AFTERWORD: CHANGE AND STRUCTURE IN DISPUTE PROCESSING

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One need only thumb through the back issues of this journal to sense that the material presented in these two special issues on litigation represents a change of some sort. The post-World War II revival of social scientific interest in law has been characterized by a strong programmatic or policy orientation which has tended to assign a peripheral position to the issues raised in these pages (cf. Black and Mileski, 1973, 3-5). The revival of this interest, which gave birth to this journal, received much of its impetus from concern with questions of social control. Broadly speaking, the question was: "To what extent can legal institutions be used to achieve legally mandated objectives?" The legal impact study's search for the effects of legal acts has expanded to include the conditions which shape those effects. This search has sometimes been informed by theoretical consideration of the organizational processes affecting legal functionaries as they deal with the problems of putting legal doctrine into practice. In many ways, we have learned how legal actions become transformed by their encounter with the "real world." The law, we repeatedly discover, does not always have its "intended effects."

To focus attention, as we have done in these issues, on dispute processing is to invite a significantly different, though not unrelated, perspective on the relationships between law and society. The legal impact approach has viewed the law as social physician or engineer (Black, [1973-45] refers to this as the "technocratic" orientation). When one asks about the impact of an environmental ordinance or a Supreme Court decision, that action is the key event and the research agenda is organized around the presumed intent of that action. It is an action-reaction model in which the public tends to be only a reactor. Even when the policy is one of making law "more responsive to the needs of the people," it is implied that there is a group of experts with the capacity to improve responsiveness, if only they discover the right formula.

In addressing questions about dispute processing, we need not abandon the realm of policy. Yngvesson and Hennessey, for example, consider specific policy implications of their research,

as does Felstiner. But we move away from the restrictions of the technocratic model's emphasis on the initiative of law producers as the key factor explaining patterns of legal impact. Instead, the emphasis is on the initiative of law "consumers" and on the societal characteristics and changes which affect their patterns of consumption.[1] Processes which differentiate populations according to these characteristics and changes are the researcher's concern at the outset, whether he works with broad statistical evidence (Wanner, Blankenberg, Ross, Grossman and Sarat) or with the contextual evidence of case studies (Fitzgerald, Sanders, Morrison, Kidder). Because law "consumers" are treated as determining patterns of legal activity and outcomes, the consumer-producer analogy breaks down—consumers are, along with legal functionaries, the producers.

That this approach should seem new or different is curious. For decades, anthropologists have been telling us that law develops around the handling of conflicts, "trouble cases," disputes. For many anthropologists, the study of law in society means the study of litigating.[2] Ehrlich (1936) proposed a similar agenda for sociologists in his plea for attention to the "living law." But somehow, in societies dominated by bureaucracy and technology, the application of social science techniques to the study of law has only sporadically been informed by that kind of perspective.

In general, separate theoretical traditions with significantly different implications for research divide the legal interests of anthropologists from those that have fueled the law and society renaissance. Studies of law in complex societies have predominantly been guided by a view of law exemplified by Weber (1954, 1925), which emphasizes special legal agents, legitimate authority, and sanction-produced probabilities of conformity. Anthropological studies, on the other hand, have tended to emphasize, as did Malinowski (1962, 1926), reciprocity in ongoing relationships as the basis of conflict management for the maintenance

1. The source of this emphasis may lie either in the fact that litigation is normally initiated by a disputant rather than by officials or in the nature of research funding priorities. It may be that we associate "impact" studies with policy-oriented research and litigation studies with more theoretical concerns, simply because "legal impact" studies are funded by agencies concerned with broad public policy issues. There seems to be nothing inherent in the process of litigation which would prevent its becoming a target of technocratic concern.

2. Debates such as that between Bohannan (1969) and Gluckman (1969) over the proper approach to the study of law take place within a shared assumption that law is to be found within the province of dispute processing, rather than of policy implementation by elites.

of solidarity.[3] The study of litigation in complex societies, as can be seen in these two issues of the *Law & Society Review*, represents a synthesis between the Malinowskian thesis (that legal forms are the reflections of reciprocal interaction) and the Weberian antithesis (that legal forms are the products of specialists). United here is the analysis of private, exogenous relationships (among potential as well as actual litigants) and the study of endogenous factors (*i.e.*, those generated within the legal system) affecting the actions of legal functionaries. Moreover, our attention is directed to the interaction between these two zones of activity.

