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A FIRST ESSAY ON LAW AND DEVELOPMENT

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1. The organization of and the principal theses developed in this essay are:

Paragraphs 2 - 13 introduce a distinction between the professional and scientific (in the social sciences sense) approach to law and briefly describe the heavy professional emphasis and relative scientific deprivation of Anglo-American legal scholarship.

In paragraphs 14 - 18 a definition of development as "rapidly induced progress" is introduced. The definition is hospitable to a wide variety of development objectives and strategies and avoids prescription of any of them.

In paragraphs 19 - 38 a definition of "the legal system" as the complex of legal culture, legal institutions, legal actors, legal processes, and secondary legal rules in a society is introduced. There is an explanation, supported by the metaphor of the law machine, of the exclusion of primary legal rules from this definition of the legal system.

In paragraphs 39 - 52 European legal science is examined, contrasted with Anglo-American professionalism, and both are compared with the growing interest in a behavioral, empirically verified legal science.

In paragraphs 53 - 57 the state of scholarship in foreign and comparative law is examined and found to provide an inadequate base for meaningful study

1. (cont.)

of law and development. The preparation of behavioral descriptions of a variety of legal systems is suggested as the first step in building a social science of law and development.

In paragraphs 58 - 64 I offer a "rough model of law and development." The function of this model is not to describe reality, but to stimulate and direct research that will help to describe it.

In paragraphs 65 - 94 I develop the model and consider some of its implications.

2.           Introduction

"Law and development" is a title without a field. Many of us talk about it, but few of us have been able to say clearly what it is that we are talking about. While it seems reasonable to suppose that such terms as "law and development," "legal development," and "law and modernization," among others, refer to something important, there is still no clarity of view about what that something is. In this essay I go in quest of that something. This is an attempt to define the field.<sup>1/</sup>

3. Accordingly, we must start at the beginning and address ourselves to the basic questions: what is development? What is law? How do they relate to each other? To say that the bulk of the published work on law and development avoids these questions, which it does, is not to criticize that work. Much of it is an interesting and useful account of concrete investigations into problems of developing nations and of attempts to cope with these problems by new legal arrangements. Some describe the ways in which new nations have begun to build national legal systems out of indigenous, colonial, and newly created or imported components. They illustrate the practical lawyer's concern with concrete solutions to concrete problems.

4. This is a valid concern. But for someone who is interested in building a body of knowledge about the relationships between law and social change in developing nations, the literature is unsatisfying. What he is looking for is reflection on experience, the attempt to make valid generalizations from it, a quest for principles that can be applied to other cases. What is missing in much of the literature is a concern with a "science" of law and development, as distinguished from a practical, lawyer-like approach to the perception, characterization, and "solution" of concrete development problems.<sup>1/</sup>

5. This condition is not restricted to law and development, but permeates legal education and legal scholarship throughout the Anglo-American world. Our law schools are primarily professional schools. We train our students to become practising lawyers, problem solvers (even, in heights of fancy, social engineers<sup>1/</sup> or policy scientists<sup>2/</sup>). Legal scholarship has tended to follow the same path. The focus is on the specific problem and on possible effective ways for coping with it. We are professionals; we are not scientists.

6.            Serious academic interest in the study of legal phenomena in order to derive generalized knowledge about law and society is still comparatively rare among legal scholars.<sup>1/</sup> In the social sciences, however, the balance leans the other way. The distinction can be illustrated by considering the remarks of a professor of economics in a symposium held (under the auspices of lawyers) to discuss "products liability," (i.e., the liability of the manufacturer or distributor for damage resulting from a defect in the thing made or distributed).

Professor Dorfman said:

"Whether the lawyer sits on the bench or stands before it, his business is to make social decisions. In making those decisions he has many things to take into account, and, in particular, he has to apply the standards of ethics and justice and mutual obligation that are inscribed in the law.

"The economist, on the other hand, is not concerned with reading decisions at all. His business is part that of a scientist and part that of a social critic. His task is to describe the way the world operates and if possible to describe it so well and so profoundly that he can infer how the world would operate if conditions were somewhat altered, that is, so he can predict the consequences of following different policies. These predictions are sometimes useful for reaching decisions, but they are not decisions.

6. (cont.)

If a decision is to be reached, one has to add to predictions of different consequences some social scale of values that enables one to tell which set of consequences is to be preferred. ...Economics itself is not equipped with such a scale of values. So the economist must stop at the point where he can foretell with either weak or great assurance what consequences will flow from alternative measures or policies. The politician, the moralist, the journalist or the lawyer is equipped with the requisite set of values, so that he can make or recommend a decision.2/

7. His characterization of lawyers is, to a degree, accurate. The great majority of lawyers are engaged in making decisions. Pushed hard, this notion leads to speculation on an idealized division of labor. Perhaps, if the work of economists and other social scientists were adequately financed (and assuming that they were interested), a systematic and accessible body of relevant understanding would be produced, so that lawyers and other decision-makers could make adequately based decisions. In such a view of society, lawyers would be pure professionals and social scientists pure scholars. Law schools could concentrate on producing doers and the social science faculties disinterested understanders.

8. : But in the real world such understanding as the social scientists offer may be unintelligible to lawyers. The decision-making process may exclude it as irrelevant, or torture it out of shape. Even where it can be used, it may not seem to be very useful. It is likely to make questions more complicated, to introduce nuance, to wipe away the apparent issue and show successive layers of hidden questions, to demonstrate, in the end, that such questions are not really answerable. This kind of understanding does not help the decision-maker; it demoralizes him. In a certain sense a professional lawyer may need to be protected against the work of social scientists in order to preserve his power of decision. Finally, the mores and interests of social scientists are not controlled by the needs of lawyers. When the lawyer pauses to contemplate the consequences of alternative decisions, he seldom finds that the work done by social scientists provides him with concretely useful predictors.<sup>1/</sup>

9.           The desire for a body of social science that is intelligible to and directed toward the needs of professional lawyers seeking more adequate bases for concrete decisions, however, persists. It seems unlikely to be met by social scientists alone, so a few lawyers -- usually academic lawyers -- have concluded that lawyer-social scientists or inter- or multi-disciplinary "teams" will have to do the job. Some lawyers, in other words, should become, or should become involved in the work of, social scientists in order to provide a more adequate basis for the work of professional lawyers.<sup>1/</sup>

10. Other lawyers -- again mostly academic lawyers -- see themselves as legal scientists. Their interests are like those Professor Dorfman attributes to economists. They wish to study law scientifically because that is what interests them, and they have no particular desire to provide a better basis for the practical work of professional lawyers.<sup>1/</sup> This tradition is relatively new and still somewhat shamefaced in the United States, but it is honored in Europe and elsewhere in the world where the European civil law tradition has spread. There the highest legal calling is legal science, and the problem is not one of recognizing the legitimacy of legal science but of converting it from an arid kind of logical formalism to a social science of law.<sup>2/</sup>

11.           Consequently, Professor Dorfman's conception of what lawyers do, and his distinction between lawyers and economists, is incomplete. In fact, lawyers occupy the full spectrum from science to practice. The balance, in the United States, has been heavily on the practical side, but the universe of lawyers includes some whose interests are comparable to those of other social scientists. We can call them "legal scientists."<sup>1/</sup> Like Professor Dorfman's economist, the legal scientist wants "to describe the way the world operates and if possible to describe it so well and so profoundly that he can infer how the world would operate if conditions were somewhat altered, that is, so he can predict the consequences of following different policies."

