THE INTERPLAY OF MICRO AND MACRO PROCESSES IN THE LONGITUDINAL STUDY OF COURTS: BEYOND THE DURKHEIMIAN TRADITION

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This article argues that some of the weaknesses in the longitudinal study of courts derive from an excessively macro-law focus on legal processes relatively uninformed by micro-law processes. Greater attention to the micro-macro relationship offers new opportunities for longitudinal studies themselves and for the integration of their findings into the mainstream of law and social science.

I. INTRODUCTION

In recent years the longitudinal study of courts has been an area at sea. While it has great potential for improving our understanding of law and legal processes, many, including some prominent investigators in the field, have argued that the longitudinal study of courts is without theory, with inadequate theory, or with wrong theory.[1] To many both inside and outside the area it has seemed that most existing findings are at best of tangential interest to the rest of the field of law and social science. It is the thesis of this article that the longitudinal study of courts has been guided by a macro-law focus on legal processes that is relatively uninformed by micro-law processes, and that greater attention to the micro-macro relationship offers new opportunities for longitudinal studies themselves and for the integration of their findings into the mainstream of law and social science. I will develop this argument first by indicating the way in which much of the work in the field has been informed by the procedures and assumptions of Durkheimian social science. I will note some of the weaknesses of this tradition, especially when used to explain the phenomenon typically under investigation in the longitudinal study of courts. In

[1] Munger (1988: 60), for example, notes the general failure of early studies to find a simple direct relationship between social development and increasing rates of litigation; see Laurent (1959), Toharia (1974), Grossman and Sarat (1975), Friedman and Percival (1976a), and Daniels (1980, 1982). For criticisms of current theory see Munger (1986b), Daniels (1984), and Heydebrand and Seron (1986).

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the second half of the article I will argue for an action theory alternative that integrates macro- and micro-law processes. As those who read this issue will discover, however, this essay points down a road many are already traveling. As they do, they increase our understanding of courts and of the legal process in general.

II. THE DURKHEIMIAN TRADITION

Emile Durkheim, often referred to as the founder of sociology,[2] has influenced many students of law and society (see, e.g., Schwartz and Miller, 1964; Friedman, 1969; Wimberly, 1973; Black, 1976). Perhaps nowhere in legal studies has this tradition had a greater influence than in the longitudinal study of courts.[3] One in fact could reasonably argue that the majority of work in this area has been in the Durkheimian tradition. What does it mean to be in the Durkheimian tradition? I shall focus on one aspect of a Durkheimian analysis. Most of Durkheim's work concentrates on macro processes while devoting little attention to the micro processes through which these macro processes, or "social facts," produce their effects.[4]

This concentration informs both the procedure and the assumptions of Durkheim's quantitative methodology. The procedure is to compare social rates of various phenomenon. For example, in his classic *Suicide* ([1897] 1951) Durkheim argued that changes in suicide rates are to be explained by exogenous changes in social organization. The changes in these exogenous variables, such as the marriage rate and the percentage of the population that is Catholic, alter the moral conscience of the society. In countries with high rates of Protestantism or unmarried persons, egoism is high. It is this cultural/social state of egoism that produces higher suicide rates.

One assumption underlying this procedure is that the effects of social change can be observed without looking closely at micro processes. Indeed, to do so might obscure the sociological effects. It is possible to ignore micro processes either because individual behavior may be thought of as constrained by social forces or because individual differences may be thought of as Gaussian error terms, randomly distributed around the main social effects (Stinchcombe, 1968: 67).

A Durkheimian analysis has been employed in the longitudi-

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[2] For a brief biography of Durkheim and his work see Coser (1971).

[3] This is not a novel observation. Several writers have commented upon the Durkheimian influence in this area. See, e.g., Daniels (1984).

[4] For Durkheim's formal statement justifying his line of analysis see *The Rules of the Sociological Method* [1895] (1964b). I should note that in *The Elementary Forms of Religious Life* [1912] (1965), regarded by many as his single greatest work, Durheim finally began to develop an explicit macro-micro link that was absent from his earlier work (see Alexander, 1984; Alexander and Giesen, 1987). The link, however, was constructed by employing a more affective and less rational view of individual behavior than I propose in this essay.

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nal study of courts because here, as in many of the problems of interest to Durkheim, there are *rates* (of litigation) waiting to be explained. The nature (if not the substance) of this dependent variable is defined. Moreover, there are a wide variety of independent variables (often other rates) standing by waiting for an opportunity to explain the dependent variable(s). These independent variables include urbanization and other population variables (Friedman and Percival, 1976a), economic changes (Stookey, 1986, 1990; Toharia, 1974), social development (Daniels, 1984), cultural changes (Grossman and Sarat, 1975; Friedman, 1985), and religious orientations (Greenhouse, 1986).[5] The longitudinal study of courts is thus a natural setting for a Durkheimian analysis, which when successful, may reveal nonobvious relationships in the society. Some set of structural changes alter the moral and normative environment, which in turn causes changes in the rate of certain behaviors. Even when successful at this level, however, this type of analysis offers little insight into the springs of individual behavior, for there is little micro theory and often little micro-level (individual) data.[6] I shall comment on the consequences of these shortcomings, first with respect to Durkheim's work and then with respect to the longitudinal study of courts. I should note that many of these observations have been made by others in this field.

