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The Battle of the Processes

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The Battle of the Processes

THE quest of security is man's most time-honored occupation. Eventually he comes to find a considerable degree of that security in the institutions that he has developed. But social institutions are not static. They are continually changing and giving way to new institutions. Frequently these changes occur before men are through worshiping the ideal. Such changes necessarily result in great social anxiety and inevitably produce a feeling of insecurity.

Today we are witnessing such a change in Anglo-American law. Most of us have come to worship the law and the court system, feeling, as indeed we had the right to do, that law represented the very highest degree of attainment in social institutions. Nevertheless, forces have been unleashed which bid fair to undermine our legal institution and leave us with nothing but a hollow ideal. Technological invention was bound to leave its mark. The new economy that has resulted from the inventions of the past fifty years has done much to disturb our peace. Moreover, it has stratified the whole social field. This structuring, or grouping of the social field, has necessitated the development of new control devices. Whereas, in the field of law we sought to umpire the game that was going on *within* the group, we are now called upon to find some device to control the game *between* the groups. In this country we have called upon the bureaucracy to exercise that control. Suddenly we are horrified to discover that the bureaucracy is not using the same rules in handling the game between the groups that the courts have been using in the game between the members of a single group. Instead of umpiring the game as the courts do, we suspect that the administrator is actually playing in the backfield at least a part of the time. This appalling disregard for those conventional rules of justice and procedure that civilization has been thousands of years in establishing has given us a tremendous feeling of insecurity.

Recently the Supreme Court has ruled that the administrative bodies must acquire and adjust themselves to rules similar to those followed by the lesser courts.[1] If the problems that confront the administrators are the same general type of problems that confront the lesser courts, then we may find a good deal of satisfaction in such a command. But if the game of social adjustment that is being played between groups is essentially a different game from that of

[1] See, for example, Morgan v. United States (1938) 304 U. S. 1.

adjustment within a group, we are guilty of worshiping false gods. If the latter be true, and the writer is disposed to feel that it is, the social scientist finds himself confronted with an entirely new problem —a problem that will not be solved by an armchair observation of musty tomes or a re-examination of the referendum and the recall. He confronts a problem that will necessitate the use of the combined strength of psychology, anthropology, political science, and economics in the laboratory of human experience. If security of person and property and peace of mind is to be attained, that security must be attained through the development of proper types of control.[2]

THE INSTITUTIONAL DIFFICULTY

Any analysis of social institutions presents certain very concrete difficulties. First the limitations of time and space compel an attempt at artificial isolation of the institution under consideration from all other institutions. In reality, of course, this cannot be done. Society is after all a configuration which may well be compared to one of grandmother's old patchwork quilts. It is made up of an unlimited number of social institutions, just as grandmother's quilt was made up of a countless number of patches that were cut from innumerable pairs of grandfather's old pants. If we were to make a study of patchwork quilts we might choose between two methods of procedure. We might take the quilt apart and examine the pieces individually, or we might examine the quilt as a whole. The difficulty with the first method is that if we take the quilt apart we would probably find ourselves studying pants instead of quilts. The size of the patches, their color and arrangement, when considered in relation to other patches, is an indispensable part of the configuration of the quilt. The same

[2] The reader of this paper will immediately realize that much that is expressed herein has been borrowed from others. In a general way my own thinking has been materially influenced by the writings of the late Professor William Graham Sumner; Professor Albert G. Keller of Yale University; Professor Walton D. Hamilton of Yale University; Thurman W. Arnold, now Assistant United States Attorney General; Professor Kurt Koffka of Smith College; Professor Kurt Lewin of the University of Iowa; Professor J. F. Brown of the University of Kansas; Professor E. Pendleton Herring of Harvard University; and Professor Robert E. Cushman of Cornell University. A number of years ago Professor Robert Hall Bruce, Chairman of the Department of Psychology at the University of Wyoming, invited me to join him in offering a seminar in social psychology. The main theme of this paper was worked out in this seminar with no small amount of assistance from Professor Bruce. But where ideas have been taken from so many sources and over a period of years, they tend to become so mingled with one's own thinking as to make it difficult if not impossible to give proper credit. For that reason I have limited my notes to those instances where the reference is direct.

is true of social institutions. A particular institution, when separated from other institutions, may take on an entirely different appearance from that which it has as a part of society as a whole. But since society as a whole is far too large to observe at one time, we are forced to make an artificial and verbal separation for the purpose of analysis much in the same manner that the scientist isolates a physical force in the laboratory for purposes of observation and measurement. It can only be hoped that the *institution* will not lose too much of its true color by the adaptation of this process.