12. If we arbitrarily take three points on a continuum they can be characterized as legal scientist, legal engineer, and legal operator.<sup>1/</sup> The legal operator is traditionally the dominant professional participant in the Anglo-American legal process, either as practising lawyer or judge. He may also be the least qualified by education and experience to participate productively in foreign development research or foreign development programs. As Professor Dorfman points out, he is equipped with a set of values and makes decisions in accordance with them. In his own legal system he does this in an atmosphere of more or less generally accepted and understood, even if not articulated, premises. Thrust into another culture (i.e., into a different atmosphere of inarticulate premises), he is a menace to himself and others.<sup>2/</sup>

13. But as one moves toward the other end of the continuum, the emphasis on decision-making is relaxed. There is a greater tendency to examine critically the applicable norm structure, to recognize the existence and the power of the inarticulate premise. The commitment is less to doing and more to understanding. The Anglo-American legal tradition and academic legal mores in the Anglo-American world fall heavily on the side of doing things. The bulk of our literature on law and development comes out of that tradition. I am interested in understanding something (and, at a certain point, would expect the record of work done by more professionally inclined lawyers to provide useful information and data). The central question in this essay can accordingly be phrased as follows: Is there scope for a scientific interest in law and development, and if so, how should one begin?

14. Development

At the most general level, development means progressive social change, and an underdeveloped nation is one in which there is still room for development<sup>1/</sup>. In those terms, all nations are developing nations. More specifically, development has come to mean the process by which the poorer nations can catch up with the richer nations<sup>2/</sup>. This usage carries with it the notion of urgency, of the need to speed things up<sup>3/</sup>. To suggest that the pace of progressive social change must be speeded up implies that it can be, and that leads naturally to the notion of inducement, of deliberate, planned, engineered change<sup>4/</sup>. As applied to the poor nations, development has come to mean rapidly induced progress.

15. It will be observed that such a definition leaves a large number (some would say all) of the important questions open. What kinds of change will be thought of as progressive? Who will do the deliberating that results in the development policy decision? Who will be charged with executing this policy decision (i.e., inducing the desired change)? Who will decide, on what bases, what is the appropriate pace? My definition of development deliberately avoids attempting to answer such questions; they are to be answered by the responsible persons within the society concerned.

16. There are several reasons why I prefer this course. One is that we do not know enough, and are not in a position to learn enough, to make such decisions for other nations. We are not even very good at doing it for ourselves. Another is that, as legal scientists, we are not particularly interested in supplying answers to such questions. We can leave it to others to determine the precise direction and course of desired development (there is no lack of volunteers for this assignment) and limit ourselves to predicting, or providing the basis for predicting, the consequences of different policies.

17. This notion of development accordingly differs in an important way from most of those in current use: while incorporating the idea of social progress, it does not enter into the debate concerning the nature of social progress. That is an important and interesting debate, and lawyers are (or ought to be) centrally involved in it. It will clarify our thinking about the relations between law and development, however, if we do not at the outset limit ourselves to one among the many competing conceptions of the substantive nature of development. Instead, we should be prepared to deal with any of them, or at least with any that are likely to receive serious consideration by those who are responsible for making development policy decisions in the nations in which we are interested.

18. This "hospitable" conception of development liberates us from the necessity of making what would, at this stage of our thinking, be baseless and fruitless choices among a variety of development models. Any model is an appropriate one for study if it has been adopted by some nation. Eventually, when we acquire a great deal more understanding than we now have about the relations between the development process and the legal process, we may have something useful to say about the legal implications of various development models, and what we have to say may under some circumstances make some development models seem preferable to others.<sup>1/</sup>

19. Law

Rather than attempt to define "law" (law libraries are full of attempted definitions and confident refutations of those definitions), I prefer to describe "the legal system." The reader will soon notice that this description, like that of development, is a "hospitable" one, leaving open a number of important questions about the form and content of the legal system. He will also find that the description is a curiously distorted one, in which legal institutions and procedures are emphasized and legal rules -- particularly the kind of legal rules most people think of as "law" -- are deemphasized or excluded entirely from the description.

20.

— If we look at the full range of social structure and social activity in a given society, we will observe that certain kinds of social structures and certain kinds of social activities are referred to by members of that society as "legal," "juridical," or as directly related to or forming part of the "law" or the "legal system." These structures and activities can be thought of as the legal system within that society (or better, within that social system). The legal system is a sub-system of the social system.<sup>1/</sup>

21. If, as seems obvious, different social systems are actually different in important ways, it is reasonable to suppose that these differences may be reflected in, or may reflect, differences in their legal sub-systems. Accordingly, we should not be surprised to find that the legal systems of nations A and B differ in one or more of the following ways:

- (a) Some of the kinds of social structures and activities falling within the legal system of A will fall outside it in B.
- (b) For some of the structures and activities of legal system A there will be no functional equivalents either within B's legal system or elsewhere in its social system.
- (c) Even where apparently analogous structures and activities exist in both legal systems, they may still differ in important ways. In other words, they may not be precise legal cognates.

22.           Reduced to its simplest terms, the proposition is that (1) it is up to the individual society to decide what it will treat as law: (2) it is up to the individual society to decide what kinds of legal structures and activities it will have: and (3) different societies may decide these questions differently. The evidence in support of the third of these propositions from comparative lawyers, anthropologists, sociologists, and others is overwhelming. The first and second require further discussion.

23.

It is probably unnecessary to linger very long over the notion that there is some single ideal form of functioning (or "developed") legal system toward which all societies ought to aspire. So simplistic a proposition would find support only from the most zealous natural lawyer, What one is likely to encounter takes a slightly more sophisticated form. Certain "fundamental propositions" are advanced as universally valid, or certain assumptions are made about the common legal needs of all societies. Thus, a particular version of justice symbolized by the term "rule of law" is urged on governments everywhere, and its absence is taken as convincing evidence of legal inadequacy.<sup>1/</sup> Or a famous West European legal scholar drafts a civil code for an African nation, incorporating legal institutions and assuming legal procedures that are foreign to the recipient culture, expressly justifying the undertaking with the reasoning that such institutions and procedures are marks of a developed legal system.<sup>2/</sup>

24. One difficulty with such endeavors is the absence of any serious attempt to demonstrate their utility. It is asserted, without empirical support, that certain consequences will flow from proposed legal reforms. It is assumed, without critical discussion, that they will be accepted by the recipient legal culture. Another problem is the ethnocentric nature of such enterprises. The "rule of law" enthusiasts, who are mainly my fellow-Americans, promote a sanitized, idealized version of certain aspects of American law. The civil code drafted by the French legal scholar for Ethiopia looks very much like the French Code Civil. The penal code drafted for the same nation by a Swiss scholar closely resembles the Swiss Penal Code. All of this makes one uneasy.

25. It is possible to reject the notion of a single ideal type of legal system and, at the same time, to reject the contrary notion that there are no limits on the range of legal behavior. Indeed, it seems important that inquiry be directed toward determining answers to such questions as:

A. To what extent, and in what ways, do legal systems express fundamental stable characteristics of human society? For example, does the fact that children are helplessly dependent for some years after birth have legal consequences -- possibly predictable legal consequences -- in every society?