First, because most of the argument remains at the macro level, there is a vagueness about the causal relationship among concepts.[7] How do independent variables affect dependent variables? For example, the relationship between "suicidogenic currents" and suicide rates is mediated through an uncertain set of micro interactions. Due in part to the vagueness problem, there is the problem of what is a cause, what is an effect, and what is "only" an indicator. It is possible, for example, to read Durkheim's *Division of Labor in Society* ([1893] 1964a) not as a book about how society changes law but as a book about changes in society. The role of the legal analysis is to prove that the theory about society is correct.[8] Here, however, as in other Durkheimian analyses,

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[5] One should note that many of these studies include more than one dimension. For instance, Grossman and Sarat (1975) are also interested in economic determinants of litigation.

[6] Most of these remarks are addressed to the lack of micro-level theory. However, the lack of micro-level data can also cause difficulties. Within Durkheim, the absence of such data creates the potential for aggregation problems. Although the arguments suggest that certain people more than others will be influenced by their structural situation in society and thus will be more likely to commit suicide (or sue), we do not know if this is so because the analysis does not reach the individual level. For a discussion of aggregation problems in Durkheim, see Selvin (1965).

[7] For a discussion of this problem in Durkheim, see Douglas (1967) and Hunt (1978).

[8] In *Division of Labor*, the movement from repressive to restitutive law is the objective indicator of a moral change; the weakening of the collective conscience accompanying a societal movement from mechanical to organic soli-

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the causal mechanism tying the indicator to the underlying process is not well defined.[9]

The problems inherent in a Durkheimian theory are exacerbated when such a macro model is brought to the longitudinal study of courts in an effort to understand various rates surrounding the litigation process.[10] Suicide is a relatively homogeneous event.[11] Its overriding purpose is clear: to take one's own life. The objectives involved in the decision to litigate are less certain and seem to vary from situation to situation. A litigation rate is, in this sense, an index comprised of a number of discrete behaviors (see Duncan, 1984). Litigation studies increasingly recognize this by subdividing the rates, frequently according to the area of law involved.[12]

Moreover, suicide is a personal action, with its proximate cause to be found in the individual. There is no structure impeding one's will. The suicide rate is, in an important sense, an individual rate. By contrast rates involved in the litigation process, even relatively simple rates such as a filing rate, are institutional rates. Behavior occurs within an institutional structure (Coleman, 1987). Those involved in longitudinal studies recognize this when they recommend that we introduce into our models variables dealing with court structure, jurisdictional limitations, attorney availability, litigation costs, and other institutional factors. This, however, raises the question of the proper role of these variables in the analysis. Do they function as "control" variables, as necessary adjustments that will allow the underlying relationship between rates of social change and litigation rates to emerge? Or are they

darity. On this view see Merton (1965), Aron (1967), Lukes and Scull (1983), and Duncan (1984).

[9] Durkheim's argument on the nature of law as an indicator is itself complex. Mechanical solidarity (the solidarity of similitude) creates a high level of collective conscience that is reflected in repressive laws that punish those who somehow violate this shared moral understanding. Organic solidarity (the solidarity of differences), however, has a more complex relationship to the legal indicator. Organic solidarity weakens the collective conscience and thus might lead to less repressive law, but it is not clear why this would cause restitutive law, rather than a simple diminution of law. Presumably restitutive law is a response to a social need to facilitate the increasing number of exchanges and interactions that typify an organically solid society. Related to this theoretical problem is the methodological problem of what rate we should be examining: restitutive law as a percentage of all law? Or restitutive law per capita? The choice is not unlike the choice between Friedman and Percival's (1976a) and Lempert's (1978) way of looking at the Alameda and San Benito counties data.

[10] As I shall note below, a variety of rates are associated with disputing and litigation.

[11] Even with respect to suicide, however, complexities abound. Durkheim was plagued with the problem of different types of suicide, ultimately settling on three: egoistic, altruistic, and anomic. Egoistic and anomic suicide are not always easily distinguishable; for his effort to do so, see Durkheim ([1897] 1951: 258).

[12] The most consistent "finding" in longitudinal studies has been the shift in caseload away from property and contract cases and toward tort and family law. More recent studies usually focus upon one or two areas of law.

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part of what is to be explained, the very things that are altered by social change and, over time, by the actions of litigants (Monkkonen, 1990)? Are they endogenous or exogenous variables?