The ever changing nature of a social institution presents a second difficulty. The institution of agriculture as it is now evidenced on the midwestern plains is something quite different from the institution of agriculture which gave John Alden his livelihood. Yet, if we are to fully understand agriculture as a social institution we must study it in its earlier as well as its later forms. But the evidence of past development is not always clear. Much material has no doubt been lost for all time. The botanist can place a seed under a microscope and watch it germinate and grow into a fully developed plant, but a microscope by which we may observe the origin and development of social institutions has not yet been invented. We are forced to speculate. In a general way we know that social institutions have their origin in practices that man indulges in to satisfy certain basic urges which are probably inherent in the human species. More than this we are not sure of. Professor Walton Hamilton of the Yale Law School says:

> "It is impossible to discover for such an organic complex of usages as an institution a legitimate origin. Its nucleus may lie in an accidental, an arbitrary or a conscious action. A man—savage or civilized—strikes a spark from flint, upturns the sod, makes an image of mud, brews a concoction, mumbles a rigmarole, decides a quarrel or helps himself to what he may require. The act is repeated, then multiplied; ideas, formulæ, sanctions and habits from the impinging culture get attached; and gradually there develops a ritual of fire, a hoe and spade agronomy, a ceremonial for appeasing the gods, a cult of healing, a spell for casting out devils, a due process of law or a sound business policy."[3]

The demise of an institution is as uncertain as the origin. Just as institutions are born to assist man in adjusting himself to his environment, so also must they change as the environment changes. A "gold standard" gives way to a "managed money." The horse gives way

[3] 8 ENCYC. SOCIAL SCIENCES (1932) 84. Reprinted with the permission of the publisher, The Macmillan Company.

to the machine and a bureau of corporations becomes a federal trade commission. But the transition is not always recognized. Repeated usage develops a habit; and a habit when practiced over a long period of time—a period of time long enough so that the memory of man does not know the origin of the usage—becomes a "natural law." Since we are unable to explain a "natural law," we credit it with supernatural origin and bless it with worship. But worship closes our eyes to reality. During the extended period of time a war has been fought, a plague has struck, or someone has invented a machine and the whole social field has been restructured. The change has produced what in reality amounts to a new institution, but the new institution is so patterned after the old institution that it is not recognizable as such. The worship becomes purely symbolic. This point was driven home to many of us a couple of years ago when we discovered that the vast multitude of the American people actually thought that the United States Supreme Court decided cases in accordance with a written document rather than acting in its more newly acquired capacity as a high court of economic justice. In this instance the symbol proved to be stronger than the reality and as such should probably be treated as a reality in itself. Difficult though it is to make this distinction between the symbol and the reality, to make the distinction is fundamental to any scientific attempt at social analysis.

The method of approach, or the manner of studying a social institution, presents a third difficulty. The particular manner in which people view social institutions is in itself *institutional.* It is doubtful whether an institution can ever be properly analyzed when examined through institutional eyes, any more than a word can be defined in its own terms. But there is no escape from the problem. Jones, through training, habit, and tradition has developed one set of thought patterns. Smith, through equally severe training and long habit and tradition, has developed another set of thought patterns. An institution when observed through the thought patterns of Jones will look entirely different from the same institution observed through the thought patterns of Smith. This presents a very real difficulty, and one from which there seems to be no escape.

Finally there is the problem of language involved in a paper of this kind. The lawyer and the psychologist and the sociologist do not understand each other's jargon. Any attempt to clarify one's expres-

sions for the sake of one group generally results in confusing another group. Nevertheless, a start must be made, if progress is to be had.[4]

THE JUDICIAL PROCESS

Though man is no doubt an individualistic creature he possesses certain biological urges or drives that are forever forcing him into groups or associations with his fellow men. Each time he enters a group he loses a degree of his freedom and individuality, but he has no choice, for it is a price that he must pay for the privilege of life itself. These urges, or drives, have been classified in a number of different ways. The sociologist refers to them as being drives of hunger, sex, anger, and fear. The Gestalt psychologist has referred to them as economic, social, and intellectual drives. The anthropologist, on the other hand, speaks of the impulses of hunger, love, vanity, and fear. These forces may express themselves in different ways in different societies, but they are fundamental to all societies. They are biological in their origin; the manner of their expression is determined by environment. If life is to continue, these drives must be satisfied and the process of satisfying them is one of socialization.