B. In what ways are particular social decisions and legal systems related? For example, if an agricultural nation decides to industrialize, is it possible to predict anything about the kind of legal system it will need, or about the consequences of failure to provide such a legal system?

26. I would accordingly re-state my basic proposition as follows: Within certain very broad limits, as yet undefined, it is for the individual society to decide what kind of legal system it will have. The outside limits are imposed by the nature of human society; at a different level, such limits are the consequences of fundamental social decisions. The limits are so broad that a great deal of room for variation is left within them. Accordingly, even the most scientifically designed legal system may turn out to be unlike other scientifically designed systems. In other words, a developed legal system may (I would substitute "must") be specific to the social system within which it functions.

27. Without doing serious violence to this very flexible notion of a legal system, it may be useful to try to refine it. For example, one might think of the legal system as composed of the legal culture<sup>1/</sup>(prevailing ideas about what law is, about the shape a legal system ought to take, about the nature of legal obligation, etc.): legal institutions (such as courts, law schools, bar associations): legal actors (such as judges, litigants, legal scholars): legal processes (such as legislation, civil litigation, law reform): and, least important of all, legal rules. I place no great emphasis on this set of categories; others are certainly conceivable and, in the present state of our learning, have as much claim to validity as this one.<sup>2/</sup> Those I propose seem to me to be useful at this point because they call our attention to a proposition that is fundamental to the thesis of this essay.

28. We start from a problem; the problem is that a large number of people identify "law" with a corpus of legal rules. It is a commonplace among American legal scholars that the rules of law are only one component of the legal system (although even this proposition is not widely accepted among legal scholars in many other parts of the world). But the great majority of non-lawyers, and an uncomfortably large proportion of law professionals, continue to act as if law were synonymous with legal rules. My purpose here is not to deal with that problem, but to make two independent points; that for the study of law and development, many of the legal rules -- particularly the kind most people identify as the law -- are of no particular importance; and that for the study of law and development, the distinction between this kind of legal rule and the rest of the legal system is of fundamental importance. The notion can be illustrated by the metaphor of the law machine.

29. The Law Machine

Think of a machine that, like other machines, has been designed and built in order to perform certain functions. The operator of the machine selects the appropriate function and the machine if properly designed, maintained, powered, and operated, performs it. The range of demands we can expect the machine to fulfill is limited by the components of the machine and the way they are put together. If we want a radically different kind of product, we will have to turn to another machine, or the present one will have to be rebuilt to new specifications.

30.

Certain kinds of legal rules can be thought of as statements of demand on the law machine. These are similar to what Professor Hart has called "primary rules of obligation."<sup>1/</sup> An example is the article of the French Civil Code to the effect that one who injures another is liable for compensation.<sup>2/</sup> But if X unjustifiably damages Y (the "if" part of the rule), it does not necessarily follow that Y will be compensated (the "then" part of the rule). Some legal work must be done in order to bring about that intended result. The law machine must be set into operation, in this case by Y bringing the appropriate action against X in the appropriate French court. Eventually, if the machine functions properly, an official judgment will be issued to the effect that X owes Y a certain amount of money as compensation. If X does not pay, Y can make a further demand on the law machine to have X's property seized and sold in order to satisfy the judgment. Again, if the machine functions properly (and if X has property within the court's jurisdiction that can be seized and sold for this purpose), Y may be paid.

31.

It is important that the society have appropriate primary rules of obligation, appropriate in the sense that they are directed toward controlling undesirable social behavior and encouraging people to do what is socially beneficial. The determination of what kinds of conduct to encourage and what kinds to discourage is a very complicated and often controversial matter. But, fascinating as that process is to all citizens, it is not really concerned with legal questions: they are social questions, economic questions, political questions. For example, the question whether X should compensate Y if X unjustifiably damages Y's property is not a legal question. The distinction is clearly made, in a slightly different way, by Professor Dorfman:

"In the present instance I suffer from the layman's disability of not really understanding what the legal issues are. I do understand that they have to do with the legal liabilities of firms that manufacture goods and permit them to be placed in the hands of users. ...I gather that no significant new legislation has been enacted but that the courts in recent years have been deciding cases in ways that they would not have decided them some time ago, so that the law is changing and courts are changing it. Now I can see clearly enough that there is a significant social issue here. People occasionally do suffer loss or injury as a consequence of the performance of articles that they

31. (cont.)

have purchased. And it is often a matter of deep human significance to decide who should bear what part of the burden in such cases and to have a policy on which such decisions can be based.

I call that a social problem, rather than a legal one, because it concerns social relationships, although the solution to this problem may be contained in the law. There is an economic problem or question related to this social problem. That is the question of economic behavior of different possible resolutions of the social problem. Professor McKean insists, and he is correct, that the solution of the economic problem has a bearing on the solution of the social problem, for we should certainly want to resolve the social problem in the best possible way, meaning by this the way in which all the consequences, including importantly the economic ones, are as favorable as possible. That states clearly enough for me how the economist gets into the picture, and what the social and economic questions are. But what I perceive only vaguely is where the legal problem lies."

32. Professor Hart usefully distinguishes such primary rules of obligation from what he calls "secondary rules" or "rules about rules." These are the rules that tell us how the primary rules should be made, interpreted, applied, and modified; how legal institutions should be constituted and maintained; how the various legal processes should begin, proceed, and end; how the roles of participants should be assigned and played. Unlike primary rules, which are addressed to the legal system but are not part of it, secondary rules are best thought of as components of the legal system.

33. This distinction between primary rules, on one side, and the legal system (the complex of legal culture, institutions, actors, procedures, and secondary rules), on the other, is merely one of convenience. It is a device which I have introduced in an attempt to make a persuasive case for a certain approach toward the study of law and development. It would be artificial and misleading to insist on a rigorous distinction between primary legal rules and the legal system. The primary rules assume, and often are produced by, the system. Much of the work of the system is concerned with the enforcement, interpretation, and application of the primary rules. A legal system with no primary rules to apply, or primary rules with no legal system to apply them, are both incomplete notions. In any functioning society one can infer a good deal about the legal system from an examination of the primary rules, and vice versa.

34.            Still, it is important to recognize that what is "legal" about a primary rule is that it assumes, or calls into play, the legal system. It is the legal system that does the legal work for the society, that consumes the resources, that determines how and to what extent the precept stated in the primary rule shall be translated into social consequences. The primary legal rule is basically a statement of a desired social outcome. The legal system is the mechanism for bringing it about. When we study primary legal rules we are studying what society asks. The mere request will of course affect social behavior to some extent (although we know very little about the nature and intensity of that effect). But if we are really interested in knowing something about social control of human behavior through law we will have to turn our attention to what I have called the legal system. We will not get very far in that effort by studying the primary rules of law.

