed his own values.

204 Indeed, Weber's purpose was to set forth all the possible modes of rationalization. For illustrations of legal rationalization under a variety of social conditions, *see* Llewellyn and Hoebel (1941) (Cheyenne Indians); Holleman (1950) (Shona of Rhodesia); Fuller (n.d.: 86) (American judiciary); Riesman (1951: 133-34) (American legal profession); Mayhew (1968: 146) (Massachusetts Commission Against Discrimination).

205 The notion of the autonomy of a differentiated sphere of activity receives exceptionally clear expression in a most unlikely source:

> Society gives rise to certain common features which it cannot dispense with. The persons selected for these functions form a new branch of the division of labour *within society.* This gives them particular interests, distinct too from the interests of those who gave them their office; they make themselves independent of the latter and—the state is in being. . . .
>
> . . .
>
> It is similar with law. As soon as the new division of labour which creates professional lawyers becomes necesary, another new and independent sphere is opened up which, for all its general dependence on production and trade, still has its own capacity for reacting upon these spheres as well. In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is *consistent in itself,* and which does not, owing to inner contradictions, look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class—this in itself would already offend "the conception of justice."

This extraordinarily Weberian formulation is in fact from Friedrich Engels, in a letter to Conrad Schmidt, written in 1890. *See* Marx and Engels (1947: 480-81). I am grateful to Brun-Otto Bryde for this reference.

[206] Kaplan describes the decrease in communication between dispute institution and society which follows an increase in differentiation (1965: 93).

[207] Fuller (n.d.: 86) and Golding (1969: 85-86) note that the institution redefines social problems for its own purposes, and will ignore problems that cannot be so redefined. Basil Bernstein makes a similar observation about the power of language to shape a social situation in order to facilitate a particular kind of communication (quoted in M. Douglas, 1970: 156-57).

[208] Mayhew has analyzed at some length the way in which institutional solutions are not social solutions (1971). This inevitable consequence of differentiation is nevertheless a frequent source of concern to legal scholars, who deplore the "gap" between law in the books and law in action. I discuss this issue further in an extended review essay (1973).

[209] The dispute institution in society can be viewed as maintaining a variety of homeostatic variables: the number of ongoing disputes, conceptualized in discrete units; the overall intensity of disputing, etc. It would be possible, and fruitful, to conduct a functional analysis using each of these variables; in the discussion that follows, however, I have concentrated on the aggregate number of disputes which the institution or the society is handling at a point in time. This level is often one of the principal concerns of the institution itself (*see* Sykes, 1969).

[10] The formulation of functionalism presented here lends weight to the common criticism that it is a theory of the status quo which offers no insight into, indeed obscures the perception of, change. I therefore hasten to add that the dispute institutions of a society may, over time, fail to maintain the level of disputing; that level may increase—as has perhaps happened in contemporary urban society—or the society may, as a result of increased disputing, divide into a number of fragments—which again might be a helpful image for understanding the contemporary situation.

[1] It is often argued that bureaucratic institutions apply norms which are universalistic rather than particularistic. This is one way of transforming the ideology of the rule of law into a social scientific variable. I will consider ways to operationalize this concept below.

[2] Effort, unlike time or expense, is a subjective index of the quality of an act. It is an attempt to measure intensity; for example, I would expect a repetitive act to be less effort than an idiosyncratic one, even though both might take the same time and cost the system the same amount of money.

[3] The Ethiopian "affersata" and the official Chinese court system are extreme examples of dispute institutions which maximize official efficiency at great expense to the non-official participants (Fisher, 1971: 720; van der Sprenkel, 1962). In the language of economics, these institutions externalize the latter costs.

[4] These contributions may take the form of court costs in civil cases, or fines and bail forfeitures in criminal prosecutions. It is common for the latter to produce a net surplus, whether in India (Nicholas and Mukhopadhyay, 1962: 17, 24, quoted in Galanter, 1972: 60) or the United States (Saari, 1967: 297), although the practice has recently been subject to criticism on constitutional grounds in the United States. But it is not unusual for civil litigation to produce a surplus as well. Alan Gledhill has noted that the Indian judiciary "is the most successful of the nationalized industries" (1964: 8, quoted in Galanter, forthcoming). And the same might have been said of colonial Kenya (*see* Patterson, 1969). This may be attributed to the general British colonial policy of seeing that the colonies paid their way. It may be contrasted with Bentham's belief that judicial institutions ought to be free.

[15] The interest of bureaucratic institutions in finality has been reported many times. Skolnick (1966) describes the way in which police bargain with suspects for "closings," offering a lesser plea in return for an admission of other crimes which will close files, but for which the suspect will not be prosecuted. Connecticut courts rarely take the initiative in litigation; a notable exception is their diligence in dismissing cases sua sponte after they have reached a certain age. The calling of the dormant list is one of the few occasions on which that bureaucracy shows real energy. By contrast, tribal institutions often refuse to conclude a dispute

even after the parties have lost interest, for fear that some hidden grievance lingers. *See* Holleman (1952: 34).

[216] *See* Trubek's discussion of the "core conception" of modern law (1927b).

[217] I have taken this distinction from Black (1973).

[218] Both traditional Chinese mediation (Cohen, 1966: 1217) and contemporary Chinese mediation (Lubman, 1967: 1321) had this character. So did traditional African dispute institutions—*e.g.*, the Akan of Ghana (Mensah-Brown, 1970: 143) and Ethiopia (Fisher, 1971: 726, 728). Even contemporary American culture retains something of this ideology, as witness the sense of outrage expressed at the failure of bystanders to intervene in the murder of Kitty Genovese.

[219] This was apparently true of the traditional Chinese official court structure, as distinguished from non-governmental mediation. Indeed, the inertia of that system was so extreme that many cases were ended simply because the disputants could not mobilize sufficient energy to move the magistrates to action (Buxbaum, 1971: 274). The American judicial system is, of course, highly reactive. Indeed, Fuller makes this an essential element in his definition of adjudication (n.d.: 54). One could argue that the American legal system as a whole is still proactive, but that the latter function has been taken away from the judicial branch and given to the executive, in the form of police and prosecutors. Yet even these institutions, especially in urban areas, have tended to become reactive: police do not patrol a beat on foot but respond to calls in patrol cars; prosecutors pursue many criminal infractions only upon the insistence of a complainant.