This composite approach may help us to disabuse ourselves of the misconception, a too-prevalent legacy of Weberian and Durkheimian analysis, that modernization (or the increase of complexity) necessarily and uniformly obliterates older (or simpler) social forms. We may also avoid the Malinowskian pitfall of overlooking what is unique to the operations of organized legal authority. Legal impact studies are meaningful in complex societies precisely because bureaucracies are so deeply involved in the processing of legal matters. But as we can see, to some extent in all of the papers in these issues, and especially in those by Felstiner, Galanter, Ross, Sanders, and Fitzgerald, a focus on litigation helps to place bureaucracy, and centralized authority, in perspective as part of a polycentric process. It calls for information about the specific structure of relationships between litigants, their specific position in broader structures, and the details of their developing relationships with legal arenas and social networks. Law, then, is a creation not only of policy makers, but of social conditions which shape the decisions of potential litigants.

This view does not necessarily celebrate the vitality of democratic institutions. Indeed, as several of the articles here illustrate, the advantages of litigation arenas may be used for the promotion and maintenance of inequality (Galanter, Fitzgerald, Yngvesson and Hennessey), the development of professional callousness and norm-subversion (Sanders), and the entrepreneurial development of new forms of privilege (Kidder). But it does eliminate the simplistic, unilinear assumption that "development," both economic and legal, cancels the influence of sub-system processes and their centrifugal tendencies by superimposing

3. We need not enter the anthropological debate over the adequacy of Malinowski's definition of law. Most legal anthropologists, regardless of their position on this, continue to emphasize societal conflicts and interdependence as the sources of legal forms and institutions.

centralized control mechanisms. We need not celebrate the "responsiveness" of the law in order to recognize that it is more than just a tool in the hands of technocrats.

We hope that bringing together the various approaches to dispute processing contained in these two issues expands awareness of the possibilities for new research and for a more fully developed law-and-society paradigm (see Schwartz, 1973). Several of these articles, for example, strike me as stimulating new approaches to the accumulating (though sometimes contradictory) evidence about the relationship between rates of litigation and societal development. Felstiner, Grossman and Sarat, and Blankenberg deal most directly with this. Grossman and Sarat propose a model based on information in papers by Friedman (1973) and Toharia (1973). They reject Friedman's thesis (that litigation rates eventually stagnate because of the increasing cost, delay and alienness of the process) in favor of Toharia's conclusion that a phase of economic takeoff accounts for the dramatic rise of litigation early in the process of industrialization, and that its subsequent "leveling off" is related to the consolidation of new relationships. But then Grossman and Sarat find evidence that challenges the whole curvilinear model—federal court litigation has not "leveled off."

Felstiner produces a model of complementarity in which adjudication and mediation are adequate for multiplex relationships, while avoidance serves simplex relationships. He explains the complementarity of these two poles by reference to the relative costs of avoidance—in multiplex relationships, too much is at stake to choose the avoidance option. Mediation and adjudication differ primarily in the degree of shared experience between disputants and the availability of (and need for) coercion as an element of effectiveness. Adjudication, it seems, necessarily replaces mediation in situations where there is no individual with close personal ties to both disputants. This condition appears when groups become too large to allow that kind of personal involvement with sufficient frequency.

To translate Felstiner's thesis into a social change model, we might expect rates of litigation to fit a curvilinear model under the following conditions. Litigation rates should rise at the expense of mediation (the prevailing mode in simpler societies) as increasing societal complexity substitutes larger groups for smaller ones within various functional areas. We would then expect avoidance to replace both mediation and adjudication as complexity produces shifts from multiplex to simplex relationships. A corollary hypothesis in this model would be that the

early stages of industrialization (the "take-off phase" mentioned by Grossman and Sarat) would be characterized by new forms of economic activity based on older forms of solidarity that tend to be multiplex (family, clan, caste), and that the new economic activity makes these groups too large to provide the foundation of shared experience on which mediation works. Avoidance is too costly at that point, so formal litigation rises rapidly. As modes of economic organization respond to the demands of efficiency, relationships become simplex and litigation tapers off in favor of increasing rates of avoidance. Adjudication is thus a kind of interim phase in societal development.[4] Its ability to respond to people's needs changes as the structural circumstances of those people change.