Nowhere is the theoretical complexity and ambiguity of the longitudinal study of trial courts clearer than in the choice of rates to serve as the dependent variables. The choice of both numerators and denominators used to construct rates is problematical. Potential denominators include court cases (filings), total disputes, disputes within a certain substantive area (e.g., contracts), and disputes broken down into Galanter-like categories ("haves" and "have-nots") or surrogates for them (e.g., company or individual parties). Some of these denominators may appear as numerators in another analysis. Using these denominators and appropriate numerators, a wide variety of rates may be constructed, including *dispute rate*, or the number of disputes by the volume of a certain type of activity (e.g., contractual activity) in the environment; *litigation rate*, or the number of cases going to law by total disputes;[13] *trial rate*, or the number of cases going to trial by total filed cases; and *appellate rate*, or the number of cases appealed by cases tried or filed.[14]

Problems of validity are associated with many of these values because they are measured by indicators. For example, the number of various kinds of disputes has been estimated by measuring, among other indicators, population, business activity, and automobile accident rates. These efforts at times have become quite sophisticated (see Munger, 1988). Nevertheless, the quality of the indicators often remains an unknown, and thus when there is a failure to find trends predicted by theory, one cannot always be certain to what degree the problem lies with the theory or with the operationalization. Unfortunately, the failure to find predicted changes is not infrequent (see Daniels, 1984; Munger, 1986b).

The wide variety of dependent variables is not surprising given the variety and, some might say, ambiguity, of the theories concerning the causes of changing legal activity. The best-developed example is the body of theory that is variously called the "social development model" (Daniels, 1984) or the "normative effects

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[13] See Stookey (1986) for a distinction between what I am calling the dispute rate and the litigation rate. See Grossman *et al.* (1982: 97) for examples of what I have called the dispute rate (percentage of households reporting a dispute) and litigation rate (percentage of disputes filed in court).

[14] One has to be careful about terms if confusion is to be avoided. I have used the terms "activity," "disputes," and "litigation." Miller and Sarat (1980–81: 563) speak of "grievance," "claim," "dispute," and "civil legal dispute." For the sake of simplicity I have collapsed their first three stages into the term "dispute," while their "civil legal dispute" is similar to my "litigation," or at least the idea of legal activity. In many situations, however, it is worthwhile to think of grievance and claiming as stages between activity and disputes, especially when attempting to describe the micro process whereby one recognizes an event as something that raises a problem and begins to act on this recognition (see Felstiner *et al.*, 1980–81; Mather and Yngvesson, 1981).

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model" (Munger, 1988). From my reading of this literature, the model has come to stand for at least the following arguments in the single area of contract litigation.

1. Rapid social change creates uncertainty as to the correct rules governing certain types of behavior, and people turn to law for advice or normative instruction about reordering certain relationships.[15] This argument would presumably predict that rapid social change will produce a higher *trial rate* or *appellate rate*. One could presumably look at the appellate docket to search for cases in which people are attempting to use law to set precedent in uncharted waters.[16]

2. Rapid economic change creates more breached contracts and therefore more potential suits.[17] Note that by this argument the *litigation rate* would be unchanged. What would change is the *dispute rate* with respect to some activity (e.g., contractual activity) in the environment. Thus even a constant litigation rate would produce more litigation.

3. Change replaces multiplex and enduring relationships with simplex and episodic relationships. This in turn alters the litigation rate. However, there is some disagreement about the direction of this effect. One argument is that the more simplex and episodic the relationships in society, the fewer the social constraints upon formal litigation and therefore the higher the litigation rate.[18] A second argument is that the more simplex and episodic the relationships the fewer the benefits of achieving one's due in any given exchange and therefore the more likely one is to lump it and accept a loss without a fight. This would produce a lower litigation rate (Felstiner, 1974).

Note that with respect to both of these arguments the social change involved is not necessarily *rapid* change. The independent variable, therefore, does not need to be a rate of change, although theories that incorporate the idea of rapid change can be built on this foundation. Thus one can argue that rapid change destroys

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[15] Munger (1988: 68) attributes this argument to Hurst (1956). Krislov (1983) attributes similar arguments to Fuller (1934). Those familiar with Krislov's article will find parallels in the following discussion, for I find myself in substantial agreement with his arguments.

[16] This argument might also suggest a higher litigation rate. If, as Galanter (1983b) argues, court decisions have radiating effects, doctrinal and conceptual uncertainty may weaken the strength of the rays. If, as a result the parties are less certain of their rights, they may find it more difficult to settle a dispute without the intervention of the legal process. For a recent work arguing that litigation is a coping mechanism for a community under stress from social change, see McIntosh (1990).

[17] This change might be in either direction, that is, depression or expansion (see Stookey, 1986; Munger, 1988).

[18] See Friedman (1985). One might supplement this argument by adding that disputes in simplex and episodic relationships may involve a greater amount of relative conflict of interest and therefore would be more likely to be litigated rather than compromised (see Axelrod, 1970; Menkel-Meadow, 1983).