[220] *See* Aubert (1969c: 289). This characteristic of modern courts may explain why they fail to achieve certain goals which require a more active role—for instance, the preservation of marriage in actions for divorce. Courts in the United States (Goldstein and Katz, 1965: 140-61; Rheinstein, 1972: 59-60), in England (Rheinstein, 1972: 60-62), in France (*Id.*: 219-20), and in Poland (Gorecki, 1970) have all found that the requirement that an action for divorce be investigated by the court soon turns out to be a nullity. (Compare the success of Canon law in this regard, Rheinstein, 1972: 57-58.) This suggests, at the very least, a certain caution in giving the *court* responsibility for furthering important values—for instance, for securing "the best interests of the child" in custody disputes. The one exception to this generalized passivity is behavior which serves to terminate the dispute expeditiously, or simplify it; thus the court will not hesitate to raise, sua sponte, such conclusive obstacles to further litigation as lack of jurisdiction, res judicata, lack of standing, etc.

[221] Thus one of the first acts of a colonial government is to outlaw certain modes of disputing which lie beyond the control of the newly introduced courts—feuding, revenge, self-help—and to regulate indigenous dispute institutions. Similarly, disputants engaged in litigation in western courts commonly have to obtain leave of the court for many actions while the dispute is pending; in addition, the court has authority to freeze the status quo by means of a temporary restraining order or an injunction pendente lite.

[222] For the victim of a crime to compound the felony is itself a crime; the activities of the police are subject to elaborate scrutiny to insure that any crimes discovered are properly investigated; the prosecutor cannot drop the charges, or nolle a prosecution without the approval of the judge.

[223] The dispute institution may urge, or require, the disputants to take their dispute to another institution first. Thus the local courts in Kenya commonly require disputants to consult with indigenous elders in at least some disputes (Abel, 1970: 50-59). Official Chinese courts similarly encouraged mediation (Cohen, 1966: 1210). And at least one appellate court in Kenya, held by a district officer, urged litigants to accept mediation by elders in place of a hearing before him (Phillips, 1945: 53-55). This practice is not unknown in European or American courts. The New York City small claims court offers litigants the choice of having their dispute mediated by a lawyer—with the incentive of a speedier hearing. In Poland, Jan Gorecki observed judges pressuring litigants to accept an uncontested divorce (1970). And I saw the same thing in the Family Relations Division of the Superior Court for New Haven County. Gellhorn has documented the way in which defendants are persuaded to agree in paternity suits, proceedings for non-support, marital fights, and matrimonial actions in the courts of New York City (1954: Chs. 7, 8, 9, 13).

[224] American judges rarely reject a bargained plea in a criminal prosecution, or a negotiated property settlement in a divorce action.

[225] The Akan of Ghana use simple, everyday language for all norms, even those that are consciously legislated (Mensah-Brown, 1970: 132). Where these norms fail to cover the disputed situation, maxims are cited from other areas of behavior (*Id.*: 135). A. L. Epstein found that general ethical notions pervade discussion in the local courts of Zambia (1952: 16-17).

[226] This is consonant with Bohannan's notion of the reinstitutionalization of legal norms (1968a). Mayhew and Reiss have documented the fact that in our own society only those norms which concern the problems of the upper classes are reinstitutionalized in the legal system (1969).

[227] Thus we find increasing emphasis on such ideas as neutrality, generality, universality, logically formal rationality.

[228] Everywhere in Africa customary criminal offences have been replaced by a comprehensive written Penal Code (McClain, 1964: 196).

[229] *See, e.g.,* Fallers (1969: 68-69) (Soga of Uganda); Nekam (1967: 47) (Karamojong of Uganda). This is true in non-colonial situations as well. Local Ethiopian institutions treated the Fetha Nagast as custom (Fisher, 1971: 712), and dispute institutions on the East African coast, in the Sudan, and Northern Nigeria gave a similar treatment to the Sharia.

[230] Twining has compared the restatements of African customary law prepared by Cotran, a lawyer, and Cory, a sociologist; and he has noted that local courts tend to treat even the latter restatement as though it were a statute (1963: 33, 37-51). More recently, Saltman has observed the use made of Cotran's restatements in the local courts of Kenya, and noted that they are given almost statutory force despite the fact that they contain explicit cautions against such an intent (1971).

[231] Indeed, Saltman (1971) explains the use of the Kenya restatements as a protection against reversal on appeal. District Magistrates increasingly feel the need for such a guide because they are often from another part of Kenya, and unfamiliar with the customary law they must apply. Some even seek to avoid applying customary law altogether. In recognition of this, the Chief Justice felt compelled to issue a memorandum reminding District Magistrates of their duty to apply customary law, and to take evidence where they were ignorant of its provisions (Circular No. 1 of 1968, November 5, 1968).

[232] Writers on undifferentiated dispute institutions frequently comment on the high degree of agreement upon, and knowledge of, customary norms. True, this contrasts sharply with the disagreement in our own society concerning legal norms, and the widespread ignorance about those norms. But the more appropriate comparison is with the degree of consensus and knowledge displayed by the legal professionals who staff our own more differentiated institutions.

[233] Codifications and restatements of customary law can be found very early in colonial history. *See, e.g.,* Natal Code of Native Law (1943) (South Africa; 1891); Haar (1948) (Indonesia; nineteenth century); Schapera (1938) (Bechuanaland); *see generally* Abel (1969a). More recently, the Restatement of African Law Project has devoted considerable energy toward this end (*see* Allott, 1968-72), and a number of African nations have begun to codify their law, most notably Ethiopia.

[234] In Akan law, an oath may be sworn to initiate proceedings, but there is no preliminary inquiry into the content of the substantive grievance (Mensah-Brown, 1970: 139 ff.). The contrast with the later history of English law is extreme (*see* Maitland, 1962: 4-5). Buxbaum (1971: 263) and Cohen (1966: 1211) disagree over whether Chinese magistrates made such an inquiry. It would be reasonable to expect a more stringent screening of disputes as the state became more involved in their handling.

[235] An example of this may be the dramatic curtailment in the chain of causation which will be investigated by the intervener. Traditional dispute institutions in Africa, investigating a death, will review all the antecedent events, however remotely they may be connected (Hopkins, 1962: 8). Where the ultimate outcome of a course of conduct is still in doubt, the hearing of the dispute will be postponed to await it (A. L. Epstein, 1952: 9). Contrast this with the limitation of liability in Anglo-American tort and contract law to "foreseeable" consequences.

[236] Holleman notes of the Hera that during a hearing of a dispute, participants exert pressure for the broadest definition of the issues (1952:

38). A. L. Epstein has observed a gradual narrowing of the issues in the urban courts of the Zambian copperbelt, where the inquiry in matrimonial proceedings now concerns whether grounds for divorce exist, rather than whether the marriage has broken down (1952: 4-5, 9-10). Hopkins observed that Ankole courts judge the whole person, not just the act, in a criminal proceeding (1962: 11). And our juvenile courts tend more in that direction than do our regular criminal courts.