35. Professor Dorfman is right to suggest that the question whether the manufacturer should be responsible to the user for damage caused by the thing he manufactures is primarily a social and economic problem, not a legal one. Whether, and how, a policy in favor of imposing such responsibility on the manufacturer should become law does raise a number of what I will call "legal policy questions." One of the first of such questions is whether it is or is not socially desirable to try to effectuate that policy by way of the legal system. Lawyers should have something useful to contribute to the consideration of that question; certainly no one else does. Related to it are many other questions: given the variety of institutions, actors, and processes already existing within the legal system, what is the best way to use them in effectuating the social policy? What adjustments must be made in the legal system if this social policy is to receive legal implementation? What will be the effects of such adjustments, or of failure to make them? What kinds of social consequences can be expected to

35. (cont.)

flow from making this kind of demand on the legal system? To revert to the metaphor, the decision to demand a new product of the old machine has to be based on certain conclusions concerning the capacity of the old machine to produce a new product, the availability of alternative productive facilities, the nature and cost of changes in the old machine necessary to modify it to meet the new demand, the amount and quality of production that can be anticipated, and so on.

36.           The decision-making process in most societies only infrequently addresses itself to such questions. What actually happens, if the matter is raised in the legislature, is that most of the legal policy questions are assumed away and attention focuses entirely on the social policy question. Someone introduces a bill making the sale of marijuana a felony, supported by alarming testimony that marijuana is a serious social problem. The bill may be enacted without any consideration of whether the legal system should be employed to try to combat the claimed evil,<sup>1/</sup> whether the criminal sanction is likely to be an effective method of legal control,<sup>2/</sup> or a multitude of related questions of legal policy.

37. The conversion of social policy into legal policy by way of judicial decision, rather than legislation, also typically limits attention to only part of the problem: the trial of a concrete case, in which the burden is on counsel for the contending parties to introduce the evidence and the arguments, is not always an ideal context in which to consider fundamental questions of legal policy. Suppose the plaintiff sues the manufacturer for injury suffered as the result of a defect in the manufactured article, the law is unclear, and this is the first time the question has come before a court in this jurisdiction. Counsel for the parties are expected to raise the issues and introduce the evidence for and against "interpretation" of the existing law on a novel question. Even if all the law professionals involved are realists, and know that the question goes beyond "interpretation" to "law-making," the context is not ideal. The kinds of empirical information needed to decide the questions of legal policy involved do not exist. The judge has neither the power, the resources, nor the time to compel their accumulation and evaluation. He is not qualified

37. (cont.)

to judge between conflicting sophisticated criticisms and interpretations of the data if they are presented to him. Still, he must decide, and if he decides to impose liability, he has no power to compel adjustments in the legal system to accomodate the new demand made on it.

38. We have to recognize that in real life the opportunities for disinterested investigation and resolution of basic questions of legal policy are rare. The good law professional - the lawyer or judge - has developed a feel for the legal system that enables him to act effectively and responsibly within the limits imposed by the operating legal system and the kind and quality of information and theory that are readily available to him. The legislator, who frequently finds himself making important legal policy decisions without being fully aware of their range and importance, is saved from his own relative ignorance by supportive agencies (such as law revision commissions, legislative research organizations, drafting services, etc.) and by the opportunity for the representation of a broad spectrum of special interest and opinion in the legislative process. But none of them is in a position to give sustained attention to basic questions of legal policy. As in other fields, the general expectation is that this sort of work will be done in universities and similar academic institutions. This places an additional obligation on (or creates an additional opportunity for) the work of legal science.

39. Legal Science

Legal scholarship in both the Civil Law and Common Law traditions is rule-bound. In both the tendency has been to focus attention on the rules (particularly the primary rules) and to neglect legal culture, legal institutions, legal actors, and legal processes. The only major exception to this generalization has been a concern within both traditions about the proper distribution of functions between legislator and judiciary and between executive and judiciary. That aside, although there is a very large body of legal scholarship both in the Anglo-American and the Civil Law worlds, it is a strongly rule-centered scholarship.

40.           The two scholarly traditions have approached the study of rules from different points of view. In the Common Law tradition, the approach has been primarily professional and practical; the dominant point of view is that of the legal operator. In the Civil Law tradition, on the contrary, the emphasis is on legal science; the dominant point of view is that of the scholar. Among a variety of scholarly approaches to legal science in the Civil Law, however, one has dominated over all others.

41. This "continental legal science," which also dominates legal thought in a large part of the developing world, received its principal development in Italy, France, and Germany. Adequate explanations of its origins and growth can be found elsewhere.<sup>1/</sup> For present purposes its principal relevant characteristic is that the natural phenomena that are the objects of its study are the rules of law, and only the rules of law. Since all of the major civil law systems are legislative positivist (with custom accorded only a minor and decreasing role as a source of law), the scientific study of law becomes the study of laws -- i.e., of enacted rules of law. This tradition of legal science has been dominated by scholars of substantive private law. This has tended to push the law of procedure and public law into the background, further reinforcing the emphasis on rules -- and particularly primary rules -- at the expense of the principal components of the legal system.

42. Continental legal science places great emphasis on the importance of certainty and stability of law. The focus on rules makes the professional lawyer a rule-expert. Both of these tend to make the lawyer conservative and to limit his utility as an agent of change. Further, although continental legal science purports to be value-free, it had its principal modern development in the 19th century and actually incorporates basic institutions of 19th century bourgeois liberalism. This tends to make lawyers defenders of a particular political, social and economic system.

43.           Although there is widespread awareness of the defects of this kind of legal science among contemporary legal scholars in civil law nations, particularly in Europe, it still tends to dominate the literature and to form the minds of civil lawyers. Moreover, in the nations of Western Europe to which it is native, this kind of legal science has tended to become a traditional form of rhetoric, unrelated to the realities of the legal system. While this creates certain tensions and problems, the accommodation works reasonably well. Legal science is taught in the faculties of law. Books by scholars working solidly in the tradition of legal science regularly appear and fill the libraries. Meanwhile the legal system carries on according to its own set of working principles, subject only to the requirement that its results be stated in language that is compatible with legal science.

44. It is the existence of this thoroughly developed and sophisticated practical tradition, with appropriate formal respect paid to legal science, that is the mark of the effectively functioning Western European legal system. The difficulty faced by a number of the developing nations that have "received" Western European legal systems, in one form or another, is that they have received the formal written tradition of legal science but not the practical, unwritten tradition that makes an effectively functioning legal system possible. What the European jurist treats as rhetoric is taken literally. The expert from the mother culture invited to the developing nation to advise on legal matters is almost invariably a professor who speaks in the language of the traditional legal science, rather than in that of the working legal system.

45.           The academic legal tradition in the United States was briefly influenced by European legal science. But the rise of sociological jurisprudence and of American legal realism effectively discredited most of its significant manifestations in American legal thought. The demolition of a European style of legal science in the United States was not, however, accompanied by substitution of any alternative body of legal thought. The practical legal order, free of the influence of any very powerful set of theoretical propositions, carries on - indeed glorifies - a professional, pragmatic tradition. The ground has been cleared of scientific theory, but nothing has appeared to take its place.

46.           The situation might be summed up this way. In the Civil Law tradition there is a strong commitment to legal science, but to the wrong kind. In the Common Law tradition (and particularly in the United States) there is no commitment to any form of legal science. Indeed, the generally negative Anglo-American preception of the state of European and Latin American legal scholarship supports an anti-science bias. In the Civil Law the professional approach to law is submerged to the point of invisibility; in the Common Law it is legal science that is submerged and professionalism that dominates. In the Civil Law the traditional form of legal science is in decline, and the question is what new form it will take. In the Common Law there is no very significant commitment to legal science, and the question is whether one will appear (and what form it will take). Civil lawyers have the benefit of a commitment to science and the disadvantage of a misdirected scientific tradition. Common lawyers face the problem of a professional bias against science and the question of the direction legal science should follow.