One can well imagine the feeling of freedom and individualism that *homo sapiens* must have enjoyed on that bright, clear morning when he first came down out of the trees and stood up on his hind legs to survey the horizon of a high Asiatic plateau. But his joy was probably short-lived, for soon he was to feel the pangs of hunger gnawing at his vitals. Yonder was wild game, but he had no way to reduce it to his possession. He was probably compelled to call upon one of his fellow men to assist him in driving the animal over the cliff in order that the first and most important of the drives or impulses could be satisfied, and thus an economic association or group was formed. His stomach full, he may have sought rest, but rest was not to be had. A distant man was, perhaps, after his game. Again he must call upon his fellow men, this time to help drive the enemy away. Another impulse is satisfied and another group is formed. The enemy subdued, he may have once more sought rest, but rest is in itself stimulating. He would ask, how did I get here, how long will the game last, how

[4] The basic concepts of "field dynamics" here used are taken from the Gestalt psychologist. For a good general explanation of the "social field," see KOFFKA, PRINCIPLES OF GESTALT PSYCHOLOGY (1935) 664, 679. The methodology used is best set forth in LEWIN, PRINCIPLES OF TOPOLOGICAL PSYCHOLOGY (1936). For an interesting application of Gestalt psychology to modern social problems, see BROWN, PSYCHOLOGY AND THE SOCIAL ORDER (1936).

will I protect myself, how will I continue my kind, who will keep me company, and before whom may I exhibit my splendor? Yes, these and a thousand other questions, no doubt, came to his mind and so he set out to answer them, and, in so doing, he was forced to enter into groups and associations of a thousand different natures.

Sumner and Keller have summarized the effect of these socializing impulses:

"In general, life in society is a species of insurance. Insurance is something which man has had to develop against the chances of life, although he could not realize its nature and function until long ages had passed. Its function is the reduction of the risk-element in life to a constant; the substitution of a small, recurring, calculable loss for a possible ruinous and incalculable one. Living within a peace-group, a man enjoys security which he paid for by the limitation of his freedom, by services rendered, and by payments in goods; outside of his group, he was a prey to the mischances of life just as any one is exposed to fire-hazards if his property is uninsured. It is clear that early man was bared, in the absence of an apparatus of protection, to ruinous calamities: starvation, cold, violence. He needed protection; association afforded it; and he was forced into association whether he willed or not."[5]

The group then, is a protective device to which man must submit whether he "wills or not" if he is to live in adjustment with his environment. But the process of adjustment is by no means ended with the acquisition of group membership. If the group is to have permanency, ways and means must be formulated by which its members may live in peace with one another. Otherwise the group will fail and the purpose of entering it will be defeated. The institution that man has devised to accomplish this intra-group peace we call law, and its methods of operation we generally term as the judicial process. It is to this process that we must now direct our attention.

We shall probably never know exactly how law is developed. We know, in a general way, that laws come from customs and that customs come from *mores*, and *mores* from folkways, and folkways from some simple action of a single individual that has been many times repeated —indeed, repeated until it has become a habit. A prospector in search of gold comes upon a strike. Since the strike is not subject to reduction to immediate physical possession and since his prospecting tools are not adequate for mining, he is forced to leave his discovery until

[5] 1 SUMNER and KELLER, THE SCIENCE OF SOCIETY (1927) 20. The quotation above and that in the text to note 8, *infra* are reprinted with the permission of the publisher, the Yale University Press.

such a time as he can acquire proper equipment to reduce the ore to physical possession. But before leaving the discovery, he tacks a notice upon a nearby tree stating that he has made the discovery on a certain day and that he claims a tract of land of certain dimensions from the point of posting the notice. In his absence his neighbor, who is also a prospector in the same community, happens to come upon the same strike. But he observes that a fellow member of his group has already discovered the particular strike by the notice that is posted on the tree and so he leaves it unmolested. He does this because he realizes that if he disturbs the property a fight will follow which will probably result in his being expelled from the mining community. Such practices when frequently repeated are soon discovered to be in the interest of the group and are thus elevated to the standards of a *mos*. Since the particular practice is in the interest of the group, the group prohibits infringement of the custom, and thus a set of taboos is developed. Finally, a Congress of the United States, being anxious to dispose of its public lands in an equitable fashion, passes an act[6] providing for the patenting of mining claims in accordance with the customs established in the local mining districts.

