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CONFLICT, LAWYERS AND ECONOMIC CHANGE

Chapter 3

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CHAPTER 3

Law and Lawyers in Conflict Theory

It can be argued that the development of Western political cultures has tended to conditions of universal access to low cost information. With perfect and universal information conflict management could no longer rely upon values and interests supported by distorted perceptions of reality and ignorance of latent interests. Rather some utilitarian calculus akin to legalism will progressively emerge and depend upon confirmation in order to manage conflict over long periods of time. Confirmation in turn depends on resolution and ultimately economic capacity or wealth, relative to the standard of social satisfaction. The operation of the legalistic system in a society producing and valuing material wealth will necessitate the functioning of lawyers, legislators and other specialists in the processes of conflict resolution.

In developing societies, with yet severe limitations on information distribution, reliance on non-confirming ideologies and small knowledge about latent interests is more feasible. The role of the law and the lawyer must be reconciled with unsatisfactory capacity for resolution. In order

to build legal institutions and actors adapted to the conflict management needs of the polity, the potential of lawyers as conflict articulators, intensifiers, and resolvers must be understood both in theory and in any specific context. Unless we accept the notion that any approximation of a modern state model is a step to modernity, no abstract or transnational program for legal education and services can conceivably be designed.

Let us assume that law has two related uses from the viewpoint of the political decision maker.[112] It is first, with its associated institutions, an element in the conflict management system. We may speak of law with regard to the resolution process, substantive or symbolic, to ideology, to information control, etc. Political actors may obscure state-backed rules to bring about or prohibit certain forms of behavior or allocations of resources. This could be labelled the use of laws and legal institutions to effect pre-defined goals or more simply law as regulation. The effectiveness of any single law in achieving goals is problematic, assuming goals can be defined clearly and so as to be discoverable. The purpose of impact studies is the measuring of this ideally knowable relationship.

If we postulate a scale going from 0 to 100% enforcement of a law or participation of eligible parties in its benefits, an intended or goal ranking along that scale is in theory assignable. That is to say, if there is a law that unmarried mothers have a right to free legal counsel to rep-

resent them in support and paternity suits, the law maker may intend different consequences to follow. He may wish that every member of the defined class receive such services. He may intend that only some lesser percentage take advantage of the law as full enforcement was very costly. He may wish that few mothers be represented and intend the law as a symbolic or ideological gesture.

The percentage of the members of the legal class which can take advantage of a law or the degree of its enforcement we will call its penetration in the narrow sense. The difference between actual penetration and intended penetration is the factor of mistake, or inversely, effectiveness. Impact studies have too frequently assumed intended penetration to be high and have labelled the split between norms and behavior as ineffective law.[112a] Formalism is law penetration and may be quite explicitly intended as an element of conflict management.

Formalistic laws can also be correlated with allocative states. In effect they leave prior allocations alone. There would be no reason for passing formal laws to bring about a new allocation. They have conflict management utility in preserving goal states otherwise established. Formal laws are allocative only in a non-action sense of politics. For this reason we will speak of allocative or regulative uses of law where non-formal levels of penetration are intended.

The determination of intended penetration, and thereby of the possibility of mistake, is no simple matter. Intent

may only be defined with a range of the penetration scale. Legislative statements, administrative structures and practices, past performance could be partial indicators. Reasoning analytically, the problem disappears since it is the perspective of the decision maker which conflict analysis assumes. The concept selective penetration denotes the fact that intent may be intended in theory anywhere between 100 and 0.

Penetration is a concept which has gained wide acceptance since the insights of the legal realists. Llewellyn wrote in 1930: "It cannot be too strongly insisted that any attitude toward 'rules' of law, treating them as universal in application, involves a persistent twisting of observation. . . . The possible application and applicability are not without importance but the actual application and applicability are of controlling importance. To think of rules as universals--especially to think of them as being applicable to 'all persons who bring themselves within their terms'--is to muffle one's eyes in a constitutional fiction before beginning a survey of the scene."[113]

Low levels of enforcement of values proclaimed in the antitrust laws, the Clayton and Federal Trade Commission acts, the Interstate Commerce laws, public utility statutes and right to work laws have been studied.[114] Both speeders and murderers often go unnoticed. The poor have until recently been unable to divorce because of cost. Realists became aware that of the number of people who have the capacity or

mentality to be part of a legally defined class, only a lesser group ever can deal with the norm. Penetration stresses that the field of application of a law is determined by the substantive or grammatical content of the rule and the nature of the legal process which implements it. Especially, actual penetration depends on knowledge of the rules and access to the processes.

Looking at an entire system of laws we will see a series of rules with different penetrations. Some will be purely formalistic, others widely used or enforced. One could imagine use of laws which defined the class covered so narrowly that perfect penetration in the narrow sense was approached. A rule could say only those who can afford counsel may charter a corporation. In practice laws are not written this way. Administrative regulations may specify classes more closely. Special dispensations may be given to textile exporters alone. As a rule, the incidence of low to medium penetration is a common feature of legal systems.

Penetration in the narrow sense refers to the percentage of members of a class defined in a rule who can take advantage of it. In a wider sense we can speak of the penetration of a rule as the percentage of all societal actors who can include the rule and its effects when taking a decision.[115] Actors who have no relation to laws about exporters may wish to base their political choices on how export laws allocate resources. Perfect penetration would mean that all such actors had information about the legal system or costless access

to it. We can then speak of high and low penetration of individual laws, or the legal system as a whole, depending on how many actors can deal with the benefits of the rules or the rules themselves.

Substantially more work has been devoted to law as regulation than to law as conflict management. The bulk of these studies has come under two strategies. Impact studies concern legislative mistakes but may in the future pay more attention to intended penetration. Other work has grown from theories about which goal states can be or should be the object of legal regulation. This type of work is concerned with achieving a non-formal level of penetration in the narrow sense in order that law can bring about some desired behavior or allocation of resources. Bentham's arguments that law must provide security of property and Weber's concept of law as a "formal order" requisite to capitalist economies do not specify how high penetration must be.[115a] Particular laws, and even entire models of legal systems, are analyzed relative to alternative legal or political arrangements as to their contribution to the realization of economic and social goals. Law as regulation work has dealt with the question of what laws, if any, should be enacted and how should they be implemented to do what is intended.[115b]

Finding out how law can channel behavior in desired paths or produce allocations of resources is of prime interest to economic development theory. Creative research and hypotheses have focused on allocative effects in Latin America

of various systems of tax law[116] and the broadening of capital markets.[117] The significant analysis of Holt and Turner provides numerous insights into the use of law as economic regulation during the periods of English and Japanese industrial expansion. They stress the Benthamite point that security in criminal law had to be increased because the traditional norms upholding security of property were breaking down. Statutory civil and commercial law regulating Weber's formal order on bankruptcy, negotiable instruments and corporations were developed greatly in Japan, and in England as well.[118] They finally that burdensome taxation did not fall on the economically most active section of the population, that inheritance laws permitted the concentration of wealth, and that prestigious classes were not discouraged from investing in commerce and manufacturing.[119] Tort law, property laws permitting slavery, laws on foreign investment remittances, labor and welfare laws all deserve analysis on their allocative effects and economic growth in the history of the United States.