47.

There is surprising similarity of thought about the directions that ought to be taken, both in the Civil and the Common Law worlds. The prevailing notion is that the study of law should be related to the study of society, that legal science should be empirically tested, reformulated on the basis of such research, in the interest of building a socially and behaviorally verified body of knowledge. Rather than follow the narrow, rule-centered, logical formalism of continental legal science, or the ad hoc, non-reflective, non-cumulative pragmatism of legal professionalism, we should move to a behaviorial, empirically verified legal science.

48.           While there is substantial support for this general view of the directions legal scholarship should take, and while the literature since early in this century has been full of stirring calls for the kind of theory-building and research it entails, only a modest amount of work has actually been done. The reasons are not hard to find. In Civil Law nations, a strongly entrenched traditional science stands in the way. In the United States, a strongly professional tradition allocates resources to professionally oriented teaching and scholarship.

49.

One result in the United States, which has been a leader in the modern development of the social sciences, is that the interests of the law schools and of the social science faculties have sharply diverged. The social scientist, like Professor Dorfman, has not really been interested in the professional legal matters that are the principal concern of his law school colleagues. The lawyer, on his side, has had no great interest in the construction of a science of human behavior. Legal scholarship has traditionally been a special sort of bookish work, carried out in law libraries (which are, compared to the libraries employed by social scientists, enormous). The funds available to support legal research (aside from that carried out in representing clients or other practical law work) are quite limited. Lawyers have neither the interest, the empirical orientation, nor the resources to engage in a significant scientific research.

50.           There has been a certain amount of interest in relating law to the social sciences, most particularly to economics. However, the interest of the lawyer has typically been in the contribution the economist can make to better solution of a legal problem (for example, to the drafting, interpretation, and application of anti-trust laws). The purpose of this sort of enterprise is not to build a science of law but to do a better job of regulating certain kinds of economic behavior. Most work in law and economics would appear to fall into this category. Less frequently, the economist has provided the lawyer with a different way of thinking about the socio-legal system. The most prominent example is the use of economic welfare analysis as a way of approaching the solution of legal problems.<sup>1/</sup> While welfare analysis has been used primarily for professional purposes, it has tended to direct the attention of lawyers outside the law library and toward the study of behavior. One can also perceive in welfare analysis a thrust in the direction of systematic thinking about law and society of the sort that could eventually lead to serious scientific research.

51. The relations between lawyers and other social scientists are more difficult to assess. Often one finds a genuine "scientific" interest. The notion that the lawyer turns to the sociologist, anthropologist, political scientist or psychologist for solutions to problems is less common than is the case with economists. At the same time, the amount of work actually done in testing hypotheses about law and social behavior is not imposing. The principal obstacles lie in traditional attitudes of lawyers and social scientists and the difficulties of bridging them on the one hand, and the difficulty of finding resources to support empirical research, on the other. Indeed, if one investigates the literature in law and social science, he discovers that the bulk of the work has been done by the social scientists. Much of the momentum toward developing a social science of law comes from outside legal scholarship. A substantial proportion of the work actually done has been stimulated, carried on, and funded by non-lawyers.

52. To summarize the position as I see it, traditional legal science, never very strong in the United States, was finally deprived of any remaining vitality here by sociological jurisprudence and legal realism. Even in those nations in which it has been a very strong force, the traditional legal science appears to be dying; while it retains some vigor in the provinces, the center is rapidly deteriorating. Both sociological jurisprudence and legal realism remain. They both imply, if they do not expressly call for, a social science of law. A trend in the direction of a social science of law, which is unlikely to be reversible, appears to be under way in both major Western legal traditions.

53. Comparative Law

The field of foreign and comparative law is a relevant and instructive example of the state of legal scholarship I have just described. In the late 19th century, under the influence of continental legal science, comparative law had its scientific, as well as its professional, justification. By studying the rules of law within a given national legal system, it was believed, one could derive from them the more general principles, valid for that system, of which they were merely specific manifestations. The next logical step was to study the rules of different legal systems in order to derive from them the more general propositions, valid for all legal systems, of which they were merely specific manifestations.

54. In contrast to this "scientific" approach, which has never been taken seriously here, comparative law in the United States has always had a number of more practical justifications.

It is useful for internal legal purposes to know how other legal systems have perceived and treated a similar social problem. It is necessary to know the applicable foreign law in order to apply it properly in certain kinds of domestic litigation. One can deal better with his counter-part in a foreign nation if he has some understanding of the legal context within which that counterpart lives and operates. One who engages in international business, cultural, or political activities may function more effectively if he knows something of the foreign legal system.<sup>1/</sup>

55.           The traditional legal science approach to comparative law has, by now, lost most of its vitality. The practical justifications for the study of foreign and comparative law remain, and are its principal driving force. A social science of comparative law is yet to be born. Occasionally a comparative lawyer attempts to relate aspects of legal systems to more general propositions about human behavior. On the whole, however, this sort of work is impressionistic, not based on careful empirical observation, more suggestive of possibilities than descriptive of reality. It is actually difficult to find useful descriptions of individual legal systems, including our own, or to find the information on which such descriptions might be based.

56. Finally, most foreign and comparative law scholarship is rule-centered. At the nadir it is no more than the collection and "comparison" of the formal primary rules (usually legislative rules) entirely out of systemic context, on a given topic from a variety of different legal systems.<sup>1/</sup> More typically, one finds descriptions of the way in which a given foreign legal system perceives and deals with a problem, and a certain amount of comparison, usually impressionistic, with the way in which the same problem is treated in one's own system. Even in the latter case, however, it is unusual to find the discussion reaching very far behind the formal statement of the primary rule. The discussion is doctrinal rather than behavioral.

57. The comparative law example is a cogent one because the study of law and development demands comparison, and this requires us to deal with foreign legal systems. If comparisons are to have scientific utility, they cannot be based on the primary rules, but must instead grow out of the study of what I have called the legal system. This would appear to call for some generally applicable scheme which could be used to develop parallel, and therefore comparable, behavioral descriptions of a number of relevant legal systems. At present, no such scheme exists. It would be interesting, as well as useful, to develop such a scheme and to prepare descriptions of specific legal systems in accordance with it. Indeed, it may be impossible to develop any very significant scientific understanding of law and development without first providing, or finding, this basic informational and theoretical resource.

58.     A Rough Model of Law and Development

Using these ideas about the nature of development and law, and about the direction that a social science of law and development might take, we are in a position to develop a crude theoretical model of law and development. Such a model provides a coherent way of thinking about the topic that can be translated into proposals for productive research. It should be clear enough that any proposal for research implies some such model.

59. It is not necessary, and may not even be desirable, that the model accurately represent reality. The function of the model is not to describe the world, but to stimulate and direct research that will help us to describe it. Such research can produce results that, at the extremes, either demolish the model or fully confirm it. Either result would appear to be significant in the abstract, but if the negative correlation applies to a patently silly hypothesis and the positive correlation to what was already banally obvious, nothing very significant has happened. Research is most significant when it casts serious doubt on what is generally accepted as true, when it confirms what common sense or the conventional wisdom tells is false, or when it surprises us with insights into unsuspected phenomena.