But our illustration need not be limited to the hypothetical. History furnishes us with a case in point. The year of 1849 marked the discovery of gold in California. A hundred thousand people were to migrate to that state within a single year, all in quest of gold. There was no government in the region at that time and a serious question of law and order was to arise. In order to preserve the peace and to make it possible to carry out the mining enterprise, the inhabitants of each mining camp formed what was known as a mining district. The members of the district formulated certain rules by which they were to be governed in their relations with one another. These rules were for the most part a codification of the practices that had been established by the individual members that seemed most advantageous to the group as a whole. Each district had its own set of rules but all these sets of rules were fundamentally the same. For instance, the right to a claim was definitely limited so that each member of the group might have his opportunity. Failure to work a claim for a certain period of time was declared an abandonment. Since water was indispensable to the working of a mining claim, a water system in harmony with the economic enterprise had to be worked out. Here, again, the miner relied upon the "first come, first served" principle,

[6] 14 STAT. (1866) 251.

regardless of the location of the land with respect to the stream from which the water was taken. The amount of water that one person was allowed to take from the stream depended upon the size of his ditch. If the quantity of water was limited it was divided according to the date of the first taking or appropriation as we now call it. These rules were strictly enforced by the members of the group and served to preserve law and order and to make progress possible until a political authority was established in the state, at which time they became a part of the body of the law of the state of California.[7]

The board of deans in a western university meets shortly after the beginning of each term to hear petitions for re-entrance to the university from those who have been slack in their academic endeavors. The board once had the power to refuse or permit re-entry according to its own will. There was a time when each petition was given individual consideration, but as the student body grew and the number of applications increased accordingly, there developed the custom of granting the student's first request for readmission without further consideration. Today it would appear that a student has a legal right to be readmitted at least once providing his failure does not involve more than mere academic negligence. A single incident, repeated a number of times, becomes a habit which will ripen into a custom and become a law.

A number of years ago, the same university sought a grant and loan from the federal government for the purpose of constructing a liberal arts building. The university sought to pledge the income from certain of its land funds to secure the payment of the loan. The whole affair was very much tied up with red tape. It finally took an act of the legislature purporting to give the university power to borrow money for the particular building and to pledge the security and a decision of the state supreme court upholding the constitutionality of the law to obtain the grant. A few years later the university sought another loan and grant with which to construct another building. The application was prepared in substantially the same manner but the act of the legislature and the decision of the court were omitted. The government officials noting the similarity of the two applications approved the latter upon only cursory examination. It does not require an extended use of the imagination to foresee a whole law of

[7] For an interesting dissertation on the development of water law in the mining districts of California, see Shaw, *The Development of the Law of Waters in the West* (1922) 10 CALIF. L. REV. 443.

P. W. A.-university relationship developing out of this rather humble start.

Other illustrations could be given which would indicate the different stages in the development of law but the aforegoing will, I trust, suffice to indicate the general nature of the process. There are, however, a number of incidents to the development that are deserving of specific attention. First of all, it should be noted that the law of the kind that here concerns us is entirely an intra-group development. It has previously been shown that people are, of necessity, compelled to live in groups. Life within the group demands the peace and order which the law supplies.

Secondly, the nature of the law developed will depend largely upon the economic structure of the social group. An illustration will be helpful. The first commercial use of water was by mill owners and manufacturers who located their plants along the banks of streams. Soon a system of water law was in the process of development. In a general way the water could only be used by one who owned the land on the banks of a stream. And the water could be used only. It could not be retained. It had to be returned to the stream in substantially the same quality and quantity as it was taken in order that the mill owner below could have it to use again. Such a set of *mores* worked perfectly among mill owners and manufacturers; and so in the course of time these *mores* were elevated into the law of what we now call riparian water rights. On the other hand, the miners of California were confronted with an entirely different economy. They needed water to work their mines, but their mines were frequently far from the streams. Hence, they developed a system of appropriation of water which entirely disregarded the location of the land and did not require that the water be returned to the stream. Thus we have two entirely different systems of water law. Each system accommodates a different economic process. So the final and determinate factor in each instance is the method that the members of the particular group have hit upon to adjust themselves to their physical environment.