It is clear that the same laws can be analyzed for allocative and conflict management effects. Any allocation (goal state) will cause conflict which must be managed. Since numerous rules are present in complex societies, some hierarchies of importance and adjustments between the two effects must be made. Such adjustments can be most difficult where the allocative goals call for high penetration. We may take as an example the encouraging of investment in stocks and

bonds of particular types through tax breaks. If knowledge of and access to the law are universal--perfect penetration--investment may exceed absorptive capacity and desirable levels. In addition tax revenues useful for conflict resolution will be sacrificed. Intended penetration could be middle level in a capital market statute. Other development laws could be of higher intended penetration. The paternal or educative laws of the Soviet Union must penetrate as far as possible to achieve uniform acceptable behavior.[120] If misallocations of the market mechanism are to be corrected, optimizing housing codes will need near perfect penetration where private bargaining is inhibited by substantial transaction costs.[121]

High penetration in the narrow sense would be necessary to vastly redistribute income through welfare laws. It would also be desirable if resolution capacity were high and conflict management depended on legalistic resolution heavily. There is a potential problem where resolution capacity is not great and the conditions needed to permit high penetration in the narrow sense also bring about high penetration in broad sense. This combination would limit the conflict management capacity of other elements of the system. The determination of penetration levels is key for both allocation and conflict management. It is then important to inquire of the relationship of lawyers and legal services to penetration.

Many attempts to define modernization have settled on the concept of structural differentiation. Smelser refers to

differentiation as "the evolution from a multi-functional role structure to several more specialized structures."[122] The differentiation of economic activities is studied as division of labor. Durkheim demonstrated that with increasing division of labor can be discovered an increase in mechanisms to integrate the actions of persons with diverse roles. He noted that the legal system was prominent in making integration possible.[123] As economic roles become increasingly specialized and require more technical competence for performance, it is likely the rules relating roles to societal goals and other roles will become increasingly complex. It is also probable that a specialized role will be evolved related to the understanding and operation of these complex and numerous rules.

Societies do get along without lawyers. The need for lawyers would be small where all laws were formalistic and allocations and behavior were not structured with positive legal norms. Richard Schwartz's study of a Kvutza settlement in Israel does not treat a low penetration situation.[124] There are no lawyers in this community--an occurrence Schwartz attributes to 1) the form of economic organization, 2) the small size of the community, 3) the consequent effectiveness of informal social controls, 4) the clarity of the norms in the system. There may be high penetration without lawyers where legal norms are unambiguous and are able to be found out, understood, and acted upon without the advice of a specialist. Empirically, such clarity seems to correlate

with the norms internal to communities without substantial economic differentiation or those norms not dealing with that differentiation. Often the members of such communities will have a large amount of face-to-face contact.

Examples of Latin American groups with high penetration of norms but no lawyers would include Cuban barrios with popular tribunals and rural villages with regard to their internal dispute-settling apparatus.[125] The essence of these situations seems to be that the rules are not proliferated or technical, are not concerned with modern economic organizations, and are invoked primarily about elementary types of personal conflicts. As rules become complex, structuring many different situations, where conflicting expectations pull in opposite directions, intermediation becomes common. This may be done by men specializing full time and working with many diverse legal rules or by others part time and handling a limited sub-set of all the rules. Either model of legal services must take into account the popularizing of legal knowledge these specialists may bring about.

There may be other models of legal systems with high penetration in the narrow sense and without lawyers which are not tied to small scale and a non-differentiated economic order.[126] The Marxist notion of administration replacing law might mean that conflict will disappear or administrators will take over lawyers' work. In a more totalitarian sense it might imply that where only downward communication is pos-

sible, lawyers are unnecessary. It is true that the need for lawyers as intermediaries depends on private parties participating in the legal system. However penetration in the broad sense would demand information about the rules be distributed so that they could be challenged (upward communication). Administrative allocations under rules could afford high penetration only in its narrow sense. It is not necessary to discuss this sort of model here since no developing country can approach the administrative capacity needed.

We can divide the roles played by men ordinarily called lawyers into two classes. By functional roles I mean those tasks related to the operation of non-formal levels of penetration of a group of complex rules regulating behavior or allocations in a differentiated economy or social structure. The roles are functional because the rules essential to the differentiation could not so operate without their performances. By cultural roles I mean tasks associated with full-time lawyers in different societies which bear no necessary relation to the operation of the system of rules. These roles could be derived from the appearances kept up for formal rules, from cultural styles, from values imbued in legal education, historically assumed identifications or duties. The distinction has importance because the adoption of a non-formal legal system as a means of controlling allocations or behaviors will involve the use of lawyers in functional roles. The adoption need imply

nothing about importing cultural roles.

Lawyers are people who perform these functional roles, who have received some specialized training thereto, and who spend an appreciable percentage of their time as intermediaries between a system of state announced and enforced rules and the members of the society affected or believed to be affected by them.[126a]

The functional roles performed are information, interpretation, and articulation of claims of rights under the system of rules. Information refers to transferring to non-specialists knowledge of what the rules are. It can be done on a specialist-client level related to particular group or individual interests or as a result of popularization. The initiation of the specialist/non-specialist relationship can come from either side, often depending on professional canons. Information about entitlements and opportunities under the rules must be available for high or middle level penetration in the narrow sense. Because of the large number of rules in a differentiated system it cannot be expected that non-specialists can learn all the legal rights, duties and options pertaining to the groups in which they are includable. High penetration thereby depends on the information services of legal specialists.

Interpretation is a function close to information necessitated not by the expanse of the system but because of the complexity of individual rules and their inter-relations. Rules are complex both because they are in technical language

and because words are open textured or ambiguous. It has been suggested that the employ of legal language as a special vocabulary is designed to require interpretation. Where legal services are lacking, low penetration or formalism is thereby insured. This sort of analysis would stress the symbolic or conflict management use of law and argue that in Latin America complex language is a means of preserving traditional allocative goal states.

Technical language in rules structuring foreign exchange controls, financial and tax matters and other such economic matters would not be easily deleted. The problem of interpretation will in any case be present in a system that works with rules. The efforts of the French codifiers to write laws which would be clearly applicable without judicial interpretation were unsuccessful. Statements about what the rules should be taken to mean must be provided by specialists in the language and the methods of interpretation if actors are to know the relevance of the rules to their decisions. High penetration will vary with the availability of interpretative services.

People who graduate from law schools can have no monopoly on the information and interpretation functions. Government administrators, businessmen, labor leaders and all actors who are continually affected by the rules gain substantial acquaintance with them. Information services printing legal rules and decisions, distributed through libraries or hawked on the street, play lawyer roles. If we call in-

formation and interpretation agents the brokers of legal rules, the catalogue of brokering agents would be long and vary with the society. I will make no attempt here to develop such a list. Touts, go-betweens, jail house lawyers would give it an exotic flavor and I will grant that they all perform legal functions.

The factors that limit the brokering work of non-lawyers are important enough that control of legal services by lawyers will still provide a serious check on information flow. Organized services reporting on the law are undeveloped in Latin America. Usually they report law in legal language and have little use for the near illiterate masses. Increasing specialization has made even businessmen et al more reliant on lawyers. This willingness to leave brokerage functions to lawyers is reinforced by the near monopoly on articulation of legal claims they possess. In any case the brokerage performed by business and the bureaucracy rarely has touched the poor to this point. In Latin America the part-time legal work performed by government officials and industrialists has often been done by men with legal training. As the traditional liberal education in law is abandoned, it is unclear whether part-time brokerage will decrease.

A second alternative to the lawyer-client relation as the paradigm of legal brokerage is the popularization of special legal knowledge by lawyers. Newspaper and television programs explaining legal rules, lectures by legal services,

attornies travelling the nation, books reducing legal language to understandable alternatives all perform brokerage services. The increase of penetration on this information distribution model is not yet appreciable in Latin America. People probably do not pay much attention unless they have access to lawyers as articulators of claims of right. Any move by the conflict management system to control information by structuring legal services must take account of brokerage by popularization.