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multiplex and enduring relationships, thereby causing an increase in the litigation rate.[19] The litigation rate begins to fall, however, as new relationships are consolidated.[20] This is, of course, one version of the "curvilinear hypothesis" that social change creates a rise and then a subsequent decline in litigation.

4. There is a more purely "cultural" aspect of changing litigation rates. According to one version of this argument, technological development creates a greater sense of control, which in turn produces a legal culture that includes a general belief that every harm deserves recompense (Friedman, 1985). This would produce a higher dispute rate and, if total activity were constant, more litigation.[21]

This complex array of hypotheses, touching as it does on a wide variety of potential dependent variables with no explicit mechanism connecting the independent and dependent variables, or even connecting the dependent variables to each other through some explicit theory of transition rates, leads to a general uncertainty about the effects of change. Thus Munger (1988: 69) makes the following comments with respect to the relationship of business cycle fluctuations and courts.[22]

> We might argue, for example, that depressions and business downturns create conflicts due to inability to perform. The rate of litigation (but not the degree of normative instability) would then rise. On the other hand, we might also argue that business upturns increase the likelihood of breach of commercial agreements in order to take advantage of rising prices and thus lead to an increase in the litigation rate. One, both or neither of these patterns may hold for an industry depending on how changing economic conditions actually affect conflict. Further, even though norms are relatively stable, the litigation rate may vary depending on how businesses value litigation relative to other forms of conflict resolution. For example, litigation may be more highly valued in times of depression than in times of relative expansion due to the greater number of alternatives available when market are growing.

To avoid this type of conclusion there is a considerable search for some alternative to social development models to redefine key concepts such as "case" and "court" and to find the source of change in rates in the activities of the state rather than in the

[19] And, confoundingly, an increase in the number of disputes as activity increases.

[20] For such an argument see Toharia (1974), Grossman and Sarat (1975), and Kidder (1975).

[21] For a more structural version of a cultural argument see Miller and Sarat (1980–81). The cultural argument plays an important role in cross-cultural analyses (see Miyazawa, 1987; Wagatsuma and Rossett, 1986).

[22] In this passage Munger is criticizing what he calls the "normative effects model." My sense, however, is that the comments, insofar as they suggest the uncertainty surrounding the predictions of various theories, are more generally applicable.

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functioning of society (Snyder, 1980; Munger (1987a, 1988; Heydebrand and Seron, 1986). As yet this effort has made most of its points by indicating difficulties with existing work rather than by developing and testing new propositions.

III. AN ACTION THEORY ALTERNATIVE

In the remainder of my comments I shall propose an alternative line of analysis borrowed from recent work on building micro-macro links in social science. What follows does not simplify the longitudinal study of courts. I do not propose that we abandon any set of dependent or independent variables. Rather, building on the premise that some current difficulties in the area are inherent in a Durkheimian analysis as it has been adapted to the study of litigation rates, I argue that devoting greater attention to two types of analysis—the theory of micro processes and the theory of organizational effects—will improve our understanding of historical changes in the use of courts and their alternatives.

A. Improved Micro-Level Theory

James Coleman (1986: 1310), in a recent call for a new action theory for the social sciences, argues for theories in which large-scale macro changes in society are understood as occurring through the purposeful actions of individuals.[23]

> Social theory with this kind of grounding [makes] . . . possible a connection between the individual and society, and it even [makes] . . . possible a conception of how social systems might be shaped by human will. Perhaps most important it [makes] . . . possible a link between positive social theory and normative social philosophy, by connecting individual interests with their realization or lack of realization.

In doing so he rejects theories which fail to examine micro processes. On such theories, he comments that "unless the theory is functionalist, and the system itself is treated as homeostatic—there is no explanation or understanding of why one relation holds rather than another" (1986: 1321–22).

This problem especially plagues longitudinal studies that focus on rates. As the earlier quote by Munger indicates, there is a weak understanding of why one relation rather than another holds. In place of a solely macro-level explanation, Coleman proposes an analysis in which theories begin at a macro level, move down to a micro level of individual actions, and then go back up again. Of course many theories implicitly move to a micro level, including most of those concerning litigation rates. The dependent variable is ultimately an aggregation of individual behaviors.[24] Coleman

[23] For a further elaboration, see Coleman (1990).

[24] Not all theories have an implicit micro component. Some are built on

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(1986: 1322) is urging us to be explicit about our theories of purposeful human action and about the micro-macro relationships connecting individual actions to changes in the social system, especially the process by which micro-level individual behaviors combine to produce macro effects. Figure 1 diagrams this approach.[25]

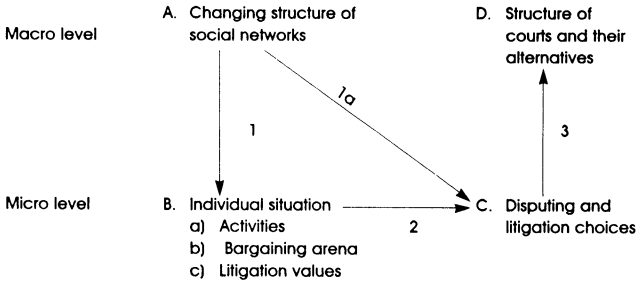

Figure 1: Macro-micro relationships in litigation decisions

In terms of this diagram, theories in the Durkheimian tradition move directly from *A* to *C* through step 1a. What is missing is a theory of micro processes that transform macro effects to individual behaviors (step 2) and often a theory of the organization connecting micro behaviors to macro change (step 3).