Finally, as economic conditions change, so must the *mores* change with them. Some *mores* will change faster than others depending upon their proximity to the maintenance process. Sumner and Keller have put it this way:

"The mores that have to do with self-maintenance, being closest to natural conditions, are checked up more speedily and obviously on the life-conditions than are the rest of the mores. Poor methods in hunting are

revealed to be such much more readily than are inexpedient religious practices.... The rest of the mores, however, take their tone from the maintenance-mores, as from a sort of basic theme. The former experiences a strain toward consistency with the latter.... The superstructure—those mores which are farther removed from the ground of natural conditions—must conform to the foundation-lines of the maintenance-mores."[8]

What role do the courts play in group society? Theirs is historically the task of solving intra-group disputes, that is, disputes between members of a single group. To be sure, they have not limited themselves to this task alone. Indeed, they frequently do decide disputes between members of different groups or between the groups themselves. But as we shall see, this is a jurisdiction from which they inevitably withdraw because in their very nature they are ill-fitted for any such task.

In early societies the intra-group disputes were as a rule settled by the self-help method. But in time the practice developed of submitting the dispute to the oldest members of the clan, or elders as we call them, for settlement. The elders were given the task of determining whether or not a *mos* had been violated. Since they were the oldest members of the tribe, it was presumed that they would be most likely to be familiar with all customs and taboos of the tribe, and hence best able to determine whether or not the particular acts in question were, to put it in modern phraseology, "against the law."

The processes that are followed in the modern courtroom are not very much different from that just described. Jones, who is a gold miner in the state of California, goes out to look at his ditch, which has furnished water for his mine for a good many years, and discovers that it is dry. Investigation reveals that Smith has diverted all of the water from the stream through his ditch to his mine. Jones hails Smith into court, seeking an order enjoining him from diverting any water from the stream until after he, Jones, has filled his ditch. At the trial Jones proves that he first diverted water from the stream some ten years before Smith diverted water. This evidence being in, Jones rests. Smith now comes forward and proves that Jones had used no water from the stream for a period of more than five years. The evidence being in, Jones now urges upon the court the custom of the miners that the first appropriator had the prior right to the use of the water. Smith admits the existence of such a custom, but argues that this case is to be determined by another custom which

[8] SUMNER and KELLER, *op. cit. supra* note 5, at 36-37.

was just as well established, namely that five years' non-use was treated as an abandonment. Jones denies the existence of the latter custom. Now if the judge were an "elder," he would reach back into the archives of his mind and determine whether or not there was any custom of abandonment. Fortunately we no longer have to depend upon his memory. The existence or non-existence of the custom can probably be determined by an examination of the previous decisions of the particular or some other court. If there is a custom of abandonment, Smith wins the law suit, otherwise Jones gets his injunction.

But now let us suppose that there is no custom to decide this particular dispute. In such a case the judge will reason by analogy from custom known to exist. In the hypothetical case just referred to, let us suppose that Jones had admitted the existence of a custom that five years' non-use of a mining claim would be considered an abandonment of the claim, but asserted that no such custom had ever been applied to the right to use water. The court would probably determine the dispute on the basis of an analogy. If five years worked an abandonment of a claim, then why should not the same custom be applied to the water that made the operation of the claim possible? Some lawyers would argue that the court had in this instance actually made law; others would contend that it merely determined the law. With this argument we have no concern. It is obvious to all that the judge is bound to act in a case of this kind in accordance with the prevailing opinion of the group, and beyond this we need not go.

Thus, it will be seen that in the vast majority of the cases the court functions in exactly the capacity that we have set for it, namely, as an independent and non-partisan arbitrator or umpire of disputes. The custom or *mos* that shall govern in the particular case is generally quite clear; hence, the judge may act with a surprising degree of objectivity.[9] But suppose the particular dispute is an inter- as distinguished from an intra-group dispute. As we have seen, judges are independent and objective individuals deciding cases according to customs and *mores*. But different groups have different *mores*, the difference being little or great depending upon the difference in the economic order of the groups involved. Which set of *mores* is the judge to decide the case upon? Such is the problem that we must now consider.

[9] The aforegoing should not be considered as a dissertation on the development of the law and the judicial process. The purpose was to indicate the general nature of the process, that it might be distinguished from the administrative process that we are now about to discuss.

An inter-group dispute—that is, a dispute between individuals belonging to different economic groups—presents the court with a problem quite different from that which was analyzed in the preceding pages. There it was pointed out that the court acted as an umpire determining whether or not there was a rule governing the particular case and which party had violated the rule. But in the inter-group dispute we have two sets of rules. Which set is the supposed umpire to adopt? If he adopts either set, can he still be considered merely an umpire? These are questions that we must attempt to answer.