A tenable objection to using non-lawyers for legal brokerage roles is not functional but related to the political culture. For high penetration in the narrow sense a model based on part-time specialists brokering legal rules could be satisfactory. All members of a legal class could be made aware of their rights and duties under the rules. The differentiated society could function adequately and goal states could be realized. As economists are specialists in a technical vocabulary and methodology and are expected to produce explanations of economic processes, special knowledge about legal processes reasonably has often come from lawyers with special training and knowledge. However part-time or narrowly specialized lawyers have been unlikely to inform clients about the general effects of the other laws in which they are not specialists. Brokerage of laws for people who are not conceivably members of a legal class is not required for full penetration in the narrow sense. For penetration in the broad sense information about the interests served by all

laws must be available.

The intended level of penetration in the narrow sense must take account of the desired allocation. The decision to permit high penetration in the broad sense can be related to conflict management capacity alone. The analytic efforts called for by legal realism and which are carried on as sociology of law can produce necessary inputs to decisions about the relation of laws to sets of interests. Where the political culture is committed to all actors making such calculations or where the conflict management system can accommodate the articulated interests in equilibrium, this information can be distributed. Lawyers have been the most likely parties to investigate these questions, though certainly not the only ones. The greater part of the distribution of this information needed for high penetration in the broad sense has also taken place in lawyer-client interest group relationships. Perfect penetration will increase with the provision of legal services to group interests, like the poor, which have been unorganized in the past.

Tax laws or pollution laws support certain allocations discoverable by investigation. Latent interest groups or quasi-groups are prejudiced by these allocations or would prefer others. Brokerage is necessary for the effects of the laws to be known and for opposing claims to be made specific or more intense. This brokerage has fallen, where undertaken, on lawyers. Brokerage to the public of information on legal effects is a cultural role since the allocation ef-

fects could be achieved without it. It is likely to be the socialization or education of lawyers which determines their adherence to cultural roles. Since high penetration in the broad sense is tied to conflict management, we can infer that conflict managers must pay attention to styles of legal education.

The third functional role of the lawyer is the articulation of claims of right under the rules. Since rules are open-ended and conflicts between different legal norms do occur, some special process for meeting these problems is functionally tied to the operation of a system of complex rules. There is no obvious reason why some group should have a monopoly on the right of presentation of claims in all cases. In small claims courts in the United States this fact is recognized. Beyond historical and guild justifications for setting up a professional stranglehold on this right, the learning of the forms and language used in special process interpreting the legal rules supports some degree of monopoly in the name of administrative cost and efficiency.

There is also no clear reason why the same people should be brokers and legal articulators of claims. The solicitor-barrister model of the legal profession in some way approximates this split. Touts are only brokers; customs agents in Latin American ports who guide clients through a maze of rules, arguing claims as they go, are marginally legal articulators. Since the skills of brokerage and articulation are similar and the lawyer-client relationship has

dominated brokerage, the education of a single professional group was arguably cheaper. If the popularization model of brokerage expands, it may be more economical to loosen the monopoly and allow popularly informed citizens to press their own complaints. In Chile the recent decision to increase the penetration level of the labor laws might be more easily implemented with popular dispersal of information and citizen claims than by supplying new massive legal services.

The fact that law school graduates have preserved a high degree of monopoly on making claims in special processes has in some cultures including the United States led to an extensive political role. Lawyers commonly put forward legal and even non-legal claims to legislatures and administrative agencies where there is no professional monopoly. The cultural role of lawyer as political leader seems close to the cultural role of broker of information on legal effects. If lawyers become claim articulators generally as well as specially, they contribute to raising conflict intensity by making demands specific and fulfilling a condition for group organization. Representation has become a less prominent function of the modern attorney than counselling, but it is requisite to any system of rules and specialization in articulation of claims before special process is unlikely to be substantially discontinued.

The division of functional and cultural roles refers to law as regulation only. Cultural roles could be func-

tionally related to conflict management. Where allocative or other goals demand non-formal penetration, legal services will be necessary. The conjunction of complex and ambiguous rules with major sections of the population having no access to affordable legal services has marked Latin formalism. Penetration requires access to information and resolving institutions. The imperfectly penetrated laws are effective as allocation policies only so long as actors are unaware they have rights going unused which benefit others. They are most effective as conflict management policies when they do not know that formal laws preserve allocation patterns contrary to their latent interests.

In theory any allocation or regulation policy can be brought about with legal regulation. Some will need much positive regulation and high penetration. Others may be simply preserved with non-action and formal laws. When positive rules are written specifically defining the group intended to end up with resources, the penetration will be necessarily higher than with a more inclusive rule. The more narrowly laws are drafted, the more it can be argued, without studies of the law in practice, that law is class or otherwise biased. In Latin America, where legal information has been limited and realist studies rarely undertaken, numerous rules are broadly written and not highly penetrated.

Again, in theory, by rationing legal services, an allocation corresponding to an intended imperfect penetration

can be produced. If, simply, it was intended that 50% of eligible actors take tax breaks by making certain investments, this could be had if only 50% of them had access to legal services required for brokerage and representation. This ideal relation assumes a complex rule system and that all other conditions for a law penetrating or taking are present.[127] Cultural or political factors can lead to resistance to any law trying to produce a desired economic or social state, whether lawyers are present or not. Realistically, it is extremely difficult to distribute precisely legal services. The rationing that can be identified is usually associated with income distribution, social, ethnic or colonial divisions.

Legal services are as a general rule necessary for penetration of medium and high levels in a complex system. The services need not be provided on a Northamerican model of full-time lawyers working in a lawyer-client relationship. Brokerage and articulation or representation may take a multitude of forms but cannot be dispensed with. Full-time law graduates are a theoretically efficient and have been a historically prominent means of assuring legal specialization in Latin America. As legal services decrease, in quantity and in range of services, possible penetration must fall. As penetration falls, formalism by definition increases. Formalism may be a resolution of interests if the claims satisfied by formal laws are about prestige or status. Where this is not the case and formal laws as ide-

ologies or inducements substitute for resolution, the choice of confirmation or information control will arise. Whether satisfaction of interests or control of information must be selected in the near or more distant future depends on the extent of the willingness of actors to believe in or accept the formal laws to be genuine promises.

The potentiality of confirmation of formal laws depends on the resolution capacity of the system. Resolution capacity in turn must be related to goal states. I shall try to show that in many Latin states attempting to accumulate capital for economic growth and hold down production costs to stimulate both investment and export capacity, the potential for resolution of quantitatively important latent interests is not large. If information control is not maintained, it is quite possible that formal laws will lose their effectiveness as conflict management policies. Additionally, should it be demonstrated that the legal process consistently does not operate to satisfy specific legal claims put forward by previously inarticulate groups or that the system as a whole operates to favor limited interests, legalism as an ideology may lose utility for conflict reduction.

The control of information implies control over technical and popular knowledge. The more complex are the rules, the less control must be exercised over non-specialists in legal matters. While many formal laws and regulations are technical and hidden from general knowledge in administrative processes, others are open to the scrutiny of journalists

and politicians. For example, two reporters have recently contrasted the formalism of the United States Marine handbook with standards of treatment at boot camp. The rule against brutality was not ambiguous and conflict management depended entirely on opposing interests not learning what occurred. Conflict rose appreciably when the specific instances of maltreatment were exposed. Formalism as ideology must run the risk of discovery and the subsequent building of skepticism about the purpose of other laws.

If formalism presents this unhappy choice and imposes costs in information control to preserve both allocations and ideology, its value is questionable. As well, whatever its past value, its ability to manage conflict in contemporary Latin America must be demonstrated. One case which could be seen as selective intended penetration with a high degree of formalism has been described in a study of the colonization of Burma.[128] In a pre-market economy, English familiarity with contract and property law was instrumental in the restructuring of agricultural production in Burma. The importation of the Common Law rendered understanding of and access to its benefits improbable for the native population. Acting within a legal framework, the colonialists were able to shape changes in the economic system while externalizing many of the social costs of their actions.