Part of what Coleman is calling for with respect to micro processes is a fuller integration of economic styles of analysis into theories. He provides the following example. Compare a traditional sociological analysis explaining female labor-force participation through a statistical analysis that introduces such possible independent variables as age, marital status, husband's occupation and income, and number and age of children, with an economic analysis that uses the same data. The economic analysis begins with an assumption that each woman has a utility function and that she will act to maximize her utility. If household time is of greater value than the wage she would earn in the labor force, she will not seek employment. Many of the same variables a sociologist would use enter into the econometric model as "arguments" to

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a methodological holism in contrast to the methodological individualism that, as Coleman (1986) notes, grounds sociology in a theory of action. The first chapters of *Suicide* are an appeal for a type of methodological holism. Heydebrand and Seron (1986: 319) appear to join in such an appeal. They reject "an individualistic, reductionist bias . . . focusing on disputing and litigious *behavior* [in which] the question of social and legal conflict is collapsed into one of individual motivation." Of the current research, their prescriptions for progress are probably furthest from those presented here. As will become obvious below, however, this essay shares with Heydebrand and Seron's work a desire to move beyond rates as the dependent variable.

[25] The structure of this figure is borrowed from Coleman (1986: 1322). The examples have been changed, however, to reflect problems in the longitudinal study of courts.

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the utility function. The sociological and economic analyses therefore are not radically different, but the interpretations are. Whereas the sociological analysis is likely to view the independent variables as "determinants" of behavior,[26] the economic explanation explicitly builds purposeful human action into the model.[27]

To be sure, one may disagree with a simplistic economic model of purposeful behavior (utility maximization). As Wippler and Lindenberg (1987) note, the "economic man" of traditional economic analysis is not sufficiently informed by a concern for how institutional and social structural conditions affect goals and constrain behavior, or for ways in which psychological theories influence behavioral assumptions. It is better, however, to be explicit about a theory of individual action than to allow the theory to remain either implicit or relentlessly agnostic about the spring of human action. By being more explicit we can, if we choose, begin to develop a more elaborate, historically grounded model of human action.[28]

Such elaborations are particularly important for the longitudinal study of courts where we need to understand how macro social arrangements produce orientations toward law and disputing that shape individual litigation calculations and choices (Sewell, 1987). Decisions and bargains are made in an arena shaped by changing substantive and procedural legal rules. In addition, there are other important macro-to-micro processes at work that shape the psychology of disputing. As Stinchcombe (1986) suggests, we should view rationality not as an assumption but as a variable. We should look to the market and situational factors that produce various degrees and types of rational behavior.[29]

For example, investigators are increasingly likely to conclude that the individual micro situation is shaped not only by activity levels but also by litigation values embodied in the concept of legal culture.[30] Legal culture shapes individual perceptions of when a

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[26] The tendency to treat such independent variables as "determinants" can in part be traced to the Durkheimian heritage. As Alexander and Giesen (1987: 8) note, "Durkheim's later theory became the 'classical' referent for sociologists who believed in the subjectivity of action but considered it to be ordered in a strictly macro, antivoluntaristic way."

[27] See Priest and Klein (1984). For a review of attempts by economists to model litigation and settlement decisions and the empirical evidence bearing on these models see Cooter and Rubinfeld (1990).

[28] Here as elsewhere there is a trade-off between simpler models that are mathematically tractable and more complex models that are not. From this perspective there is no one right model of human action (Kahneman *et al.*, 1987; Plott, 1987).

[29] "Sociologists have as their distinctive mission in the science of rational decision to analyze the social structural causes of rationality" (Stinchcombe, 1986: 8).

[30] Investigators who are in other ways rooted in different traditions are apparently coming to agree about the importance of legal culture. Thus Friedman (1985) explains the growth of law in twentieth-century America as the product of a developing legal culture of plural equality. Friedman (1987: 373)

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claim exists and when one might litigate a dispute.[31] It may be, for instance, that in certain areas dispute rates change as individuals alter their view as to the appropriate "rule logic" to be used in judging the acts of others.[32] A person employing a criminal law rule logic in which intention is essential for liability may dismiss an unfortunate occurrence with the thought, "He probably didn't mean to do it." If cultural changes cause individuals to move toward a negligence rule logic in which intentional wrongdoing is not required, the same act might produce the thought, "He should have foreseen that his act would hurt me," and thus begin a dispute. Perhaps increases in charges of sexual harassment in the work place are due in part to this type of change in legal culture. The changing prospect of damages may also alter individual perceptions and litigation decisions. Lloyd-Bostock (1983a, 1983b), for example, notes that the attribution of fault for an accident is correlated with the prospect of compensation. An important question is how such values change over time. At the micro level, cultural values shape individual decisions about whether one should dispute and whether one should litigate. In economic language, they shape the utility of various alternatives available to the individual.