237 Compare contemporary Chinese mediators (Lubman, 1967: 1308) or Hera dispute institutions (Holleman, 1952).

238 A fascinating instance of this is the Ethiopian practice of placing wagers upon the outcome of an intervener; because the size of the wager frequently exceeds the amount in controversy, the actions of the intervener become more important than the original dispute (Fisher, 1971: 734-37).

239 In the undifferentiated structure, the only relationship necessary for participation was some kinship or like connection with a disputant. In the differentiated structure, it is necessary to demonstrate a personal interest identical to that of the disputant.

240 It is a valid, if much abused, generalization that relations between groups are extremely important in tribal society. Hence a dispute that began with the conflicting claims of individuals may quickly be transformed into a dispute between the largest groups which do not yet include both (Holleman, 1952: 30). Many observers have noted that as such societies are westernized, an individual who had acted as representative of a group in a dispute now seeks to arrogate to himself personally the interests he is seeking to vindicate. This is especially visible in the area of land ownership. In Kenya, Kikuyu fathers suing for the impregnation of their unmarried daughters claim for themselves the goats that previously went to their kinship group. Thus disputes between groups are transformed into disputes between individuals. In highly differentiated legal systems, such as our own, there are substantial restraints upon litigation by a group, as in the technical problems of class actions, and perhaps also the doctrine of political questions.

241 This is clearest in criminal prosecutions. Recently, criminal accused have sought to turn the tables on the state, and accuse it of crimes in turn: those who have protested against the war in Vietnam are an outstanding example. Without exception, American courts have rejected such attempts. In an action for divorce, the defendant has the option to file a counterclaim. If he does so, however, he runs the risk that divorce will be denied to both parties under the doctrine of recrimination (at least until recently). If he fails to do so, and appears at the hearing, the court is likely to deny him an opportunity to speak.

242 The whole concept of standing is a development of the differentiated dispute institution, where it is narrowly viewed: a person who, in the larger society, is seen as having a real grievance, will be found to have no standing in court (*e.g.*, suits by taxpayers, conservationists). The victim is not party to a criminal prosecution in American law, although interestingly he is in Soviet law (*see, e.g.*, Feifer, 1964). By 1966 at least one of the primary courts in Kenya (the Kiambu District African Court) had begun to deny the victim a civil remedy in a prosecution. On the other hand, contemporary Ethiopian efforts to eliminate, or at least to control, the participation of the victim in a criminal prosecution, have not been very successful (Fisher, 1973). It seems to me that their lack of success can be attributed largely to the relative lack of differentiation of the institutional apparatus for criminal prosecutions in Ethiopia.

243 A. L. Epstein found that in Lunda (Zambia) customary law, the husband had come to substitute for the wife's father in actions for adultery (1952: 8). And Simon Roberts found that Kgatla (Botswana) women, rather than their fathers, now sue for impregnation (1971: 72). In Kenya, the same result occurred for the ten year period 1959-69 when the Affiliation Act was in effect.

244 Obvious examples are the prosecutor in American law, and the procurator in Soviet law. But there are many others: the welfare department which represents the interest of a child in a neglect hearing, the family relations officer who does the same in a custody fight during divorce. Even the professional attorney may be seen in this light—an officer of the court, who represents the party and yet is subject to control by the court. Blumberg has given a striking portrayal of "defense lawyer as double agent" (1967). Perhaps for this reason, American courts are extremely reluctant to allow a criminal accused to conduct his own defense, as the Chicago trial of Bobby Seale showed. It is interesting

that African courts initially allowed a disputant to be represented by anyone—a friend or relative—but have recently moved in the direction of granting a monopoly of representation to legal professionals.

245 Maine emphasized this notion (1950: Ch. 5), and many others have since taken it up.

246 The Ethiopian practice of placing wagers on the outcome of a dispute effectively makes the bettors additional parties (Fisher, 1971: 737). The requirement that a party have a surety has a similar effect; *see* Fisher (1971: 731) (Ethiopia); Brockman (1972: *passim*) (China). Even Connecticut has the residue of a similar practice; every party who initiates a civil action must have a surety for the payment of court costs. In contemporary American law, the amicus curiae, or the stockholder in a derivative action may be examples of parties created by the institution.

247 As the dispute institution becomes less tolerant of disputant delay (*see* notes 215, 219 *supra*), it creates delay of its own. An overcrowded calendar is one of the identifying marks of the contemporary western court; it may take as long as seven years to have a negligence case tried to a jury in New York City. This is not just one of those incomprehensible hassles of modern life, but an inevitable consequence of structural developments (*see* Sykes, 1969). An increase in differentiation means a decrease in the number of interveners who serve a given population; an increase in bureaucratization means an increase in the formality of the procedure, with the associated delays. The convergence of these two tendencies is truly Kafka-esque: the disputant may be required to wait his turn with a legion of fellow petitioners, and to wend his way slowly through the bureaucratic maze, only to discover that his claim is barred because he did not prosecute it with sufficient diligence. A comparable situation has recently arisen in an Italian criminal trial, in which the prosecution has found itself unable to complete the appeals process before the statute of limitations runs on the crime (*see New York Times*, February 27, 1974, p.5).

248 It is one of the ironies of judicial reform in the United States that the small claims court, which was intended to be a relatively undifferentiated forum, has become largely a mill for administering default judgments. Although non-appearance of a party is penalized in this way, non-appearance by a lawyer is commonly excused.

249 This is obviously the case in criminal prosecutions where, in addition, the defendant is further penalized for his non-appearance. An even more extreme situation is one where the court keeps one of the parties away from the hearing, and thereby defeats the claimant's petition. *See Leonard v. Mitchell* (1973) (Court refuses to compel the Attorney General to disclose the whereabouts of petitioner's ex-wife, who had absconded with the children of whom he had been granted legal custody, since she had remarried a government informer whose identity was secret).

250 The defaulting party is in effect punished for wasting the court's time by making it hear the matter twice. The punishment may take the form of additional costs paid to the court. The other party is not compensated, although he also had to appear in court twice, possibly at considerable personal cost and inconvenience.