Again an illustration will prove helpful. A few years after the gold rush of 1849 a second large migration to California took place. But this time people came to farm rather than to mine. Some of these people settled along the river banks while others settled on the higher land, a considerable distance from the rivers. Those whose land was immediately adjacent to the rivers adopted the old riparian water system previously described. But those who lived on the higher lands adopted the prior appropriation system that had been worked out by the miners a decade or more before them. Conflict between the two groups was inevitable, and in due season the matter was taken to the courts.[10] Now we said the courts decide problems according to the customs and *mores* of the group. But, in this instance, which set of *mores* was the court to favor? There were obviously two sets of *mores,* each based upon a different economic order. Either way the court decided, it must cease to act as umpire and indeed throw its weight behind one group against another. In such a decision, obviously there can be no umpire. The decisions depend, then, upon which group the referee wants to see win the game.

Now there is nothing new about the inter-group disputes. Courts have been handling them for many centuries. And despite the fundamental differences involved, the courts have on the whole been surprisingly successful. But the nature of the inter-groups disputes presented to the courts today involve more serious clashes of interest than in previous centuries. In the last section I attempted to point out that the type of *mores* that the group developed depended largely upon the economic order of the particular group. I also tried to show that the closer the proximity of the *mos* to the maintenance problem the more susceptible it was to immediate change, and that a

[10] See Wiel, *Public Policy in Western Water Decisions* (1912) 1 CALIF. L. REV. 11; Shaw, *op. cit. supra* note 7.

method of obtaining a livelihood would be subject to much more rapid change than a religious philosophy. Hence we find that all group conflicts do not involve *mores* that are diametrically opposed to each other. Indeed, many groups may develop the same general religious philosophy though their maintenance *mores* be vastly different. Furthermore, the maintenance *mores* may not be altogether in conflict. For instance, there is but little conflict between the customs of brokers and the customs of bankers. Thus a decision between these two groups can still be made with some respect for objectivity. But the extent of the objectivity in each instance will depend upon the extent to which the *mores* of the groups involved are in conflict.[11]

In the United States it has only been within the past fifty years that the maintenance *mores* of the several groups have come into sharp conflict. The peace of years gone by was no doubt due to the fact that the early American social field was a relatively fluid one. The economy was not greatly diversified. For the most part it was rural or agrarian. The industrial order, such as it was, consisted mainly of small shopkeepers, each man being pretty much his own entrepreneur. As a result, the economic *mores* were not altogether contradictory as they were later to become. There was, to be sure, some conflict between fundamentals. The slave economy of the

[11] Some of my critics have urged that all litigation involves group conflict. They point out that in a suit wherein the corner grocery attempts to recover the amount of a grocery bill from Smith, in reality two groups are in conflict. The argument fails to recognize that while there may be certain differences between Smith and the corner grocery, yet both Smith and the corner grocery are by and large members of the same group, and the particular group has a long and well-established rule that each of its members must pay his grocery bills. If a man does not pay the bill, he is expelled from the group. Otherwise the group could not exist. This is but one of the prices the individual pays for membership in the group. Of course all individuals belong to more than one group. For example, an individual may belong to the laboring group and the consuming group. In a conflict between the two groups the individual will adopt the *mores* of the group which most vitally affects his economic interests. Society is but a maze of overlapping groups, each with different interests and *mores*. The difference may be said to be one of "degree" but it is nevertheless real and substantial.

My colleague, Dean Carl F. Arnold of the Wyoming Law School, has suggested that the difficulty lies in the confused meaning of the word "group" and that it would be profitable to coin a new word. There is much force in the suggestion. However, the word "group" has become so commonly used among sociologists, anthropologists, and psychologists that the coining of a new word would, I fear, only add to the confusion. A religious adoption of the "time and place referent" will probably do more to expel confusion than anything else.

Anyone desiring to study the problem here raised will do well to read LEWIN, *op. cit. supra* note 4, cs. 1-9. The problem is, after all, psychological in its nature.