Of course there is a serious impediment to quantitative research about legal culture at the micro level, since as Friedman (1987: 6) notes, "those who work with historical documents . . . cannot interview the dead." Here we will have to rely upon qualitative sources, and on contemporary work such as that done by Engel (1984) and Baumgartner (1984, 1988). In addition, we can benefit from cross-cultural work. For instance, comparative work on Japanese-American legal culture offers insights into the sources and effects of cultural differences on dispute and litigation rates (Smith, 1983; Hamaguchi, 1985; Leung and Lind, 1986).[33]

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notes that in California in the last two decades of the nineteenth century, at least with respect to tort law, "The legal culture of the time was a culture of low expectations with regard to tort compensation. The rules of law suggest this; so does the behavior of juries. Munger in an article on tort litigation in West Virginia explains the relatively low level of industrial accident litigation in part by noting:

> It is possible to suggest that miners themselves accepted many of the values of self-reliance which were embodied in the common law rules that emphasized employee responsibility. . . . Their pattern of litigation does not suggest increasing discontentment with the system of recovery based on common law. (1987a: 107, 112)

[31] The exact content of the concept of legal culture is still in flux. Efforts to borrow directly from the concept of political culture have enjoyed limited success (Grossman *et al.*, 1982). Friedman (1985) adopts a narrower definition based in part upon the idea that injuries will be compensated.

[32] For a discussion of the idea of "rule logics," see Lempert and Sanders (1986).

[33] For instance, the litigation rate for injury producing accidents is less than 1 percent in Japan, and lawyers are involved in out-of-court settlement in as little as 3 percent of the cases. American filings and lawyer participation are at least ten times higher.

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A second, psychological elaboration of a simple economic model that may prove useful in understanding decisions to litigate is the work of Kahneman and Tversky (1979) and others that indicates systematic ways in which individuals fail to act as perfect utility maximizers (see Hogarth and Reder, 1987). These findings dovetail nicely with Galanter's (1974a) insights about the advantages of repeat players. Because repeat players (often corporations) are frequently less risk and loss averse than one-shot players (often individuals),[34] they may be able to take advantage of suboptimal decision rules by individuals to gain a bargaining advantage and to avoid litigation.[35] Individual decisions may also be influenced by the routinization of an area of law and by risk spreading techniques that reduce the conflict of interest in various situations. As Friedman (1985) notes, insurance has changed everything.[36]

With these cultural and psychological elaborations of a utility maximization model, we can work toward a better understanding of the alternatives facing disputants and the costs and benefits of various courses of action.[37] Indeed, a better understanding is crucial if we are to explain litigation and other rates. It is my intuition that we have failed to predict litigation rates more accurately largely because of miscalculations in translating the individual situation into disputing and litigation choices (see step 2 in Fig. 1). Traditional theories suggest a set of macro factors that will alter the individual propensity to dispute or to litigate. These individual effects are aggregated to predict a change in dispute or litigation rates. The error comes in the aggregation (Coleman, 1987; Hondrich, 1987).

For instance, it has been argued that economic depressions

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[34] To be risk averse is to fail to assign a linear value function to risky choices. Most people would choose a sure $800 to an 85 percent chance at $1,000. Individuals also tend to be loss averse because the subjective value function is steeper for losses than for gains. Most people are reluctant to bet on a fair coin for equal stakes.

[35] Out-of-court settlements are sometimes thought of as situations in which repeat players may enjoy a bargaining advantage. Friedman (1987) discusses the accident compensation process in later nineteenth-century California in which employees typically bargained away their right to common law remedies in case of injury in exchange for employer relief plans. In Friedman's (1987: 371) words, this was "surely a bad bargain" for the employee. Companies also bargained with consumers (e.g., railroad passengers) in a way that is much like the way insurance claims adjusters respond to people harmed by their insureds (Ross, 1970). The implicit psychology embodied in such efforts is that a risk-averse individual will be unable to refuse such offers. Of course, arrangements such as the contingent fee may improve an individual's bargaining position, but as Friedman (1983: 24) points out, this system can only operate when legal rules create a surplus that can be used to pay the attorney.

[36] For a particular example of the effect of risk spreading, see Kagan (1984).

[37] A number of writers have called for efforts in this direction: see Lempert (1978), Friedman (1983), and Daniels (1986).