251 Fuller (n.d.: 56) makes this an essential element in the definition of adjudication.

252 The first is sought by voir dire of the jury, by moving that a judge recuse himself, or by requiring that the hearing judge be different from the judge who conducted the arraignment. The second is sought by secluding the jury and controlling access of the mass media to the case. But because the judge is more differentiated from private disputants than he is from other professional quasi-official members of the dispute institution, his isolation from them is substantially less complete; a judge who would never be caught hob-nobbing with a criminal defendant, or a civil plaintiff, will nonetheless socialize with prosecutors and lawyers.

253 Anyone who has practiced in an Amercian court is familiar with the reluctance of many judges to hear evidence. Whatever the latter may protest, this is often not a function of caseload. Many studies have shown that judges spend only a small part of the day on the bench. *See, e.g.*, Mileski (1971: 509). Casual observation confirms this. At the hearing of uncontested divorces in the Superior Court for New Haven County, for instance, judges often refuse to listen to anything substantive by the defaulting husband; when custody is contested, the judges prefer to send the case for investigation by a family relations officer, and decline to hear any evidence beyond what is contained in the report of that officer.

[254] A. L. Epstein finds presumptions commonplace in an African urban court (1954: 13), and Hopkins describes the use of inferences from motive, from the failure to answer an alarm, and from the sudden accession of substantial wealth, in criminal prosecutions in Uganda (1962: 2-4).

[255] Gluckman's concept of the reasonable man—the paradigm for inference in tribal courts—is actually a device for introducing into the dispute institution all the common-sense expectations about behavior in the outside world (1955: Ch. 3). Compare the much more technical chains of inference employed by American courts, *e.g.*, those which must be followed in authenticating documents.

[256] *E.g.*, evidence of prior crimes in the course of a criminal prosecution.

[257] *E.g.*, evidence which would disclose that the defendant was insured in a tort action.

[258] *E.g.*, the rule that excludes a wife's testimony against her husband on the ground that such testimony would destroy the marital relationship. *See Hawkins v. United States* (1958). It is characteristic of the sense of self-importance acquired by interveners in differentiated dispute institutions that they come to believe that everything they do in the role of intervener has an impact outside the institution, and an important one at that. They thus come to rationalize their actions on that basis, never inquiring whether those actions make any difference in fact. A good example is *Pashko v. Pashko* (1951), quoted by Goldstein and Katz (1965: 131). There a judge in an action for separate maintenance ordered the "other woman" to stay away from the erring husband during the pendency of the proceedings, saying:

> Divorces are at a scandalously high level in the United States today. Courts should use whatever powers they have to stem the tide. A restraining order against the third party in this case will be notice to others deliberately intent upon breaking up a family to take heed and desist from their course. The court is convinced that it will deter others from similar action and become a shield in protecting the integrity and the sanctity of family life in our community.

Law schools foster such thinking by training students to analyze the "policies' underlying judicial decisions, and to criticize those decisions in terms of their own policy objectives.

[259] An example of this can be found even in Kenya customary law: in an action for cattle trespass, the complainant must summon an elder to view the cattle on the damaged land, at least if the trespass has occurred during the day. Without the testimony of such an elder, the complainant is unlikely to succeed, unless he has a very good explanation for its unavailability.

[260] It is the rare airing of a dispute in which the presentation of evidence is not ordered to some degree. At the very least, there will be regularity concerning which party speaks first, and when witnesses are heard (*see, e.g.*, Fisher, 1971: 734).

[261] I was impressed by the frequency with which parties in litigation before the primary courts of Kenya stated in court that they did not call a witness because he was hostile and would therefore lie, or refuse to come. They were either unaware of, or unimpressed by, the capacity of the court to compel the appearance of witnesses, and to punish perjury. These expectations about perjury, however, permit the inference that any witness whom the party fails to call does have hostile evidence, and that every party he does call is biased. *See* Hopkins (1962: 10) (Ankole of Uganda); S. Roberts (1971: 72) (Kgatla of Botswana); A. L. Epstein (1954: 16) (urban courts of Zambia).

[262] A striking American example was the contempt citations imposed on witnesses, summoned before the numerous inquiries into loyalty in the 1950's, who refused to name friends and political associates. The reasons they gave—privacy and the bonds of friendship—are certainly important values in American society, but they carried no weight with the Congressional committees or courts. The current debate over the news reporter's privilege raises the same issues. It is interesting that the imperial courts of Ethiopia also punished the failure to disclose the names of offenders (Fisher, 1971: 717).

[263] That this notion is alien to tribal dispute institutions is shown by the numerous actions initiated in the primary courts of Kenya complaining of testimony given in previous actions in the same courts.

[264] The widespread publicity which attends the occasional sensational trial

should not mislead; almost all American trials receive far less public attention than do disputes heard in tribal settings. Yet the misperception is very common; in preparing parties for the hearing of their uncontested divorces, I was frequently asked whether there would be press coverage; in fact, the press could not be less interested.

265 *See, e.g.*, Holleman (1952: 40) (the widespread use of tokens as material symbols in Hera procedure).

266 Continental procedure may represent a further development along these lines. There, an examining magistrate accumulates and digests the evidence before presenting it to the judge (Merryman, 1969: 37).

267 Parties may be encouraged to submit affidavits rather than present testimony; ultimately, the affidavit may become the only vehicle for offering evidence, as in hearings upon alimony in the New York Supreme Court (*see* Gellhorn, 1954: 340-42). Alternatively, parties may be allowed, indeed encouraged, to file cross-motions for summary judgment.

268 Among some Kenya tribes, a traditional mode of establishing the paternity of a child born to an unmarried girl was for the elders to compare the child with the putative father. Today, both parties and court are more likely to request a blood test. Simon Roberts notes the same development in Botswana (1971: 73).

269 *E.g.*, in American courts, the assessor in mortgage foreclosures, the psychiatrist in insanity hearings in criminal trials, the social worker in the juvenile or family court.

270 Thus Hopkins notes that Ankole judges give considerable weight to threats made by the accused prior to the alleged crime, and overheard by others (1962: 1).

271 I refer here to the general contours of, and rationale for, the rule; of course, there are numerous exceptions.

272 This observation can be generalized for a wide range of behavior: in the undifferentiated institution the norms and sanctions are those of the larger society; in the differentiated institution the norms diverge and the institution imposes its own sanctions. Consider such behavioral items as: dress, demeanor, speech, posture.

A defense lawyer in a recent criminal trial in the New Jersey Superior Court remarked at the end of the judge's charge to the jury that it was "one of the best state summations I've heard in the last five years." He was immediately held in contempt and sentenced to four days in jail for a "sarcastic" remark which tended to "degrade and humiliate the court" (*New York Times*, July 27, 1973: p. 33). Outside the courtroom, few people consider sarcasm, however effective, a criminal offense, nor would they expect it to deserve a jail sentence.