South presented one of these conflicts. The southern planters developed an economy around slave labor. The northern farmer and shopkeeper developed his economy around free labor. The southerner developed a property in slavery. The North refused to recognize such a property right. The matter was taken to the Supreme Court. Was the Court to adopt the *mores* of the North or those of the South? It made its decision,[12] but the decision resulted in the Civil War. There were other conflicts, such as that which arose over the control of money; but probably with the exception of the slavery problem, the conflicts did not involve the maintenance *mores,* and as has been previously indicated, the further the conflict be from the maintenance *mores,* the more objective a court can be in rendering its decision.

Then other influences were at work which were to do much to break down such barriers as there were between the few existing groups. The development of transportation, the rapid expansion toward the west, and the free school system all did much to level out and obliterate the already permeable boundaries. The economic tension was not great. If an eastern farmer lost his property by mortgage foreclosure, he could go west and obtain a homestead.

But the industrial revolution, together with the passing of the frontiers, did much to change the social field. Here we need not indulge in enumeration. The mention of the machine and of mass-production industry will indicate clearly enough what I have in mind. The dependent economic existence of an employee in the steel factory stands out in sharp relief against the independent economic existence of shopmen of colonial times. The wheat farmer of South Dakota can find but little in common with the agriculturist of Plymouth Colony. Independence has given way to dependence. What was once a rather uniform rural economy has given way to an extremely diversified order.

The dependent individual seeks security. To obtain this security, he is driven under the protective cloak of the group. And since our economy has become extremely diversified, we necessarily have many groups. Each group develops its own *mores,* the form of which is governed by the basic or maintenance *mores.* Thus, today, we find our once fluid social field highly stratified with business, agricultural, and labor groups, each operating from within under its own set of *mores,* each of which is quite basically antagonistic to the others.

This rigid structuring of the social field has presented us with two

[12] Dred Scott v. Sandford (1856) 60 U. S. (19 How.) 393.

new problems. First, ways and means of maintaining order within the several groups had to be devised. The law court furnished the pattern here, but the pattern could not be adopted *in toto*. The law court was accustomed to working with a large number of relatively simple problems. But these new intra-group problems were frequently highly complicated, requiring much expert evidence for their solution. It was clear that the ordinary judge, faced as he was with almost every type of problem that is humanly conceivable, had not time to make the necessary study, for instance, of a problem of rate-structure in a conflict involving two railroads. Hence we devised the administrative tribunal. We limited its jurisdiction so that its members could become expert, and we, for the most part, granted them immunity from supposed political interference, so that they might be objective in their judgments. The Federal Radio Commission, the Maritime Commission, the Securities and Exchange Commission and the National Bituminous Coal Commission are typical examples of this group. The important thing to remember here is that, by and large, these bodies are engaged in the settlement of intra-group disputes.[13] Since the group develops its own *mores*, it is entirely possible for this particular type of administrative body to proceed much in the same fashion as the court proceeds in the settlement of the dispute and with the same degree of objectivity that we have long been in the habit of expecting from the courts.

The second and more important problem that has been thrust upon us by this re-structuring of the social field is that of finding some way of solving the tremendously increasing number of inter-group disputes. A number of administrative agencies have been established in an attempt to meet this problem. Typical of this group is the National Labor Relations Board, which attempts to settle disputes between labor and business. The functions of the Secretary of Agriculture under the Packers and Stockyards Act,[14] wherein he attempts to settle disputes between farmers and meat packers, are of a similar

[13] The regulatory agencies here mentioned are self-governing devices for a group of conflicting groups. But each of the groups within the larger group has at least one major interest in common, *e. g.*, transportation, communication, or sale of securities. Certain basic *mores* are developed around the one major interest which all groups come to accept as one group. Hence it becomes quite possible for the Interstate Commerce Commission to pattern itself after a judicial body in deciding the disputes arising within the transportation group. It has been less successful in working out a national transportation system—a problem involving disputes between groups that have nothing in common.

[14] 42 STAT. (1921) 159, 7 U. S. C. (1934) § 181.

nature. But before we attempt to discuss the functioning of these agencies, let us digress for the moment to see how the courts have handled the inter-group problem.