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may increase the incidence of certain types of debts, among them the failure to pay rent (Stookey, 1986). Landlords thus have more claims.[38] It would be a mistake, however, to expect that this would be readily translated into increased litigation rates or even increased litigation. To turn to law implies that there is some way for the tenant to pay and/or that an eviction is a profitable course since there is a market of other tenants. However, neither of these assumptions may be true. The landlord faces a type of competition effect[39] that limits his ability to gain from turning his dispute into a lawsuit.[40]

In this example the desirability of litigation is a function of macro social changes altering the supply of solvent tenants. At other times the competition effects may arise over scarce legal resources. As Krislov (1983) notes, the price mechanism of courts, like that of other nonfree public goods, is queuing. At least in the short run a rising volume of litigation makes law more expensive. Once again, however, one must be careful in extrapolating these findings to litigation rates. As the queue lengthens, some are deterred from using the legal process. Others, however, may view the longer queue (court delay) as a benefit and refuse to settle, thus increasing the litigation rate (total lawsuits by total disputes). Kidder (1975) and Cohn (1976) report this type of strategic behavior in Indian courts, and at an anecdotal level Stern (1976) reports that the defendants in the Buffalo Creek disaster chose to settle only when it appeared they were not going to be able to use the legal process for purposes of delay.

If, however, we devote our attention solely to micro behavior, we will fail to capture part of what produces changes in litigation rates and in courts over time. Litigant behavior is behavior within an organization. The litigant interactions alter the organization itself. To be sure, the response is often slow and halting. As Seron (1990) notes, courts do not control their own resources and cannot

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[38] Galanter (1990: 373–74) calls this theory that litigation patterns should "follow the ups and downs in the quantity of the underlying activity" the "underlying activity" hypothesis. Clearer insights often accompany the realization that rates cannot be understood as simple aggregations of the underlying activity as, for example, when we recognize that plea bargaining cannot be understood solely as a response to case pressure. See, for example, Padgett's (1990) insightful article on the history of plea bargaining. Padgett argues that long-range changes in plea bargaining discounts were influenced by, among other factors, improvements in the average strength of the state's case and the legal culture of judges.

[39] Coleman (1986: 1330) gives as another example of a competition effect the economic return to the individual of increased educational attainment. The return exists in the short run given a certain supply of educational attainment. If, however, overnight everyone had one more year of education, we would not expect to see this reflected in our individual paychecks. The macro effect is not a simple aggregation of individual effects.

[40] Of course it is possible that some landlords will not even conclude that a failure to pay rent in the full amount or on time constitutes a dispute. The economic climate might alter perceptions of when it is appropriate to claim.

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alter supply in direct response to demand.[41] Nevertheless, much of what changes in courts over time might be thought of as organizational responses to the environment, by which I mean primarily the efforts of litigants to use the law to fulfill their purposes (see Jacob, 1983a). These responses include formal procedural changes such as jurisdictional limitations and the number and variety of appellate courts, informal changes such as the routinization of certain types of cases, and, especially in common law courts, changes in substantive rules of law.[42]

B. The Need for Improved Organizational Theory

This leads to a final point: Litigation studies are hampered by a still underdeveloped understanding of courts as organizations.[43] Creating lists of organizational effects such as the one presented immediately above is relatively easy. What is much more difficult is developing an adequate organizational theory of courts. Perhaps most importantly, to understand micro-to-macro relationships such as the effect of disputing and litigation choices on the structure of courts and their alternatives, we need to move beyond litigation rates and toward new dependent variables.[44] As Emerson (1983: 427) has argued, it is a mistake to treat individual cases as the sole unit of analysis, because cases are often thought of and disposed of in larger collectivities, and are often "shaped by reference to larger, organizationally relevant wholes." Here there is much to be accomplished, but I will mention one line of investigation that I believe to be promising precisely because it suggests ways in which individual micro decisions over time alter the macro structure of organizations.[45]

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[41] Perhaps the "lumpy" nature of court supply is part of the reason we do not ordinarily hypothesize or test equilibrium models of litigation rates. Nevertheless, there are certain suggestions in the literature of some stability to litigation rates over time (McIntosh, 1983).

[42] The court response need not necessarily be a product of conscious thought. Several economists have argued that selective litigation may produce more efficient laws (Priest, 1977; Goodman, 1978). As Cooter and Rubinfeld (1990) note, if a rule's efficiency is negatively correlated to the probability that litigants will test it in court and if efficiency is not negatively correlated to the probability of a rule surviving such a test before a judge, the law should at least weakly evolve toward efficiency.

[43] Cooter and Rubinfeld (1990) made this point in an early draft with respect to some law and economics analyses: "The law and economics literature on trial outcomes has recently begun to make use of principal-agent theory and game theory. The theories frequently lead to indeterminate predictions in part because the authors are unwilling or unable to put sufficient institutional structure on the problem to narrow down the theoretical possibilities."