273 *See, e.g.*, the thief seeker, or the use of oathing in Ethiopia (Fisher, 1971: 721, 737).

274 At first only witnesses take the oath; parties are still expected to give self-serving testimony. The nature of the cath also changes: the more serious tribal oaths frequently endanger the lives of the entire family of the affiant; judicial oaths only bind and affect the affiant himself.

275 A. L. Epstein found no concept of perjury in the urban African courts he investigated (1954: 16).

276 In Kikuyu customary law, the paternity of an illegitmate child may be proved in a wide number of ways, including the testimony of the child's mother. Under the Affiliation Act, which was applied to the Kikuyu in 1959, the mother's testimony required corroboration by at least one independent witness. Primary courts alternated between ignoring this requirement and applying it with the utmost rigidity.

277 The intervener is no longer drawing an inference from the failure to produce the evidence, but punishing the party with the sanction of loss of the lawsuit.

278 An example of the tension between these two conceptions may be found in the doctrine of res ipsa loqitur in American tort law.

279 This allows a wide variety of behavioral standards to be voiced during the airing of the dispute, and thus the penetration of many non-legal norms within the dispute institution. *See* Gluckman (1955: Ch. 3); A. L. Epstein (1954: 7-8, 12, 17).

280 Such expectations may be used to substantiate as well as to invalidate testimony. An admission of adultery is so unlikely in Zambia that it is generally given credence (A. L. Epstein, 1954: 14). Similarly, an unmarried girl in Kenya is so unlikely to divulge her love affairs that she

is generally believed when she names the father of her illegitimate child, although this is now changing.

[281] In Kenya, this development has taken the form of misconstruction of the doctrine of estoppel. In Anglo-American law, a party may be estopped from denying the truth of a statement made outside the court where he has induced his opponent to rely on that statement to the latter's detriment. In Kenya, judges will not allow a party to contradict testimony given earlier in the proceeding, or in an earlier hearing. There is no injurious reliance by a party here; the only reliance is by the court. In effect, what the court has done is to take a rule originally devised to achieve substantive justice and employ it to facilitate the task of the court in judging. The court is saying, in effect: the inconsistencies in your testimony show that you are lying; because you have sought to deceive the court, we will punish you; instead of trying to determine the truth, we will now arbitrarily choose to take your first statement as correct.

[282] Presumptions in American law often have nothing to do with probable behavior in the real world. Rather, they are extreme examples of rules devised by the dispute institution for convenience in deciding, which then come to assume the form, and perform the function, of primary substantive rules about behavior. The presumption of the legitimacy of the offspring of a marriage may be an example: the presumption is certainly not an empirical statement about sexual mores; nor, today, is there any substantive legal rule that children *should* be legitimate; yet the presumption seems to have become just such a rule.

[283] A. L. Epstein explicitly notes that this inference is *not* generally drawn (1954: 9). Compare the Roman legal maxim sometimes invoked in Anglo-American law: *falsus in uno, falsus in omnibus.*

[284] Notions of full faith and credit, and even more of comity, are late developments in the bureaucratization of dispute institutions.

[285] *See, e.g.*, Schapera (1957) (Tswana). A. L. Epstein describes disputes in Zambia as homilies on good behavior (1954: 18).

[286] Yet there is never complete disregard for normative consistency; Maine's *themistes* and Weber's *kadi* justice remain ideal types. Tanner describes tendencies toward consistency in an extremly undifferentiated dispute institution (1970: 384).

[287] Traditional Chinese law was also suspicious of precedents; citing a precedent was like "making a mark on a moving ship to show where to recover a sword which has been dropped over its side into the river. . . . Human nature is infinitely varied and there never is a case which is exactly the same as the one that has been decided before" (Wang Hui-tsu, "Precepts for Local Administrative Officials," quoted in Lubman, 1967: 1291 n. 18). Nekam attributes strikingly similar ideas to magistrates in Uganda: " 'Each case is different' they will tell you: 'how could you use precedent if you find that the facts are not exactly the same.' " (1967: 53). The opposite extreme might be represented by the "slippery slope" argument frequently found in Anglo-American judicial opinions—if we decide this here, we will be *forced* to decide that later.

[288] As in the distinction between law and equity, and their separate courts; at a much lower level of internal differentiation—the separation between adjudicating guilt in a criminal trial and sentencing, or between determining liability in tort and assessing damages.

[289] Fallers (1969) deals with this at great length, relying heavily on Levi (1948).

[290] Relatively undifferentiated dispute institutions refer to prior disputes, but only as exemplifying a general standard (A. L. Epstein, 1954: 27); increasing differentiation is necessary before the doctrine of stare decisis is followed—in the sense of the binding force of a prior ruling upon similar facts. Compare Mayhew's description of the Massachusetts Commission Against Discrimination (1968: 223). A system of precedent requires, at a minimum, the effective communication of decisions, and this is something which is found only in highly bureaucratized institutions.

[291] Societies vary greatly in the degree of differentiation within their political institutions. At a fairly low level of differentiation, the same institution declares norms and handles disputes. With increasing differentiation, these processes may be distinguished, through still performed by the same institution. *See, e.g.*, Mensah-Brown (1970: 132) (Akan). Specialized legislatures in contemporary European sccieties are often an outgrowth of dispute institutions. Even in the United States, with its

insistence upon the separation of powers, institutions tended to perform both functions rather late. *See, e.g.*, the legislative jurisdiction in divorce in the mid-nineteenth century (Blake, 1962: Ch. 5).

292 The writings of American lawyers, law professors, and the restatements of the American Law Institute are outstanding in this regard.

293 Thus Mensah-Brown writes that Akan judges have no consciousness that change in customary law has occurred (1970: 131). And Kaplan, applying the terminology developed by Llewellyn and Hoebel (1941), finds that change in Chagga law follows a pattern of drift—filling in gaps—rather than drive (1965: 90). *See generally* Mair (1962: 103).

294 These are Hart's secondary rules of change. One of the central problems of jurisprudence has been the extent to which these rules and the rules of recognition and adjudication are similar.

295 Indeed, this very differentiation may be part of the explanation for the startling fact that in our own century—apparently for the first time—law has come to be seen as an instrument for radical social change. *See, e.g.*, Friedman (1973).