Felstiner's analysis, like Grossman and Sarat's and Blankenberg's, relies on a model of adjudication which some of the other articles suggest is incomplete. Studies of litigation rates seem to assume that adjudication is a single process which may or may not yield to other forms when its costs and coerciveness become inappropriate. But the articles by Galanter, Yngvesson and Hennessey, Kidder and Morrison raise serious questions about this model. In particular, they challenge the assumption that the coerciveness of adjudicative litigation stems from the authority of the adjudicator. Alternatives to this model range from my portrayal of adjudication as divided between prolonged, mediated negotiation and entrepreneurial speculation, to Galanter's discussion of the repeat player vs. the one shotter, in which institutional characteristics produce clear patterns of unequal advantage. In both cases, the primary influence over outcomes is the relative power of the antagonists: where that power is relatively equal, outcomes resemble that which could be expected in mediation; where it is unequal, the inequality, rather than the legitimacy of the courts, explains the finality of adjudicative outcomes. So, for example, small claims courts (Yngvesson and Hennessey) and circuit courts (Fitzgerald) are transformed into collection agencies, and Fitzgerald's analysis seems to suggest that reversal of this tendency depends on the development of countervailing power through collective solidarity. In neither alternative does adjudication consist of disputing in the coercive, rule-determined way suggested in Felstiner's and Grossman and Sarat's analyses.

4. I do not want to complicate this sketch by trying to correct for such fallacies as the assumption of parallel development (that all societies follow identical developmental paths independent of their relationship to broader patterns of international division of labor—e.g., colonialism). I believe that the approach I propose here could withstand (and profit from) such corrections.

If adjudication is better understood as disguised bargaining in which bargaining power is the primary variable, what effect would that view have on our reading of Felstiner's and Grossman and Sarat's presentations? For one thing, it might modify my extrapolation of a curvilinear model from Felstiner by suggesting that adjudication itself is transformed by the replacement of multiplex by simplex relationships. At the high point of the curve, adjudication may be primarily the type of stalemated negotiation or entrepreneurial speculation described in my contribution to this series. If so, its predominance over outright mediation would signify not the ascendancy of third-party coercive intervention as the model form of dispute-processing, but rather the substitution of depersonalized (and therefore according to Felstiner less effective) mediation for personalized mediation. Felstiner's discussion of the prerequisites for mediation would then leave us wondering why a form of mediation which violates his basic criteria should be so popular. The decline of adjudication in favor of avoidance would be accompanied by a transformation of adjudication from entrepreneurial speculation or stalemate into routinized assertions of unequal power as seen in Galanter, Ross, Fitzgerald, Sanders, and Yngvesson and Hennessey. If so, the actual decline in "adjudication" is even more drastic than that recorded in formal litigation rates. Litigation as the expression of multiplex relationships would be gone.[5] In its place would be the dispute processing furnished by the same courts for new kinds of social aggregates (*e.g.*, corporations, or civil liberties activists).

Refinement of the concept of litigation might also be the best basis for beginning to deal with the contradictory evidence produced by Grossman and Sarat. Federal court litigation, as Grossman and Sarat themselves speculate, may be a process quite different from the events in state and local courts. It may also be quite different from the British and Spanish litigation from which Friedman and Toharia derived their conclusions about curvilinear litigation rates. By "different" I mean more than simply that different legal issues are involved in the cases. I refer to the kinds of relational differences which Galanter attempts to

5. By "gone," I refer, for example, to Yngvesson and Hennessey's suggestion that small claims cases are routinely treated as *simple* and *small*, though they often tend to be more complex than "bigger" cases. This complexity may mean that potential small claims cases involve multiplex relationships. If so, and if the small claims court format does not allow for the expression of that complexity, then adjudication as an expression of multiplex relationships is being discouraged in favor of routinized actions on behalf of business and property interests.

categorize, and which are illustrated in various ways in most of the papers in this collection.

These papers do not provide answers to the specific discrepancies in litigation trends found here. My comments can at best illustrate the derivation of a specific research question from these papers taken altogether. At the moment we have more questions than answers. But an understanding of litigation as variable process is a promising framework for the pursuit of answers.

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