Analysis of why the British might act in this way can relate to conflict management. The same allocation of resources could have been imposed by the force of the colonial

states. Statutory law limiting the entitled class to non-natives could also have been enacted. Again the allocative effect would have been similar to that wrought under the Common Law. In such a situation one is compelled to ask why, out of a series of alternative measures equally efficient in allocating resources, a particular type of legal enactment is chosen.[128a] We can hypothesize that the choice depends on the superiority of a form of allocation as a conflict management tool. Lack of information among Burmese about the effects of the Common Law or a British belief in the Burmese acceptance of a legalistic ideology could be offered as explanations for the shape of the Colonial program. Without access to legal brokerage and representation formalism was assured for the Burmese sector. Ethnicity has elsewhere served as an accurate rationer of legal services.

In a passage difficult to be sure of, Weber can be read to believe that formalism or low penetration because of no access to legal services permitted resource allocations which aided the growth of capitalism in England. Again, the plausible reason to have framed broad laws which would be only partially employed or to have allocated with laws which went uncomprehended and unchallenged was to manage conflict. Income distribution was the mechanism of rationing services and setting penetration, broad and narrow.

> That capitalism could nevertheless make its way so well in England was largely because the court system and trial procedure amounted until well into the modern age to

> a denial of justice to the economically weaker groups. This fact and the cost in time and money of transfers of landed property, which was also influenced by the economic interests of the lawyers, influenced the structure of agrarian England in the direction of the accumulation and immobilization of landed property.[129]

A Norwegian sociologist of law has considered the impact of the Norwegian Housemaid Law of 1948.[130] The purpose of the law, if perfect penetration is assumed, was to limit work and define work conditions for housemaids. An empirical study showed frequent violations of the provisions of the law some years after passage. Aubert found that the legislators "did not achieve maximum of clarity and simplicity in the text under scrutiny."[131] Brokerage was needed for penetration but no legal services were provided and housemaids were unlikely to organize to secure them. Faced with the option of finding a high intended penetration and legislative mistake or intended formalism, Aubert chooses the latter. It is implied that interests supporting housemaid protection were unaware of continuing violation or were satisfied by status resolution.

Analysis in conflict terms of the reasons for formalism in the Norwegian situation is at best speculative. We have no way of measuring whether conflict rose or not. Some interests were satisfied by the actual penetration and there was partial resolution. It is also possible that unsatisfied

actors and groups understood the law was highly formal and accepted that outcome as a legal defeat. They might still express little conflict if they continued to accept legalism as a beneficial political ideology in Norway. Aubert's work does imply nevertheless that the lack of legal services held down information about rights under complex rules, maintaining an allocation of resources and stilling the fervor of opposing interest groups.

To understand the potential benefits of formalistic laws in Latin America now, we can consider consecutively imperfectly penetrated laws in the narrow and broad senses of the term. In the Burmese case formalism in the narrow sense refers to actors who had legal rights and opportunities of which they were not aware or could not take advantage. In the broad sense formalism refers to those actors who never knew the law moved resources as it did. One use of formalism is as an ideology or inducement. The laws represent promises for future action and the legal system as a whole will best satisfy interests in the long run. The continuing validity of legalism as an ideology and specific rules as inducements is commonly challenged in Latin America. Years of deprivation have seriously cut the faith of many in legalized satisfaction.

I do not believe that in very many instances formalism as ideology is [illegible] in Latin America. In part the capacity of men to deceive themselves is great. Many are socialized to challenge no form of authority including the state.

Many have not learned that the law does not work in their interest. But also it is the nature of Latin legal systems to be in part confirming. Not all laws are formal. A large number affecting the daily existence of those habitually deprived are highly penetrated and effective in protecting their interests. Criminal statutes, petty commercial operations, partially resolved formal laws, civil and family codes all exemplify the fact that legal resolution constantly occurs. Like the inducement of the lottery where everyone knows someone who won and so continues to buy chances, there is eternal hope that this law may be the one to work for you. Even for those who would most be entitled to be skeptical that formal laws can be used on their behalf, legalism probably retains some force.

If we note that formalism's management capacity as inducement has been impaired by long overuse, we should not conclude broadly worded but unenforced laws will be abandoned. The labor and welfare codes have been most often cited as imperfectly penetrated laws in the narrow sense.[132] Mexico has recently enacted a pollution statute which may come to provide another good example. High penetration may be intended but this would, by itself, seem to pose a threat to the industrial expansion which Mexico has sought. If we hypothesize low penetration is intended, we could still justify its passage. Status and a sense of modernism would go to the supporting environmentalist groups. There will also be some partial

resolution which will lower conflict intensity. The satisfaction of the projects of organized interests could cut off leadership from the poorer masses of polluters. Also information on the effects of the law, on the operations of the enforcing bureaucracy, may not be available and low penetration may for some time be undiscovered.

Finally any challenge, in the form of legal actions, to the intended allocation of the pollution laws will require access to legal services. If these are not provided at bearable expense, conflicts about pollution will not be made specific claims of right before established special process. Actors who are not informed of their rights will articulate generalized, often unorganized, conflict. By hypothesis the conflict will be of lower intensity than if legal services made higher penetration in the narrow sense possible. Beyond the potential of formalism to reduce conflict levels, a study of the provision of legal services must consider whether additional or different sorts of lawyers would raise conflict above whatever levels existed at that moment in time.

Penetration in the broad sense can be low regardless of the narrow penetration. With a possible decline in the utility of formalism as ideology, the formalistic mass law like welfare or agricultural credit or labor may be less important than the proliferation of administrative regulations. These complex rules hold down conflict levels because so few understand what allocations they are causing. Tax breaks or currency controls or finance market rules may have high nar-

row penetration among the limited group who qualify. Yet they have very low broad penetration since their understanding is a technical question and this knowledge is not popularized. Without brokerage services there can be no specific conflict about these laws because there is no source of information as to what they do.

Quite possibly it was this information control which brought Weber to feel formalism had aided capitalist growth. The claim against such allocations is not a question of taking advantage of an entitlement but of politically or legally attacking the allocative rule. Multiplex networks of ministerial technical regulations have spread in Latin America and are the subject of scant objection beyond small, usually wealthy, sectors. With conflict levels already high, the process of allocating resources in ways not generally perceived can be an important means of maintaining equilibrium. I have no wish to deny that the broad spectrum of who is getting what is not understood. Claims however are not specific and interests are not channelled into intense and organized forms which could force resolution.

We have argued that the passage of formalistic laws needs to be explained because there are other forms of allocating resources equally good from a purely economic standpoint. The analysis stresses the conflict management potential of low penetration, broad and narrow. It is problematic whether empirical analysis conclusively proving the historical purpose or future value of formalism in Latin America

could be done. Too many other functional equivalents have been operating and no separation of effect is ex post possible. Rather the use of formalism must be looked at in regard to variations in other state coordinates of the system. That is, where more conflict is becoming actual and resolution capacity is shrinking because of rising expectations and growth goals, one can consider formalism as a policy for holding down conflict which can retain its force in situations of rapid social change. If legal services of small expense and innovative character are provided, then the benefits of formalism are lost and conflict, requiring other forms of management, will be predicted to grow.

When lawyers or other specialists in law raise conflicts by articulating formerly mute interests, legal or otherwise, the system must decide whether the interests are to be satisfied. If the interests are resolved, the intended allocation will necessarily be abandoned since we assumed that the formalism was purposive. There may naturally be some tolerable range of penetration but extensive legal services can soon test those limits.