60. The model contemplates a social system which contains a legal sub-system. The main reaction between them takes the form of social demand and legal response, together with the accompanying resonances. There is a subsidiary reaction running in the opposite direction: the legal sub-system makes certain demands on society which elicit a social response followed by the appropriate resonances. A stable society can be defined as one in which these reactions have reached a stable point of equilibrium. Variations in any of the four principal variables (social demand, legal response, legal demand, social response) shift this equilibrium.

61. Even in the most "stable" society change is going on, leading to changes in social demand on the legal system. However, in the stable society such change is incremental and falls within the limits of elasticity, or capacity for self-adjustment, of the social and legal systems. Accordingly, if the point of equilibrium shifts, it does so gradually. Development, however, frequently entails the kind and quality of social change that exceeds the built-in capacity of the legal sub-system for automatic adjustment at substantially the same point of equilibrium. Consequently, in the absence of some further variable, the quality of the legal response to the new demand or to the old demands, or to both, will significantly change. There will be a significant and clearly perceptible shift in the point of equilibrium, unless compensating action of some kind is taken.

62.           Compensating action may take the form of additional expenditure of social product. It costs something to operate and maintain the legal system. Even in a stable society, legal ordering and legal dispute settlement suppose the maintenance and operation of courts and other agencies of justice and call on the services of a variety of specialized personnel. A steady input of social product is required to maintain the level of legal response at the point of equilibrium. If the investment of social product in the legal system is efficient, and if the social demand is constant, then a reduction in the supply of social product should lead to a less adequate level of legal response. If the social demand increases, and if the investment of social product in the legal system is both efficient and constant, then a less adequate legal response should ensue. It is not possible to maintain the level of legal response in the face of added social demand without the investment of additional social product or a compensating increase in efficiency.

63. We can now reformulate our theoretical model as follows: in a stable society, a certain level of social demand is made on the legal system, and a certain level of investment of social product is made into that system. The system produces a certain quality of response, this feeds back into the social system, the social demand and the social product invested are accordingly adjusted, the legal system responds, and the process of feedback and response continues until, eventually, a point of equilibrium is reached. At that point a certain kind of social demand is made, a certain amount of social product is invested, and a certain level or quality of legal response is obtained. The equilibrium point can be shifted by changing the social demand or by changing the input of social product. In a stable society, changes in social demand are incremental and gradual and shifts in the point of equilibrium, if they take place, are slight. In a developing society, there are by definition more drastic shifts in social demand, producing more drastic shifts in the point of equilibrium, and calling for more drastic changes in the investment of social product.

64. Additional social product can be invested in the legal system or in something else. If it is invested in the legal system it can be invested efficiently or inefficiently. One kind of question about the investment of additional social product is whether it would be more productive if invested in the legal system or if invested elsewhere. That is a question of social efficiency. Another question is whether the social product would better be invested in, for example, additional judges, or in classifying a law library. That is a question of internal legal efficiency. Finally, there is the question of marginal productivity; an investment of additional social product in the legal system will be productive so long as it causes a net social benefit. A developed legal system is one in which the next increment of social product, efficiently invested in the legal system, would not produce a net social benefit.

65. Playing Around with the Model

The socio-legal equilibrium equation can be represented thus:

$$(1) \quad D + I \rightleftharpoons R$$

where D is social demand on the legal system, I is social investment in the legal system, R is the response of the legal system, and a condition of equilibrium exists. One could describe a stable socio-legal system (i.e., one at equilibrium) by describing the three variables in that system. If such descriptions were prepared for a number of societies, the basis for interesting comparisons would exist. For example, if several societies with similar D and I but sharply different R were identified, it could be concluded that those with comparatively low R had underdeveloped legal systems. An examination of those legal systems and comparison of them with those producing high R would provide a basis for describing a developed legal system (for societies of that D and I).

66. Another possibility would be to classify legal systems by D, instead of the more usual historical-political (i.e., Common Law, Civil Law, Socialist Law) criteria and look for relationships between I and R within each class. One might also expect to find certain structural and procedural similarities among legal systems within a given D type. Max Weber was doing something of this kind when he discussed the relations between the Protestant ethic, the industrial revolution, and legal systems. On the other hand, it would also be useful to investigate the extent to which R is a function of I, independently of D.

67. This discussion suggests the utility of four kinds of knowledge about socio-legal systems: knowledge of social demand, of social investment, of legal response, and of the characteristics of the legal system (L) itself. The basic relationship among these four variables might be represented in this way:

$$(2) \quad R = f (D, I, L)$$

68. This can be read as follows: if a given social demand, accompanied by a given investment of social resources, is made on a given legal system, there will be a predictable legal response. Or, more simply, legal response is a function of social demand on the legal system, social investment in the legal system, and the characteristics of the legal system itself. If one knows any three of the four terms in the equation (and if he knows the function), he can predict the fourth term; for example, if one knows R, L and D, he can predict I. Let us suppose, merely for illustrative purposes, that the function is a simple arithmetic one. Then the relationship between our four variables might be put in the following form:

$$(3) \quad D + I + L = R$$

69. Under this assumption about the function (not, of course, a very realistic one), equation 3 might be thought of as a "general equation of state for the socio-legal system" at equilibrium.

70. We are, however, interested in developing nations, and developing nations, by definition, are those in which changes in social demand ( $\Delta D$ ) frequently are sufficiently great to disrupt the equilibrium. Accordingly, it is necessary to refine equation 3 to take development into account. We can begin by considering the effect of  $\Delta D$  on  $R$  if  $I$  and  $L$  remain constant.

$$(4) \quad \Delta D \longrightarrow -\Delta R$$

This can be read as follows: a substantial change in the amount or the kind of social demand, unaccompanied by changes in social investment or in the legal system, will produce a substantial change in legal response.  $\Delta D$  and  $\Delta R$  are not necessarily equal, <sup>1/</sup> but they are correlated.

71.           If we wish to maintain the level of legal response despite an increase in social demand, we must increase the investment of resources in the legal system. The amount of increase is equal to  $\Delta R$ . Therefore:

$$(5) \quad \Delta I = \Delta R$$

72.           At the least, an increase in I will change the size of the legal system. However, since  $\Delta D$  will never have precisely the same composition as D, the additional investment in the legal system will not take the form merely of more of everything in the same proportions. There will be more put into some existing structures and processes, but there may also be changes in relationships between them, perhaps the elimination of some old ones, perhaps the addition of some new ones.  $\Delta I$ , in other words, will produce  $\Delta L$ .

73. Accordingly, we can now restate equation (3) to show the impact of a major change in social demand on the legal system as follows:

$$(6) \quad D + \Delta D + I + \Delta I + L + \Delta L = R$$

which can be read as follows: there will be a major loss in legal responsiveness after a major increase in social demand on the legal system unless there are a major compensatory increase in social investment and major changes in the legal system.