296 Maine may be the origin of this idea (1950: Ch. 2). Beidelman has found it applicable in the African context (1961).

297 A number of writers have found implicitness to be an outstanding—even the outstanding—characteristic of the African dispute process, *e.g.*, Fallers (1969); A. L. Epstein (1954: 6). The characteristic is certainly not limited to Africa; Mayhew found it during the early years of an American regulatory agency: "rules on the substantial matters of discrimination have not been formulated. Issues have been resolved implicitly on a complaint-by-complaint basis" (1968: 117).

298 One example of this developing interest may be the fact that the intervener begins to ask: Which norms are applicable? That is, he becomes conscious of conflicts of law problems. This awareness is almost entirely absent in undifferentiated institutions, which tend to apply the lex fori unquestioningly. *See, e.g.*, Nekam (1967); Twining (1963: 25).

299 It would obviously be impossible for a dispute institution charged with the day-to-day processing of disputes to become preoccupied with the definition and change of the norms which are to govern those disputes. Dibble has documented this for American trial courts (1973). But jurists have always known this, if they have been unhappy with the knowledge. Cardozo writes: "Those cases [where the controversy turns not upon the rule of law, but upon its application to the facts], after all, make up the bulk of the business of the courts. They are important for the litigants concerned in them. They call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before" (1921: 163).

300 Hera dispute institutions used concrete tokens, which were transferred between the disputants, to symbolize acts which would later be performed outside the institution (Holleman, 1952: 36).

301 Lubman notes that contemporary Chinese mediators are unusual in their ability to supervise future conduct (1967: 1308 n. 95). American courts are notoriously ineffectual in this regard, as illustrated by their incapacity to enforce regular payments of alimony and support following a divorce decree.

302 It is striking that disputes in traditional African customary law over bride-price or cattle loan agreements, which required the return of the identical cattle given or loaned, can now be settled by the payment of money.

303 I think this latter statement is a fair characterization of the American judicial system, with one significant exception: where very large organizations are involved in highly complex litigation, the court often seeks a consent decree. I think this is partly explained by the necessity for regulating a course of future conduct, and partly by the lower degree of differentiation between the court and parties. That the court often asks the successful party in other cases to draft a judgment is *not* an exception; the court, by this device, simply saves itself effort, while retaining full control.

304 With respect to criminal law, this has become an element of procedural due process in most countries with Anglo-American legal systems. The African Conference on Local Courts and Customary Law unanimously resolved that unwritten customary criminal penalties should be abolished (1963: 24); this has since been incorporated in the constitutions of most African states, and such penalties have in fact been eliminated.

[305] The relatively undifferentiated Hera dispute institutions involve all those who participated at the hearing in administering the remedy (Holleman, 1952: 38). One example of the way in which the differentiated institution fashions a remedy in terms of its own actions is the division between civil and criminal sanctions; where these were both imposed in a single hearing, they now require two separate actions.

[306] This may seem to be contradicted by many of the early tabulations of harsh penalties under customary law. But there is other evidence indicating that those schedules represent ideal punishments at most, and quite possibly distortions of those ideals. Ethnographers who have studied the punishments inflicted invariably find that the ideals become a basis for making threats, establishing bargaining positions, and that the actual punishments are far milder. *See, e.g.,* MacGaffey (1970: 105-06, 127, 131); Holleman (1952).

[307] By this I mean that the institution *expresses* such a concern, and proceeds to rationalize its actions in terms of that goal. Thus we find a harsh penalty justified not by the instant crime, but by the increase in crimes of that sort in the community (Hopkins, 1962: 11). A *legal* logic thus links the differentiated dispute institution to behavior in the outside world. It is a measure of the differentiation of the institution that, while the little empirical evidence we have strongly suggests that the penalties inflicted by the institution are largely ineffective to achieve the goal sought, yet that logic is not abandoned or altered.

[308] The logic of general deterrence thus permits the differentiated institution to gain (apparent) efficiency, increasing the severity of its sanctions so as to decrease the number of instances in which it must act.

[309] The undifferentiated dispute institution leaves the task of enforcement to the disputant (*see, e.g.,* Fisher, 1971: 742). Because this endangers finality and certainty, the differentiated institution affords facilities for enforcement to civil litigants, and enforces the decree itself in criminal cases.

[310] Richard Canter, who has done fieldwork in the local courts of Zambia, has remarked on the frequency with which they punish, as criminal contempt, the failure by civil defendants to satisfy a judgment. In New Haven, former husbands, who had fallen in arrears in the payment of alimony and support, were treated with some severity by the Superior Court; but when they violated a second order of that court, they were invariably threatened with jail, and often actually jailed.

[311] Review should thus be distinguished from the availability of alternative institutions to which a dispute may be brought. Most societies offer some alternatives to the disputant; fewer societies offer review in the sense described below. Failure to appreciate the distinction may help to explain the irritation which European colonial administrators felt at the propensity of African litigants to seek repeated review of the decisions of lower courts. The African litigants, dissatisfied by the outcome, may simply have been seeking *another* airing of the dispute; European administrators could only conceive of these subsequent hearings in hierarchical terms as *reviewing* the earlier decision. The European preference for this latter relationship between institutions may be seen in the *Report of the Mission on Land Consolidation and Registration in Kenya, 1965-66* (1966: 33).

An intermediate stage between repeated hearings by institutions which are different in kind but equal in authority, and hierarchical review in the sense described below, may be appeal to an institution or individual which is seen as possessing charismatic authority to correct injustice. Henry Morris describes African litigants who sought the intervention of the District Officer in this manner (1970: 17), and I heard similar stories of petitions to the Governor of Kenya which by-passed the correct appellate procedure to request direct intervention. This approach seems to derive from an attitude toward monarchical rule which sees the king (or his representative) as the fount of justice—a justice frequently perverted by his officials, though without his knowledge (Hobsbawm, 1959: 119-21). This attitude toward the Emperor still prevails in Ethiopia (Fisher, 1971: 740-41).

[312] *E.g.,* the Inspectorate of Native Courts of Northern Nigeria described by Smith (1968: 67). In a sense the whole concept of review runs contrary to many of the developments already noted: it undermines certainty, prolongs the achievement of finality, and diminishes efficiency. We may be able to harmonize the development of review with the theory pre-

sented here if we see the institution as responding not to the demands of the disputants, but to an internal interest in correcting its own errors.

313 Where the same institution engages in both initial hearings and the review of initial hearings held elsewhere, those two processes will retain some similarities. This was true in much of Africa. *See, e.g.*, Fisher (1971: 715) (Ethiopia); Mensah-Brown (1970: 125) (Akan of Ghana); Smith (1968: 61) (Northern Nigeria). As the institution comes to specialize exclusively in review—which is the case of almost all American appellate courts—the process will develop divergent characteristics.