To overshoot intended allocations will have two consequences for conflict management. Since more resources than desired are going to specific interests, opposition groups will increase intensity because of increased scarcity. As well, the pool of resources available for resolution may decrease, lowering economic capacity. For example if all entitled actors take social security payments or tax breaks,

the ability of the government to spend that money to resolve other interests disappears. It is much like rulebook strikes where workers wreck industrial operations by following every rule to the letter. No such intention ever motivated the rule framers in any large-scale organization. For actors who are unquestionable members of a legally protected or entitled class the case is clear. Without the modification of these rules, denial of such claims would not be possible. Actions for welfare rights under present laws would skyrocket the costs of the social security program and require new revenues or a shift in government spending priorities.[132] Counsel submitting habeas corpus petitions for accused detained beyond statutory maxima, a common Latin "problem," would necessitate more funds for police and courts to speed the process or impose alternative costs in decreased crime protection for some sectors of the society.

In addition to formal rights or privileges clearly granted, legal action could expand the definition of the class covered by the rule. Water pollution statutes long unused in the United States are being given new life by innovative legal suits. Water rights, laws intended for different allocations by their enactors, are the basis of action to recover property for American Indians.[133] Since legal language is open-ended, claims of right can be made out for actors marginal to the class and the core of a rule. This sort of action offers further possibilities for ruining intended allocations.

The shifting of allocations of resources under formalistic mass laws on the books in Latin America is a serious threat to many present policies. This would be an increase in penetration in the narrow sense. The allocation could also be lost if legal actions successfully challenged rules as inconsistent with other legal principles. For example, a Colombian law on administrative control of the economy had the effect of stimulating inflation. The law's constitutionality was challenged, though the movers of the action were traditionally wealthy interests, and a hard case ensued. Legal services for those working groups hurt by inflation could have used such a procedure to create an alternative allocation. With the complicated doctrine of the hierarchy of laws in Latin jurisprudence, many administrative regulations may be attacked in courtroom procedures.[134]

Access to legal services can destroy intended allocations of selectively penetrated laws if the suits are successful. They can be considered a source of disequilibrium in many cases. Since under conflict analysis the goal state or allocation must be protected, excessive penetration must be precluded by denial of claims or shifting the means of allocation. Denial of claims will initially raise conflict and increase the burden of other elements of the conflict management system. It is likely that the provision of legal services will lead to an increase in unresolved specific claims of right.

In the pollution law example above, legal services

could perform two tasks. First they could inform polluters that they are being injured by pollution. Second, they could inform them they possessed a legal right to be protected from it. The omnipresent squatters of Latin cities showed little awareness of the requirements or possibilities of adverse possession. The poor of Bogotá had no idea they had an administrative action to have their children admitted to public school. Increasing the penetration in the narrow sense of formalistic laws can both make new interests actual for the uninformed claimant and make general claims specific, of right, and resolvable in special process.

While political sophistication and information have increased in Latin America, the lack of knowledge of massive quasi-groups of their latent interests continues. These latent interests have often been included in formalistic laws which, if known, could bring a shift of values to accord with legally proclaimed standards. Peasants, for example, are often unwilling to express interests in land reform because of value schedules giving priority to submitting to authority represented by the landowner. If they are made aware of land reform rights expressed in laws with intended imperfect penetration, the state authority represented by the law could cause a shift in interests. Conflict would increase substantially if the intended allocation of agricultural capital prevented the satisfaction of the claims.

Lawyers can also increase penetration in the broad sense. Even where no suit is possible or contemplated, the

fact that the formal laws operate in the interests of others can increase conflict. Knowledge that the tax laws or the regulations on importing machinery subsidize limited interests can lead to political action. New interest groups may be molded from important quasi-groups as patterns of allocation become clear. Articulated interests may become more specific and based in harder fact. General interests may be shown to be of magnitudes which will raise conflict if the previous guess as to how large opposed allocations were was underestimated. Popularization of legal impact and effect studies can do much in Latin America, where there has been no tradition of legal realism or empirical research, to make out specific claims that the law and legal institutions be radically reformed.

Behavioral studies demonstrating, should they be widely circulated, that syllogistic, scientific, impartial canons of judicial decision making are largely formal justifications could impair the authority and the conflict management function of legalism. A recent study in Chile argued that the Supreme Court had acted consistently in favor of the wealthy classes in this century.[135] This contention even though no great news to many Chileans saw conflict rise appreciably because cases and statistics made claims less general. A breakdown of information control can also have repercussions for other elements of the conflict management systems. Market oriented regimes have relied on nationalism as an ideological control of conflict. Knowledge that the

laws of these same regimes have encouraged foreign investment with lucrative incentives could kill the utility of nationalistic arguments to postpone claims.

Where legal or reform actions are defeated, the newly articulated legal interests remain unsatisfied. Conflict may fall following the legal process if the claimant is convinced there was no justifiable claim of right or where legalism as an ideology remains valid. However a major increase in legal services will affect directly that ideology. A string of losses will make a utilitarian seek other means of protecting his interests. Increased information about the class or otherwise biased effects of highly penetrated rules will cause the reconsideration of the calculus which leads one to mitigate intensity levels after a legal defeat. When the capacity for resolution of a system is low, bringing actions to it will only destroy the belief of the claimants in its utility.

Full legal services in nations where formalism has been dominant and legal information has been hoarded or unknown will raise conflict and remove capacity to deal with the conflicts so articulated. Either capacity of resolution will have to be expanded, at the cost of desired allocations, or repression, non-legalistic ideology, and tolerance must be relied upon. The decision to expand legal sources or alter their traditional nature must appraise the availability and acceptability of these equivalent measures.

A model of a legal system with substantial areas of

imperfect penetration should be associated with a society in which resolution capacity is limited and reliance on alternative elements of the conflict management system to maintain equilibrium is questionable or not appealing. The desired allocation is the defined equilibrium condition or some policy necessary to it. The basic tenets of such a legal system are: 1) that legal services must be so distributed that excessive claims are not brought where low penetration allocations are intended; 2) where high penetration complex rules are intended that specialized legal services be provided; 3) that legal or other information sources making possible high penetration in the broad sense be controlled. This combination should lead to the bringing about of desired allocations and a minimizing of legally induced conflict.

The determination of the best allocations for economic growth is a matter of separate analysis. Where studies show that particular types of norms are conducive to modernization goals, some degree of middle to high level narrow penetration, with corresponding legal services, will have to be organized. For example if it is shown that a complex set of rules about financial intermediaries will serve to accumulate capital in a semi-private economy, the training of specialized legal specialists, full or part time, should be considered to keep penetration in the broad sense, or information about the allocative effects of the new laws, low. If penetration in the narrow sense is to be less than perfect, rationing of legal

services by income, directly or otherwise, must be contemplated.

The idea of a legal system with perfect penetration corresponds to a different model of society. Because of the definition of high penetration in the broad sense, only a society with a value commitment to nearly free, universal information would elect to have a system of perfect penetration in both senses. Where this value is espoused, various elements of the conflict management system which have been prominent in traditional society are no longer useful. A society intending high penetration of the legal system is forced into more reliance on resolution of actual conflict and a confirming legalistic ideology for conflict management. Resolution must in the acceptable future satisfy all knowledgeable and represented interests, if a rise in conflict levels is to be avoided. Legal services are necessary for the functioning of the resolution processes working with the complex rules of a highly differentiated society.

The second characteristic of a society committing itself to perfect penetration in both senses must be a high resolution capacity. Where intense interests cannot be satisfied, settlements within the legal processes will not reduce conflict levels among the losers. Resolution capacity can be high if the goal state allocation does not require the removal of so many resources from the pool available for conflict resolution that social satisfaction is widely foregone. If the goal state does so limit remaining resources,

claimants against the allocation to be preserved will intensely experience the repeated losses they must undergo in resolution processes. Unless levels of social satisfaction can be reduced in the Western world, high resolution capacity can only be achieved in a mass production industrial society. This type of society is preeminently the differentiated model demanding legal specialists for high penetration.