74. Or, to put the same proposition more fully and discursively: Our model supposes that development is accompanied by major social change, and that major social change produces a major change in the work the legal system is called on to do. In part the change in demand can be merely additive -- i.e., more of the same is called for. An example would be a drastic population increase. Other things being equal, more people will place a greater demand on legal institutions, actors, and procedures than fewer people. Assuming that the legal system before the population increase was reasonably taut and efficient, the effect of the increase will be to reduce the per capita availability of the legal system. By merely increasing the size of the old legal system the additional demand can be satisfied. However, some -- perhaps most -- major social changes will also call on the legal system to do new kinds of work. It is not enough merely to expand the legal system; it must also be modified. Accordingly, <sup>the</sup> quality of legal response will go down unless (1) more is invested in the legal system and (2) the system itself is modified to meet the change in composition of total demand.

75. A Note on R

R is the symbol for responsiveness of the legal system to social demand and is a function of the legal behavior of members of the society in which the legal system applies. The society makes demands in the form of primary legal rules. The legal system (legal traditions, institutions, actors, procedures, and secondary rules) does the work of interpreting, applying, and enforcing the social demand. It is a medium for the distribution of rights and responsibilities; for the allocation and reallocation of wealth, authority, and status; for the assignment of roles and the definition of human relationships; for the projection of an image of officially approved and disapproved behavior. It includes procedures for the resolution of uncertainty and for the solution of controversy and it prohibits alternative procedures that are thought to be socially undesirable, particularly violence, duress, and deceit.

76.           Legal conformance (C) is the tendency of people to act according to the projected image -- i.e., to act "according to the law" or to be "law-abiding." R is high when C is positive and high; where C is low or negative, R is low.

77. Why do people conform to law? Two kinds of motivation appear to be involved: perceived self-interest (S) and "loyalty" (L). A person's tendency to conform to what the law expects of him is motivated by self-interest when he believes he will benefit by doing so. For example, I pay my bills because I want to maintain my credit; I stop at the red light because I do not want to pay a fine; I am law-abiding because I want people to think well of me. S can be negative (S-), if conformance is perceived to be contrary to self-interest, or positive (S+). In the absence of loyalty, conformance (C+) can be expected if S is positive. If S is negative, and loyalty is not involved, non conformance (C-) will result. Accordingly:

(1) S+ —————> C+

(2) S- —————> C-

78. Loyalty (L+) is the tendency toward law-conforming behavior independently of perceived self-interest. The opposing tendency not to conform (L-) can be called disloyalty.<sup>1/</sup>

79. From the social point of view, conformance is a public good. That is, conformance is "a collective benefit that by its very nature will benefit all of the members of the group ... Though all of the members of the group therefore have a common interest in obtaining the benefit; they have no collective interest in paying the cost of providing that collective good. Each would prefer that others pay the cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not."<sup>1/</sup>

The rational person, in other words, both perceives the advantage to himself of law-conforming conduct by others and perceives that he will receive that benefit even though he himself does not conform.

His specific self-interest in his own non-conformance (Ss-), in the absence of other factors, will often be greater than his general self-interest in his own conformance (Sg+). Accordingly:

$$(3) \quad Sg + Ss \longrightarrow S-$$

This is merely another way of stating the more familiar proposition that a rational individual will not voluntarily (i.e., without inducement of some sort) pay his share of the cost of a collective good -- or that members of a large organization will not voluntarily act for the good of the organization.

80. This basic (and unpleasant) proposition, which is supported by what we know of human experience, means that conformance can be expected only if other factors are present. One such factor is a system of rewards for conformance and penalties for non conformance sufficient to change the calculation of self-interest. Such sanctions may be both legal and non-legal, and their effect is to increase the probability that rational people will legally conform. If we use  $X_l$  to indicate legal sanctions and  $X_n$  to indicate nonlegal sanctions, then:

$$(4) \quad S_g + S_s + X_l + X_n = S$$

which can be read as follows: the value of  $S$  (the individual's self-interest in law-conformance) is the algebraic sum of his general interest in law conformance, his specific interest in law conformance, the effect of legal sanctions, and the effect of nonlegal sanctions. To a rational person,  $S_s$  will often be negative and greater in magnitude than  $S_g$ . In order for  $S$  to be positive,  $(X_l + X_n)$  must be greater than the difference between  $S_g$  and  $S_s$ .

81. The balance between  $X_1$  and  $X_n$  may vary from one society to another. In some, recourse to law is likely to be a kind of residual, last-resort source of sanction, and the principal way in which individuals are encouraged to conform is by extra-legal social or economic pressure. In other societies the emphasis may fall somewhat more heavily on the side of legal sanctions. In general, however, legal sanctions are supported by extra-legal sanctions. When they are not so supported, legal sanctions tend to lose their effectiveness. The converse proposition, that nonlegal sanctions lose their force if unsupported by legal sanctions, does not seem to be verified by experience. Accordingly:

$$(5) X_n \geq X_1$$

which means that nonlegal sanctions are always equal to or greater than legal sanctions. Or, to put the matter more dramatically, legal sanctions against socially approved conduct have a negative effect on legal conformance. The reasons will be developed below, after we have examined the effect of loyalty on conformance.

82.           S (perceived self-interest) sums up the rational component of motivation to legal conformance.

L (loyalty) sums up the extra-rational component, the tendency for people to conform or not to conform independently of perceived self-interest. Some typical elements of L are habit or inertia (it is easier to conform than not); instilled ethical principle (the belief that the law should be obeyed); and psychological impulse (the need to relate one's conduct to some coherent set of principles). Two generally reliable indicators of L might be called perceived justice and perceived legitimacy of the legal system. To the extent that the system is seen to be fair, or just, or sensible, loyalty will be encouraged. But perceived injustice gets in the way of loyalty and reduces the tendency to conformance. Even where the system is seen to be generally just, specific examples of rules or actions that seem unfair will impair the perception of justice and thus reduce L.

83.           The notion of the legitimacy of the legal system is not easily separable from that of political legitimacy, but the distinction is important. At a certain level, any legal institution or rule or procedure has a political base. But it is instructive to recall that nations like France, or even Bolivia, with all their political vicissitudes in the last century and a half, have had basically unchanged legal systems throughout that period. Politically inspired changes in primary rules, particularly primary rules of constitutional law, are often associated with changes in political regimes. But the legal system itself -- traditions, institutions, actors, procedures, and secondary rules -- seem to be much less affected, often almost untouched, by such changes.

84.           Still, the standard arrangement is for the legal system to be a state monopoly. This makes it easy to associate the legal system with the politics of the regime and to apply one's attitude toward that regime in resolving questions of law conformance. Every reader is familiar with the argument that civil disobedience (to law in general, not just to an unjust law) is an appropriate tactic to take against a government branded as illegitimate or evil. The converse notion is even more familiar: we are urged to obey the law as a patriotic duty. Political allegiance is urged as a reason for legal conformance. One's view of the legitimacy of the legal system thus is affected by -- often dominated by -- one's view of the legitimacy of the political system.

85. True legal legitimacy (independent of any political effect) only becomes a problem if two or more legal systems are competing for applicability in the same society. Obvious examples are found in some parts of Africa, where indigenous legal systems are in uneasy symbiosis with imported or imposed European systems. But in most parts of Latin America, where indigenous legal systems were rigorously repressed, this sort of problem is less frequently encountered. Perceived political legitimacy affects legal conformance in all legal systems.