314 This development parallels the shift in focus at the initial hearing from substantive to procedural issues, discussed earlier.

315 Fallers notes that in Busoga, the appeal is treated as a new action between the disputant aggrieved by the original outcome, and the original intervener; the other disputant is not even formally a party (1969: Appendix B). In the extreme, the review comes to resemble a prosecution of the original intervener by the reviewer.

316 Kaplan reports that the decisions of Chagga appeal courts were communicated only to the intervener whose decision was reviewed (1965: 85). I found a divergence of practice in Kenya: some decisions were not even communicated to the court whose judgment was being modified; where this was done, other primary courts in the jurisdiction were not notified; yet decisions of the Court of Review were circulated (*see* Abel, 1969a: 612-26; Barnett, 1965: 117).

317 This is not to deny that the distinction is wholly arbitrary. I have limited my microsocial theory to an explanation of dispute process in terms of the characteristics of the intervener. I therefore discuss the influence of disputant relationships via the mechanism of disputant choice under the heading of macrosocial theory; it could just as readily have been included within the former category.

318 The same example can be used to suggest some limiting values for role differentiation. I cannot imagine a society in which every person greets every other person in the same way.

319 Certainly interveners handle a larger proportion of disputes in our own society than in, for instance, that of the !Kung Bushman (Marshall, 1960; Thomas, 1959), or Bambuti pygmies (Turnbull, 1961; Turnbull, 1965). Why this is so, though an important question, is beyond the scope of this paper.

320 Kluckhohn (1960: 394), citing Dodds (1957). But mere physical density does not produce interaction. Contemporary western city dwellers have learned how to minimize their significant contacts under conditions of very high physical density.

321 Even social interaction may not produce disputes if a society endows its members with a personality disposed to internalize conflict and avoid dispute, as has been claimed for many cultures of the Far East, especially those under the influence of Confucianism.

322 This seems to me one possible refinement of Lawrence Friedman's notion of legal culture (1969): legal institutions operate in certain ways because of societal pressures, and then come to value that mode of operation.

323 This assumes no conscious manipulation of the institution to avoid that result. Recently we have seen a variety of devices used to reduce differentiation: quotas in the selection of personnel from each subgroup; fragmentation of society into smaller units, each with its own institution.

324 Macaulay notes that though some larger business organizations in the United States do this, most do not (1963).

325 Mayhew and Reiss (1969) have shown that the American legal system is inaccessible to many poor people because it does not recognize their problems as legal problems.

326 An excellent history of gradual judicial development in response to evolutionary social change is that of J. Dawson (1960).

327 Nisbet (1969) gives a comprehensive statement and persuasive critique of the organic analogy in history.

328 *See* Diamond (1935) and later writings; Hobhouse (1914) and later writings; Carlston (1968). This notion appears to be one element of what David Trubek has characterized as the "core conception" of much of contemporary scholarship on law and development (1972b).

329 Southall's dichotomy strikingly resembles Maine's distinction between static and dynamic societies (1950).

[330] Among the proliferating literature on this subject, the following offer useful descriptions or analytic insight: Kanter (1972); Houriet (1971); Fairfield (1972); Zablocki (1971). Kanter and Zablocki also contain excellent bibliographies.

[331] A great deal of political, especially racial, unrest in America has focussed upon the police. Many of the demands are specifically directed toward reducing social differentiation: minorities should be represented on the force; police should live in the community which they serve. But these demands have also been made of judicial institutions, *e.g.*, that minorities be represented on juries, that at least token appointments of black judges be made, that blacks be admitted to law schools.

[332] Mayhew (1971: 197) notes that black demands have shifted from integration to separatism, but he fails to see that both are demands for reduced differentiation, though within different frames of reference.

[333] Again, controversy over the police offers the best example. Civilian Review Boards have been a consistent demand, violently resisted. Numerous other methods have been suggested to increase popular control. *See, e.g.*, Chevigny (1969); Skolnick (1966); *Virginia Law Review* [Note] (1969). The Berkeley, California, referendum to decentralize the police force—twice defeated—is another example.

[334] *See* Isaacs (1917); *see generally* Graveson (1953); Friedmann (1959: Ch. 4). This phenomenon has been observed most often with respect to employer/employee relations. But Macaulay has also reported it for relations among businessmen (1963).

[335] Fuller (n.d.: 74) acknowledges that adjudication is poorly suited to polycentric disputes.

[336] I have found this in Kenya; Lawrence Friedman is in the process of documenting it for America; Marc Galanter observes it in India (1972a: 59 n. 38). And Adam Podgorecki informs me that sociologists have noted it in Italy and Finland.

[337] Legal history is replete with competition for business among judicial institutions; Abel-Smith and Stevens (1969) present numerous contemporary instances from England.

[338] This monopoly was recently noted in *Boddie v. Connecticut* (1971). I think it is accurate to observe an increase in state monopolization of the power to alter significant status: even control over marriage and divorce is only a phenomenon of the last hundred years.

[339] Lawrence Friedman in the United States, and I in Kenya, have both found that court dockets have shifted from disputes between private litigants to quasi-administrative matters.

[340] William Felstiner has noted the popularity of that solution in contemporary America, and is currently analyzing why Americans "lump it" (1973).

[341] This is epitomized in an epigram which, in its variant forms in different parts of Africa, is commonly translated as "we marry those we fight."

[342] The only obligation of the American citizen to his dispute institutions is jury duty. It is indicative of our ordering of the importance of conflicting duties that citizens are excused from serving on a jury for numerous reasons; it ranks lower than the duty to keep house, to perform professional activities, etc. By contrast, political activity has a very high priority in tribal socities, and in contemporary American communes. Elia Katz gives an amusing, if probably exaggerated, account of the energy devoted to handling disputes among the Family, a group in Taos, New Mexico (1971: 116-58).

[343] This is the inverse of Weber's perception of the linkage between legal raticnality and the rise of capitalism. *See* Trubek (1972a).

[344] *See generally* the bibliography prepared by Ietswaart and Tiruchelvam (n.d.)

[345] *See* the African Law and Tribal Courts Bill (1969), and the accompanying legislative debate.

[346] *See* the Local Courts (Amendment) Bill (1969) and the Criminal Law (Amendment) Bill (1969) and the accompanying legislative debates.

[347] *See* the discussion in tenBroek (1971: Ch. 3).

[348] Even this is not clear; attempts to assert stronger controls over the police, by means of de-centralization, were opposed by a majority of the black population of Berkeley.