There is no reason to increase legal services without a commitment to the idea that human action should be based on informed choice. This commitment may typify the drift of modern Western political culture. Freedom from the social arrangements of the past has widely become associated with planning which in turn needs increased programmed information to be rational.[135a] Just as government needs information for free decision, individuals, it can be argued, are only free when they are aware of the options and consequences of their decisions. High broad penetration may be a value definitive of modernization. However, uncontrolled information will show up hidden interests and force ideologies to confirm their predictions or be abandoned. Short run advantages for conflict management through increased belief in legalistic inducements must also be confirmed thereafter. No society, even one with such values, should provide the legal services necessary for perfect penetration unless its resolution capacity is large enough to support it. The result of such premature provision would be a substantial rise

in conflict occasioning either a loss of equilibrium or a turn to repression, tolerance or inducement. The scope of inducement is limited by free information. Tolerance is hazardous in most developing nations. Repression is always problematical and usually more distasteful than is imperfect penetration.[136]

Between the two types of society outlined there is a clear conflict. Low penetration would inhibit informed choice in the latter. High penetration in both senses would destroy allocations intended in the former, which is partially dependent on information control to hold conflict at acceptable levels. The first model can be perceived as a stage on the path to the second should the goal states being preserved be aimed at expanding resolution capacity. Justification of the denial of free information and access on any ground except the future existence of a free information and access society may be incompatible with emerging Western political values. Even stage theories must be suspected to be nothing more than non-confirming ideologies buying time for the governing elites. Nevertheless it can be argued that totally free information will prevent the growth of resolution capacity or make conflict management based on legalistic resolution untenable in developing nations.

The two models above represent no real society. Information is neither totally free nor controlled. Legal services will increase conflict levels but compensation is possible. Increases in penetration may correspond to cul-

tural values and make ideologies more credible. Therefore even where resolution capacity is low, legal services can be expanded when other state coordinates are strong.

In a private market economy like Ecuador or Colombia, there is no strong ideology to manage conflict. The resolution pool is not large but the number of latent conflicting interests is. Assuming the same costs in delayed consumption, housing, and welfare benefits in both nations, legal services expansion might be more practical in Chile than Colombia. First, the resource pool, allowing some partial resolution, has grown because of expropriation. Second, contending interests for those resources have been removed. Finally, conflict, though articulated, may be postponed because of ideological appeals based on socialism. The degree of relaxation of controls on information about how the legal system is working and the nature of legal services available must depend on the overall state of the conflict management system.[137] The greater problem for Chile are the economic policies which must produce, given higher penetration, a confirmation of socialist growth predictions.

Looking at the high penetration model, it is apparent that the conflict articulation potential of lawyers is substantial. In his functional roles of brokerage and representation, conflict level rises as information increases and becomes documented and specific. Conflict also goes up as claims are made as of right before special processes. Subsequent decreases in conflict levels depend on extent of res-

olution, disposition of claim and the force of legalist ideology. From the performance of cultural roles, associated with penetration in the broad sense, the potential increase in conflict is greater.

One way to achieve high penetration is to train lawyers who are generalists and who subscribe to the legal realist tradition. They are generalists in the sense that they learn more than the technical manipulation of sub-sets of legal rules. Working with economic and social science methods on research investigating the effects of interrelated laws and institutions, they can provide information, new and more specific, to increase conflict. The education and distribution of generalist and realist lawyers is likely to produce other conflict effects because of the recruitment patterns to the profession.

First lawyers tend to be of middle class background or from other mobile sectors. Mannheim notes that vertical mobility is one of the keys to exposing different world views.[138] The more static and the more stratified the society the wider the divergence among members in approaches to reality is likely to be. It is probable in Latin societies that divergences in world views are the products of a socialization process effective in reducing conflict. Lawyers from different strata may bring activist styles of techniques to the passive and deferent, increasing conflict by bridging world views.

Second, lawyers in some cultures display a tendency

to be liberals politically. They view full penetration, at least in the narrow sense of equal enforcement, as demanded by the nature of the law. Jurisprudes and sociologists have argued that this view must be common to all lawyers who understand what the rule of law means.[139] While this line of reasoning seems to me culturally biased, it is true that it can be instilled in lawyers that the treatment of the law should be uniform within the class of actors included. These lawyers can represent a strong political interest pushing for the removal of traditional controls on conflict in favor of resolution processes, regardless of the capabilities of legalized institutions. They are prone to push for open political conditions favorable to group organization and expression.

Third, legal services by generalist lawyers are likely to produce political leaders. Organization around such men will increase conflict intensity. Additionally lawyers serving previously unrepresented clientoles may make manifest non-legal latent interests. For example to tell the majority of the people of Caracas that the exchange regulations of the Finance Ministry have some relation to the price of milk can be a new revelation of arenas for political action. To explain simply the dynamics of urban transportation systems can begin the formation of an interest group from an unformed community. Generalist lawyers are able to work as substitute educators and their provision under a high penetration model would have extensive conflict adding conse-

quences.

A model of imperfect penetration in a legal system must account for all potential sources of conflict increase. By structuring legal education process, institutions and professions, conflict levels can in theory be held to a minimum. Adjustments can be made depending on the capacity to manage conflict in the remainder of the system. The rationing of legal services is a difficult operation if fine tuning is called for. In specific cases the distribution of information or access within economically or otherwise uniform groups may be implemented but in general broad distinctions are at issue. However, in apportioning legal services, as with other problems, the question may be only one of leaving things as they are. The delay of reform of legal education and institutions in Latin America may provide necessary conflict management while growth begins or accelerates.

Two cases of legal services with imperfect penetration can be distinguished. In the first full-time lawyers have a very limited role which may tend heavily toward representation. Much of the brokerage function is completed by part-time specialists who are bureaucrats and government officials. The degree of penetration in the narrow sense is set by the activity of these part-time specialists while penetration in the broad sense is very low. Splitting the functions of lawyers and training specialists in narrow areas of the law have effectively circumscribed the conflict articulation role of the profession. None of the cultural roles of the

full-time generalist are associated with this model.

The second model has been traditional in Latin America. Full-time lawyers are more numerous but specialization is still encouraged. This would be compatible with the theory of imperfect penetration. If it were desired that high penetration in the narrow sense be the case for criminal defense, minor economic transactions, labor laws, and domestic relations, specialists could be provided in these areas on any of a number of distribution plans. Government attornies, judicial, student legal services would all serve so long as the competence were restricted. No such services would be provided for lesser penetration laws and lawyers would be unavailable where formalism was intended.

The basic rule of such a system is that the brokers and representatives for high penetration rules must feel it is not in their mission or competence to perform like services for low and middle penetration laws. An educational program for producing a segmented legal profession to correspond to selective penetration is discussed below. It should be noted that much in the contemporary Latin concept of law facilitates this program. Nothing in the specialist model of the legal profession would imply a higher penetration in the broad sense of the legal system. Historically, the philosophy of legal science which has supported specialization has been inhospitable to the legal realism at the core of the broad sense of high penetration.

To construct a selectively penetrated legal system

with minimal conflict production the following questions would have to be considered. Crucially, one would need to control legal education. The concept of law being taught and the role of the lawyer being learned would go far to determining whether specialists or generalists, legal conceptualists or legal sociologists, emerged. Ideas about clientele, style of representation, and legalist values are arguably effected by the brand of legal education offered. This contention is buoyed by the fact that Latin students enter law school at the age when North Americans go to college and may be more malleable to the law school experience.