86. Legitimacy is a massive concept; the legal system as a whole either is or is not perceived to be legitimate. Justice, however, is perceived at every level, from the most minute and specific to the most inclusive and general. I may think the system generally fair and still be offended by specific rules, acts, or practices that seem unjust. Legitimacy is ascriptive; the system is labelled according to its political-ideological associations. Justice is more descriptive; the system is more likely to be judged by its own characteristics and performance. Perceptions of legitimacy tend to be wholesale perceptions, all black or all white, while perceptions of justice are more particular and incremental. Perceptions of legitimacy have strong affect; they tend to color one's perception of justice. Thus, if I believe the legal system to be illegitimate, I am more likely to believe that it is also unjust.

87.           Where both perceived justice and perceived legitimacy are positive and high, loyalty will be positive and high. A less obvious proposition, however, is that where both of these indicators of loyalty are positive and high,  $X_n$  will also be high. That is, the existence and the force of non-legal sanctions for non-conformance depend on perceptions of fairness and legitimacy. People who think the legal system legitimate and just are prepared to impose social and economic sanctions on non-conforming behavior. But if the law looks unfair, and if its legitimacy is in question, then non-legal sanctions will lose their importance. Further, the legal system is manned and operated by people whose attitudes toward the imposition of legal sanctions will themselves be affected by their perception of justice, although their perception of legitimacy is more likely to be positive. Accordingly,  $X_1$  is also to some extent a function of perceived justice.

88. In commenting on equation (5), supra, I offered the hypothesis that legal sanctions against socially approved conduct have a negative effect on legal conformance. That hypothesis can now be more fully explained as follows: first, as we have already seen, conformance (C) is the algebraic sum of S and L, and S itself is the algebraic sum of  $S_g + S_s + X_1 + X_n$  (equation 4). Hence:

$$(6) \quad S_g + S_s + X_1 + X_n + L = C$$

We have also seen that the sum of  $S_g$  and  $S_s$  is often negative (equation 3). Conformance consequently depends on the combined effect of sanctions (both legal and non-legal) and loyalty, and they are partial functions of perceived justice. The application of legal sanctions to socially approved conduct seems unjust, producing the following consequences: first, in the specific case of a person deciding whether or not to act in a conforming manner, L is negatively affected by what he perceives as an unjust aspect of the legal system. Since the behavior is by definition socially approved, the value of  $X_n$  is low or negative. Accordingly, unless  $X_1$  is very

88. (cont.)

large, his calculation of  $C$  will be negative, and he will accordingly not conform. Second, the very act of applying legal sanctions to approved conduct will have an effect on perceptions of justice throughout the social system, causing some reduction in the general value of both  $L$  and  $X_n$  and reducing the general level of conformance in the society.

89. This places a very large burden on  $X_1$ , so the tendency will be to increase it (that is, to increase the legal sanctions against non-conformance), to the extent necessary to make C positive. But an increase in the legal sanctions for socially approved conduct adds another increment of perceived injustice and, accordingly, further reduces L and  $X_n$ . And, as we have already seen, the operators of the legal system also perceive injustice (although, perhaps, less clearly and more tempered by systemic concerns) and are less inclined to apply  $X_1$ . If this regression is allowed to continue, the result is not only that the specific act goes unsanctioned but that there is a general decrease in the level of C in the society. Since C is our indicator for R, the conclusion may be stated as follows: the imposition of legal sanctions on socially approved conduct both fails to control that conduct and reduces the responsiveness of the legal system to other social demands.

90. A Note on D

Let us assume, as seems reasonable, that D (social demand on the legal system) is to some extent a function of demography. The view that there is a direct relationship has recently been expressed by a thoughtful judge in the following terms:

Litigation does not rise in direct proportion to population increase, but in almost geometric proportions. For example, during the period from 1950 to 1970, the population of Los Angeles County rose 68 percent, but filings in the Los Angeles County Superior Court, the county trial court of general jurisdiction, rose 155 percent. There are a number of reasons for this disparity, including these: The more people who are concentrated in a single area, the more collisions they have with each other - both literally and figuratively. Moreover, our major cities have grown primarily because of migration, and migrants tend to come from opposite ends of the age spectrum - the young and the old. The young and the old have far more problems and far greater need for public services than do the middle aged. Migrants also tend to be drawn from the opposite ends of the economic scale. The rich and the poor spawn more litigation proportionately than do those who occupy the middle economic sector.1/

91. We may begin with the proposition that the relation between population growth and increased D is more likely to be geometric than linear. If we make a number of simplifying assumptions (that the composition of the population remains unchanged; that increased population does not affect litigation-proneness; that litigation occurs only between individuals and does not involve public or private agencies or entities; etc.), we can easily derive an equation for the relation between population growth and the possibility of civil litigation.

92. Assume a population of one individual, A. Here the "litigation possibility" - i.e., the number of opportunities for civil litigation at any instant in time - is zero, because there is no one A can sue. If another individual, B, is added, however, making a total population of two (and assuming that both have legal capacity to sue and be sued), the litigation possibility is two: A v. B and B v. A. If a third person, C, is added (and if we exclude joint plaintiffs and joint defendants as possibilities - another simplifying assumption), the litigation possibility is six. It can be shown that the equation for litigation possibility in a population of n persons is:

$$(1) \quad x = n (n - 1)$$

So that for a population of 50 the litigation possibility is:

$$x = 50 (50 - 1) = 2,450$$

If the population is doubled the value of x becomes:

$$x = 100 (100 - 1) = 9,900$$

And if the population is trebled, x becomes:

$$x = 150 (150 - 1) = 22,350$$

92. (cont.)

Accordingly we observe that the increase in the litigation possibility is proportional to the square of the increase in population. That is, doubling the population increases  $x$  by slightly more than a multiple of four, and trebling it by slightly more than a multiple of nine.

93. The equation for the increase in litigation possibility created by an increase of one in a population of  $n$  persons is:

$$(2) \quad y = 2n$$

This means that the larger the population base ( $n$ ) the greater the effect of an increase to a population of  $n + 1$ . For example, the increase in litigation possibility by adding one to populations of 10, 1,000, and 1,000,000 are:

$$y = 2 (10) = 20$$

$$y = 2 (1,000) = 2,000$$

$$y = 2 (1,000,000) = 2,000,000$$

That is, to increase the population from 10 to 11 increases the litigation possibility by 20; from 1,000 to 1,001 by 2,000; and from 1,000,000 to 1,000,001 by 2,000,000. Increasing the population of an already large unit (a city, region or nation) adds a very large number of litigation possibilities.

94. Accordingly, it is reasonable to suggest the desirability of research to discover what can be learned about the relations between demography and the demand for litigation facilities.<sup>1/</sup> A variety of related matters also call for investigation:

- A. How is the demand for litigation facilities affected by the cost of access to them, the availability of legal services to formulate and demand legal remedies, the speed and quality of the litigation service itself, and so on?
- B. What relation can be found between demography and the marginal cost of litigation facilities? Are there economies of scale? How are the costs of litigation facilities allocated?<sup>2/</sup>
- C. Suppose it turns out that the demand for litigation facilities is directly related to  $x$  and there are no economies of scale. Then each addition to the population adds a larger increment of cost. At what point does investment in the next increment of litigation facilities become socially inefficient?