[44] As Coleman (1987) notes, Durkheim's description of the suicide rate as a social fact and his ongoing polemic against social psychology sometimes causes us to loose sight of the fact that he was engaged in the explanation of individual, micro behavior. Rates per se are not macro effects.

[45] Heydebrand and Seron have also been working on this aspect of litigation studies. Their work has in part been an effort to define and measure a new set of dependent variables for the longitudinal study of courts.

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Included in this issue is an article by Galanter (1990) on "congregations" of cases.[46] A history of American litigation might be written in terms of big (automobile accidents) and little (wrongful life) congregations or waves of this kind, many of which continue for long periods.[47] Some congregations are planned efforts to use courts for social goals (school desegregation cases), while others proceed more chaotically (asbestos cases). As Galanter notes, new congregations of cases arise for a variety of reasons and are not always directly tied to the rate of some underlying activity.[48] As they move through the legal system, they set off complex organizational responses, including development of a specialized bar and sometimes a specialized judiciary, shared understandings about the worth of cases, and at times special substantive rules to deal with the unique problems the cases present. For instance, the asbestos cases and other mass tort cases have forced the courts to rethink the causal question in tort law and have created new issues and forms in bankruptcy law.

Perhaps the organizational response to many of these congregations can be understood in terms of a cycle of adjustment that leads to the routinization of part of a court's docket (Miller and Sarat, 1980–81; Lempert and Sanders, 1986). Within tort law, routinization is apparently an ongoing process. Friedman (1987) reports such a process in nineteenth-century workers' compensation cases that is parallel to the routinization that Ross (1970) finds in the area of automobile accidents many years later. A nontort example of this process may be found in Kagan's (1984) study of debt collection cases.

Occasionally a collection of cases may produce longer term effects. Thus according to some, the civil rights cases and other institutional litigation have produced a "public law" model of litigation (Chayes, 1976); and the development of workers' compensation systems in response to the population of industrial accidents at the beginning of this century (Friedman and Ladinsky, 1967) is an example of the ongoing process of apportioning disputes between traditional courts and alternative forums for disputing.[49] In

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[46] For an example of a similar line of analysis see Burstein and Monaghan (1986) on populations of education cases over time.

[47] Galanter (1990: 372 n.1) is reluctant to call something as large and as sustained as automobile accidents a congregation, and yet is willing to entertain the idea that there is a congregation of malpractice cases.

[48] Other factors that Galanter (1990: 377–78) lists as influencing the emergence of a definable group of cases include the availability of legal services and the probability of success suggested by a set of legal rules.

[49] Administrative agency hearings, small claims courts, and juvenile courts all alter the landscape confronting a person with a dispute. While the sources of some of these changes may be outside the scope of the longitudinal study of courts, their consequences are not, for they directly influence the costs and benefits facing the individual with a dispute. Today this is an especially important issue as courts and lawyers confront and attempt to capture the alternative dispute resolution movement (see Seron, 1990). As Friedman

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general the idea of congregations of cases may be a window into understanding the response of courts to their primary environmental disturbance: the caseload.[50]

IV. CONCLUSION: WHY STUDY COURTS OVER TIME?

At one point while reading materials for the Buffalo conference I felt, as many who have worked in this area must, that the field was comprised of dependent variables in search of a correlation with anything. I have now, however, come to a very different view. I now believe that the longitudinal study of courts is a worthwhile enterprise because it leads us to study a fundamental sociological and historical question of how one set of social structures is transformed by human action into another set of social structures (Sewell, 1987). Not only is this an important task; some would even say that it is *the* task for the social sciences. There is also no more appropriate place to undertake the task than in the context of the longitudinal study of the legal system. Looking at law and courts over time provides us with sufficient variance to observe the processes by which micro actions produce macro effects, and there is no more appropriate place to look for the micro-macro link than the legal process. Ordinarily actors proceed with the day-to-day flow of activities without offering accounts for their actions and decisions. Only when behavior becomes puzzling are we asked to offer discursive reasons (Giddens, 1984). Lawsuits encompass behaviors that require explanations and force us to set forth the conditions and purposes of our conduct, to expound upon the springs of micro behavior. As Coleman (1986: 1313) notes:

> One might even argue that law, as a set of rules having a high degree of internal consistency, as well as principles behind those rules, has as strong a claim to constitute a social theory as does any alternative body of principles offered up by sociologists. All case law is based inherently on a theory of action. For example, modern Western law, both continental law and English common law, is based on the conception of purposeful individuals with rights and interests, who are responsible for their actions.

In the legal process, if anywhere, are the relationships between human action and social structure laid bare for our examination.

(1983: 23) notes, "we could shed light on the inner history of courts if we knew more about the history of their rivals—arbitration for example."

[50] The macro-micro interaction does not of course end here. We live in a world of nonrecursive relationships. As Galanter (1990) remarks, the response of the courts to a congregation of cases may either encourage or discourage other litigants or even other congregations.

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