Selective penetration can be affected by the rules on legal ethics, conflicts of interest and the organization of the legal profession. If lawyers are ethically discouraged from initiating contact with client groups, latent interests may not be so easily articulated. General information on legal effects would have to be solicited by the members of the quasi-groups. Full-time lawyers and government officials can be prohibited or dissuaded from political activities which again distribute legal information. Enforcement of such canons may vary with the solidity of the organization of the profession or the process, official or private, in which it is regulated. Placing serious penalties on the unauthorized brokerage and representation of laws by bureaucrats or other non-full-time legal specialists will extend the monopoly power of the profession and make more certain lines of control over lawyers' activities.[140]

Imperfect penetration of laws in the broad sense will depend on the manner of distribution and accessibility of legal information. The closing of tax files, courts or criminal records or promoting the confidentiality of legal relationships may stifle research efforts by lawyers and others. Government information services and law reporters need not be subsidized or developed in popular form. In addition where general or popular information is encouraged, it can be so distributed as to avoid placing lawyers in situations where they may perform the cultural roles discussed above. For example, distribution of information by book, newspaper, radio or public posters as opposed to local generalist lawyers will cut off political influence and disturb less socialization mechanisms.

Of great importance for selective penetration is the form of provision of legal services. Government attornies may be of special competence and operate under different rules than the rest of the profession. The costs of student and apprentice services can be imposed as educational obligations but can be active or passive and directly rationed among the population. The rules of student or para-professional brokerage and representation may increase or decrease their role as conflict articulators. Pro bono and no fee work by practicing lawyers will affect allocation of services by income distribution. Totally free legal information would seem to require some income neutral form of paying for legal services.

Finally legally associated conflict can be manipulated by the rules of procedure and types of process. Increasingly formal adjudication may cause more conflict than mediation. Explaining jury verdicts was mentioned above. Rules on class actions may increase conflict intensity by making whole interest groups parties to claims of right and special process. Rules causing extensive delay may have the opposite effect as interest and enthusiasm may cool with time. I do not wish to attempt any comprehensive study of all the facets of law and conflict management. I only wish to intimate that the range of analysis could be great. In the last section I will take up the alternatives for legal education and university legal services in more detail.

In summary, where formalism is an effective tool of conflict management and allocation, the provision of generalist and realist legal services can increase conflict levels in several ways. Information is needed for latent interests to become manifest. The proliferation of legal or other technical information, such as the Nader task force exposure of automotive defects, may be caused by lawyers anxious over politics or the implementing of legal rights and entitlements. Information precisely about legal claims not widely understood may also be spread. We have hypothesized that the unemployed minority group worker will feel more intense conflict if he is denied work when he knows he has a legal claim to equal employment opportunity. Finally, even where interests are specific and known to have a legal base, lack

of access to resolution processes may forestall a further increase in intensity. This follows from the hypothesis that intensity rises when claims are made before a special process. The handling of heightened conflict, through legalized resolution or other elements of the conflict management system, must be understood in the context of the society being analyzed.

Postscript to Chapter Three

Conflict analysis may afford an approach to problems of development by creating typologies deriving variables from both economic and sociological models. Where management of conflict is preserved in substantial part from traditional society, development policy in a private market economy will be different from where it is not. Regimes with accepted ideologies may view modernization sequences in different order than those which do not. While it may seem conflict management stems from a vision of society without conflict, this is not the case. Conflict is a reflection of the presence of social change and an expression of the freedom of evaluation. Should lawyers prove necessary or valuable to its articulation, educating them would need no further justification. Dahrendorf has noted that the utopias of the perfectly integrated societies would be the dullest and least free forms of human organization. Moreover with a Hirschmanic flair, one could turn my analysis on its head and argue that only an increase in conflict will stimulate decision

makers to choose goal states which will expand economic capacity.

The remainder of the study will look at economic models for growth in Latin America. Given different theories of desirable allocations, socialist and private, I shall try to analyze how the costs of capital accumulation presumed by each may be distributed and glance historically at several cases of how they have been. Finally I shall combine the market strategy of unbalanced growth with political conflict conditions in Latin America to speculate about a situation in which selective penetration would be a realistic policy option. The education of lawyers in this setting would conclude the work.

Notes to Chapter Three

[112]"An order will be called law if it is externally guaranteed by the probability of coercion (physical or psychological) to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose." Weber distinguishes between "state law" and "extra-state law" depending on who guarantees or exercises coercion. The monopoly on legal coercion by the state he takes to be a characteristic of certain stages of development, but we shall limit our usage of law to "state law." Rheinstein, Max Weber on Law in Economy and Society Clarion (New York, 1967) pp. 5 and 14.

[112a]The tendency of many social scientists to assume intended penetration is high may derive from excessive reliance on the criminal law as a model for law. The distinction, for example, used by the distinguished anthropologist Leach between jural norms and statistical norms is symptomatic of the problem. Jural norms are what people should do, statistical norms what they do do. But this definition may lead to the position that jural norms (perfect penetration) is the intent of the law. The true intent may actually lie much closer to the statistical norm. The disparity between jural norms and statistical norms, or formalism, must be explained, but this explanation does not deal with the effectiveness of the law or whether its intent is accomplished.

[113]Karl N. Llewellyn, "A Realistic Jurisprudence--The Next Step," reprinted in Llewellyn, Jurisprudence, Realism in Theory and Practice, pp. 34-35.

[114]Murray Edelman, The Symbolic Uses of Politics, Illinois Press (Urbana, 1968) p. 24.

[115]In a related sense Duncan Kennedy has defined perfect penetration:

> There are two sets of requirements which a society must meet if its legal system is to achieve perfect penetration. First, the legal institutions of the society must be fully functioning in the sense that they dispense justice in a highly predictable way and in the sense that they are close to costless. Second all members of the society must be integrated into the legal system in the following senses: (a) each actor must have knowledge of the law, meaning both that he is able to recognize accurately legal wrongs done him and that he is aware of all legal facilities available to him in his cooperative relations with other actors; (b) all actors must have an identical high propensity to litigate meaning that when an actor recognizes that he has suffered a legal wrong he makes the litigation decision on the basis of an expectation that legal institutions will dispense highly certain, virtually costless justice; (c) each actor must expect that all other actors are equally aware of the law and as likely to litigate if wronged as he himself.
>
> If both sets of requirements--those relating to institutions and those relating to those relating to the "Legal Culture" of actors--are met,

> each actor will incorporate into his choice structure all those alternatives and all those social utilities and disutilities which the law associates with a particular course of conduct. This by definition is perfect penetration.

Duncan Kennedy, "The Utilitarian Model of the Role of Private Law in Economic Change," unpublished paper, p. 30.

[115a] Jeremy Bentham, The Theory of Legislation (Ogden, ed.) Kegan Paul (London, 1931), p. 110; and Max Weber, The Theory of Economic and Social Organization (Parsons, ed.) Free Press (New York, 1964) ch. II, especially pp. 173 and 275.

[115b] Possibly the most sophisticated approach to the problems of law as regulation has come into the application to legal thought of the theory of welfare economics. Laws intended to correct for the distortive effects of transaction costs and other externalities in the effort to achieve optimal resource allocations have been considered by Demsetz, "Toward a Theory of Property Rights" 57 AER 347 (1967); and by Calabresi, The Costs of Accidents, Yale (New Haven, 1970).

[116] See Richard Bird and Oliver Oldman, Readings in Taxation in Developing Countries, Johns Hopkins (Baltimore, 1967).

[117] David Trubek, Law, Planning and the Development of the Brazilian Capital Market, Bulletin Nos. 72-73, New York Univ. Institute of Finance (April, 1971).