[349] Marc Galanter has amply documented the opposition of Indian lawyers

to the revival of traditional *panchayats* (1972a: 56-57 and *passim*). The defeat of Chilean legislation which would hve created neighborhood tribunals may be a contemporary example.

350 One illustration of this is the history of marital counselling schemes attached to divorce courts. Often initiated with considerable enthusiasm, they have frequently been abolished shortly thereafter because they were thought to be too expensive. *See, e.g.,* Bodenheimer (1961) (Utah); Goldstein and Katz (1965: 150-161) (New Jersey); *New York Times,* June 2, 1973: p. 1 (New York).

351 *See In re Gault,* (1967), and the discussion of alternative models of criminal procedure in Griffiths (1970).

352 There is a lengthy literature on the "failure" of the small claims court. *See, e.g.,* Small Claims Study Group (1972), and its bibliography.

353 A striking instance of such pressure is the recent recommendation by the Canon Law Society of America that Catholic marriage tribunals be eliminated, and that in their stead some radically different institution be established, which might include psychologists and social scientists as well as priests, and seek to counsel rather than to adjudicate. *See New York Times,* October 19, 1973: p. 11, col. 1.

354 The family court movement in the United States during the present century is an excellent example of continuous pressure in this direction. At the same time, its repeated failure to achieve the stated goal of a thorough inquiry into the underlying causes of the dispute is evidence of strong counterpressures deriving from the structure of dispute institutions. *See, e.g.,* Gellhorn (1954: 163-65) (superficial inquiry into financial problems of a dissolving family unit).

355 The call for decentralization as a social panacea, for a return to small town virtues, can readily be illustrated from recent history.

356 This is, of course, a paraphrase of Weber's notions about the relationship between law and capitalism (*see* Trubek, 1972a). Weber saw the causal connection proceeding in the opposite direction; but to me this simply indicates that contradictions between social structure and dispute process generate pressure for changes in both phenomena.

357 This general development has frequently been observed during the last half century from a wide variety of viewpoints (*see, e.g.,* Dahrendorf, 1959: Ch. 7; A. Douglas, 1957).

358 Stratification is so much a part of contemporary western legal systems that participants in those systems are no longer able to recognize the fact that it exists and is increasing. Professor Maurice Rosenberg of Columbia Law School, the current president of the Association of American Law Schools, recently wrote a letter to the *New York Times* condemning the "niggardly" compensation paid to federal judges, and arguing that unless they were paid "just" compensation, good lawyers could not "in fairness to their families and themselves" afford to become judges. The present "niggardly" salary is $40,000-$42,500 a year. (*New York Times,* October 10, 1973: p. 46.) As this example shows, there are no pressures to reduce economic stratification. Rather, the demand is for greater representation of groups defined by ethnicity, religion, or sex — by the appointment of individuals who are immediately placed in the higher economic strata.

359 An instructive example may be drawn from another legal institution, the legislature. During the past century, state legislatures have gradually been transformed from a collection of poorly paid amateurs, holding other full time jobs, and meeting only rarely, to professionals, acting nearly full time, who are demanding, and increasingly obtaining, adequate pay. Yet the structural changes required to meet the demands of the contemporary legislative process may not stop there, as the following article indicates:

> Congress, caught between multiplying problems and declining efficiency, may have reached a legislative absolute — the unpassable bill.
>
> Attempting to rewrite the entire Federal criminal code in one package, the lawmakers now face the possibility that a bill can be so long, so complex and so controversial that it cannot be processed with [sic] the two-year life span to which each Congress is limited.

Some structural change may be required by the size of the bill (538 pages), its controversial nature (issues such as capital punishment, abortion, the insanity defense, obscenity), and political sensitivity. But

ironically, one such structural change — greater professionalization — may in fact be an obstacle to passage of the bill, for, as the article notes, "Lawyers make up to [sic] 54 per cent of the current Congress and 100 per cent of the two Judiciary Committees that have jurisdiction over the criminal code, and they take particular interest in carefully scrutinzing changes in the rules of their profession" (*New York Times,* July 16, 1973: p. 15).

[360] The suggestion that laymen, especially social scientists, be included in Catholic matrimonial tribunals, is an example (*see* note 354 *supra*); so is the demand for professional judges to preside over a dispute process transformed by the introduction of a written code, or by the participation of professional counsel.

[361] Judges often become personally involved in contested matrimonial actions, especially disputes over custody; evidence of this may be found in the degree of affect they exhibit from the bench, and in their frequent references to personal experience in passing judgment. *See, e.g.,* the extensive materials concerning the "Lesser" case in Goldstein and Katz (1965: 19-58, and especially 113-22). More recently, judges confronted with argumentative defendants in criminal trials have lost their self-control and thereby diminished the distance between judge and accused — which, of course, was precisely the intent of the defendant in the first place.

[362] The Conciliation Bureau of the New York Supreme Court, whose purpose was a full exploration of the problems underlying the divorce action, was recently abolished because few divorcing couples wanted such an exploration (Laws of New York 1973, Ch. 1034); on the reasons for the repeal, *see* Subcommittee on Legal Representation of Indigents and Limited Income Groups (1973: 10-12); and *New York Times,* June 2, 1973: p. 1.

[363] The most notable recent example has been the legal services lawyers who refuse to bargain pleas, or who raise affirmative defenses to eviction proceedings, thus placing intolerable burdens on institutions accustomed to routine bureaucratic processing.

[364] The champions of the rule of law are almost exclusively legal professionals (lawyers or judges), usually those who operate at the higher levels of legal institutions (appellate courts, the national legislature, the larger law firms, the professional associations). The idealogy may be seen as an idealization of the process occurring within those institutions, which is then generalized as a value for a wide variety of other institutions which handle disputes, *e.g.,* prisons, schools, universities, etc.

[365] Of the four traditional professions, the clergy and the military have little salience as contemporary role models; law and medicine have increased in importance commensurately.

[366] A wealth of data on the way dispute processing preserves intimate relationships can be found in the genre known as the American Jewish novel, *e.g.,* Roth, Malamud, Bellow; this phenomenon may be general: certain kinds of disputing may be a principal mode of integration for all families. *See* Eisenstein (1956).

[367] Galanter has made this argument for the United States (1972b); Duncan Kennedy, following Furnivall (1956), has analyzed the colonial situation in similar terms.

[368] Here, again, I am turning Weber upside down (1958).

[369] This is Weber's theory that, in the modern era, authority tends to claim legitimation upon the basis of rationality, rather than by invocation of tradition or charisma (1947).

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