[118]Robert Holt & John Turner, The Political Basis of Economic Development, Van Nostrand (Princeton, 1966), p. 277; see also Willard Hurst, Law and the Conditions of Freedom, U. of Wisconsin Press (Madison, 1964) Ch. I.

[119]Holt & Turner, p. 329.

[120]Harold J. Berman, Justice in the USSR, Vintage (New York, 1963) ch.

[121]Davis and Whiston, "The Economics of Urban Renewal," 26 Law & Contemporary Problems 105-107 (No. 1, Winter, 1961).

[122]Neil J. Smelser "Toward a Theory of Modernization" in Social Change (eds. Etzioni & Etzioni) Basic Books (New York, 1964), p. 261.

[123]Emile Durkheim, The Division of Labor in Society, Free Press (Glencoe, Ill., 1949), chs. 3-8.

[124]Richard D. Schwartz "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements," 63 Yale L.J. 471 (1954). We should note the question of whether there is any state operating in this case and whether the norms are legal under the definition we adopted from Weber above. The point however does not depend on our stipulative definition.

[125]Jesse Berman, "The Cuban Popular Tribunals," 69 Columbia L. Rev. 1317 (1969); also see Orlando Fals-Borda, Peasant Society in the Colombian Andes, Univ. of Florida Press (Gainsville, 1962).

[126]A non-differentiated economic system may have legal specialists as anthropologists have shown. The reasons for the specialization may relate to the efficient operation of resolution institutions in these societies. The argument here is only that high penetration, modern economic systems will require lawyer roles to be played.

[127]Gregory J. Massell, "Law as an Instrument of Revolutionary Change in a Traditional Milieu," Law and Society Review

[128]Kennedy Unpublished Paper cited above. Kennedy's work seems to assume, as does conflict analysis, that a purpose or intent, within a discoverable range, can be assigned to the penetration of a law. This may not be possible or true for all laws. The importation of the Common Law to Burma may have represented some compromise with outcomes and desired allocations unclear. The assignment of intent in this analysis is an analytical act, with a suspicion, that often historically a purpose may be found out. The purpose here assigned, namely the allocation brought into being, may not be the one actually intended. It could have been a mistake. However, as an example for analyzing the justifications for formalism, the historical intent, discoverable or not, is

not essential.

[128a]Lévi-Strauss in his description of Bororo society points out the formal and the actual condition of the norms on marriage. This raises the question of why study formal structure at all, rather than ignoring it in favor of statistically discoverable realities. The study of formal conditions must assume there is some purpose in so structuring society. "But what is the functional and operational validity of making a distinction between conscious (formal) and unconscious (actual) models if it does not, on the one hand, help us determine why societies mystify themselves by constructing screen type models to hide a more transcendental structure, or on the other hand, make us aware of the underlying structure because of the distinction rather than despite it." Hugo C. Nutini "Social Structure and Model Building" in Claude Lévi-Strauss The Anthropologist as Hero, (eds. Hayes & Hayes) MIT Press (Cambridge, Mass., 1970), pp. 83-84.

[129]Rheinstein, p. 353; Weber writes elsewhere: "For the development of capitalism two features [of English law] have been relevant and both have helped support the capitalistic system. Legal training has been primarily in the hands of lawyers from among whom also the judges are recruited, i.e. in the hands of a group which is active in the service of properties and particularly capitalistic, private interests and which has to gain its livelihood from them. Furthermore,

and in close connection with this, the concentration of the administration of justice in the central courts in London and its extreme costliness have amounted almost to a denial of access to the courts for those with inadequate means" Rheinstein, p. 318.

[130]Vilhelm Aubert, "Some Social Functions of Legislation," in Sociology of Law, (ed. Aubert) Penguin (Baltimore, 1969), pp. 116-126.

[131]Aubert, p. 123. Aubert continues: "The Housemaid law has, above all, become hard to grasp for an audience of housewives and housemaids, because it is written in a language shaped by an entirely different function. It is written in the same kind of language as most statutes, a language which has been sharpened and made precise as a means of communication within the legal profession. It has developed as a means to the goal of resolving legal conflicts through the intervention of lawyers and judges. . . . At the time of the study no legal suit originating in the law on housemaids had been brought to the attention of the courts or of the other legal authorities."

[132]Charles Anderson, Politics and Economic Change in Latin America, Van Nostrand (Princeton, 1967), p. 152 "[T]he advanced labor laws of Latin America depend for their effectiveness on some type of litigation for their enforcement. De-

spite the progressive attitude which has led, in some nations, to the establishment of special labor tribunals or systems of labor jurisprudence, the effectiveness of such measures is usually limited to that small part of the working force which is effectively organized and conscientiously led. The tenant farmer, the unorganized worker, is apt at best to have only the vaguest notion of the protection available to him, and generally no idea at all of the procedures of remedy he must follow to take advantage of such legislation. Even where he does not fear retaliation from employer or official or both if he chooses to exercise his rights, the world of courts, denuncias, and lawyers is alien to him, frustratingly time consuming, and expensive. Similarly liberal cooperative organization laws generally are ineffective for those who could most benefit from them in the absence of technical advice and motivation for such organization."

132a The provision of legal services where laws with low penetration in the narrow sense are important may have other allocative effects in a private market economy than a direct redistribution of resources away from the goal state. Additional resources to satisfy the new claims may come from deficit financing or new sources of revenue. Deficit financing is likely to produce an inflationary situation with the loss shouldered often by foreign and domestic creditors. In addition there will be some loss of comparative advantage on export markets with consequent foreign exchange gap or market

size problems for development. New revenue may come from taxing the recipients of the income granted under the new claims. In such a case a wash would have occurred and conflict levels would depend largely on whether actors realize what happened. If capitalists are taxed, whether the new costs could be passed on would depend on the shape of demand curves. Where no passing on were possible, losses would be felt in profit levels and subsequently in changed investment schedules. Where costs were passed on the inflation and comparative advantage problems would be repeated. The same would be true if the original claims were made against private producers. Where new revenues came only from consuming sectors or non-investing producers like workers unable to pass on increased expenditures, the loss would be felt as a direct redistribution of income, and economic effects would depend on comparative consumption schedules. The disequilibrating consequences of any of these alternatives on the goal state allocation must be considered and their conflict producing effects would need separate analysis. In the case of increased taxes and additional inflation, the conflict reactions have been in the past quite high. Finally, the policy of increasing taxes may be difficult in many Latin countries where tax administration is weak and the costs of improving it are great.

[133]Suit presently being reported in California federal courts.

[134]Dale B. Furnish, "The Hierarchy of Peruvian Laws," 19 Amer. J. of Cpl. Law 91 (1971).

[135]Antonio Novoa, "La Justicia de Clase en la Corte Suprema de Chile" Santiago (1970).

[135a]Karl Mannheim, "Planning for Freedom" in Social Change (Etzioni) pp. 463-467.

[136]It could be imagined that a society would move toward increased penetration in order to build ideological arguments to postpone conflict claims while repressive capacity was being increased. Historically, we can note that repressive regimes have usually tried to control information and not to free it.

[137]The analysis does not account for the monetary cost of providing legal services in different forms. These have often been appraised in North American law reviews. Until non-monetary costs and benefits are assessed however, no monetary calculus can be made relative to alternative uses for the funds. Knowing conflict management effects, some more accurate appraisal of legal services and educational programs can be begun.

[138]Karl Mannheim, Ideology and Utopia, Harvest Books, (New York, 1936), p. 10.

[139]See for example Phillip Selznick, "Sociology and Natu-

ral Law," Natural Law Forum 6 (1961), pp. 84-108 or Lon L. Fuller, The Morality of Law, New Haven (Yale, 1964).

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