I have already mentioned the difficulties that confronted the Supreme Court in deciding the slavery problem and of the California court in handling the water dispute. Now let us refer to some of the more modern conflicts, such as that which is now going on between labor and business. Two cases will suffice. In 1936 the Supreme Court of the United States was called upon to determine whether a New York law regulating hours and wages was constitutional.[15] Two groups were at swords' points. The labor group had developed the notion that everyone was entitled to a living wage to be acquired in reasonable hours. The business group had developed the idea that employers had the right to hire whomever they pleased at the lowest salary for which a particular individual was willing to work. The *mores* were thus in fundamental conflict. Which set of *mores* was the Court to adopt? It was impossible for the Court to act as an umpire in such a battle. Hence the question of who controls the Court is all-important. In the particular case, the Court adopted the business *mores* and threw its force against the labor group. Less than a year later a similar statute was again to be presented to the Court,[16] but this time it came from the state of Washington. But the intervening months had been highly important ones. The famous "Court Packing Plan" was pending in Congress, and a power greater than the power of the Court and backed by the groups which the Court had previously decided against seemed now about to annihilate it. This time the Court adopted the labor *mores* and thus threw its force against the business group.

The decision of the Supreme Court in the case of *United States v. Butler*,[17] holding the Agricultural Adjustment Act unconstitutional, presents us with a striking illustration of group conflict. The agricultural group had succeeded in forcing a tax upon all other groups, and specifically the processing group, for the benefit of the farmer. The group conflict was clear. Mr. Justice Roberts in writing the majority opinion went to great pains to point out that the case involved an inter-group conflict and that one group cannot be constitutionally subsidized at the expense of another group. Mr. Justice

[15] Morehead v. New York *ex. rel.* Tipaldo (1936) 298 U. S. 587.

[16] West Coast Hotel Co. v. Parrish (1937) 300 U. S. 379.

[17] (1936) 297 U. S. 1.

Stone in an already famous dissenting opinion pointed out that the problem is political rather than judicial; one of which the Court would do well to keep its hand off. There can be little doubt that the case would be decided otherwise were it to arise today.

The inter-group problem obviously does not lend itself to judicial decision, at least in the sense that we have become accustomed to think of judicial decision. In the very nature of the problem the court cannot act independently or objectively. It necessarily becomes a force working on behalf of one group or the other. As such, its effectiveness is pretty much lost. For example, during the depression, mortgage foreclosures became very numerous. The business man had long operated under a custom which demanded that a mortgage in default should be foreclosed. But irate farmers with pitchforks in their hands said that there was also an ancient agricultural custom that every farmer was entitled to regain his land. The law courts decided in favor of the business *mores,* but the pitchfork proved a stronger weapon than a judicial decree; and so a moratorium was declared. During the General Motors strike in the spring of 1937 a court of law, after looking over a musty abstract which said that General Motors owned the factory in question in fee simple, and after hearing evidence that strikers were sitting down in the factory, attempted to decide a major group conflict on common law—in this instance, on business *mores*—by ordering the strikers out of the plant. But it is a matter of common knowledge that the strikers did not obey the court order and that the court was helpless to enforce its decree. Recently the Supreme Court of the United States has outlawed the sit-down strike,[18] but it seems doubtful that its decree will be of any particular force. A judicial decision in an inter-group dispute simply amounts to a fanning of the flames. Such is the heritage that the courts have passed on to the administrative bodies. That these bodies have been no more successful in attempting to meet the problem than the courts themselves is quite readily indicated by the current criticism of the National Labor Relations Board, and of the actions of Secretary Wallace in administering the Packers and Stockyards Act. The National Labor Relations Board is called partisan. There can be little doubt that it is, in that it has consistently accepted one set of *mores,* as indeed it is compelled to do under the Act rather than another set of *mores.* Still it is doing no more than the courts have always done. Such is the inherent nature of the problem.

[18] National Labor Rel. Board v. Fansteel Corp. (Feb. 27, 1939) 306 U. S. 240.

Conclusions are perhaps out of place in this paper. The attempt here has been to outline a new field of research. We do not know as yet enough about the formation of groups or of group behavior to formulate any very definite principles. We need research on the nature of the various groups. We need to know a good deal more about group and about institutional behavior. What is institutional behavior? Why is institutional behavior so vastly different from the behavior of the individuals that go to make up the institution? Then, too, there is a need of developing techniques that will more adequately measure group boundaries, forces and tensions, and the fluidity of the social field. But research as such would be more or less futile unless we have certain objectives, or perhaps I should say hypotheses, by which the research should be directed. With this in mind, let us return to the problem at hand.

It will be necessary to examine once more our analysis of the group. Groups, as we said, are collective devices that men create in order to protect themselves in the economic struggle against nature and against other men. The nature of the group will depend ultimately upon the economic order sustaining it. The strength and solidarity of the group will be determined by the extent of the struggle to live. If the struggle be hard, the group will be rigid; but if the struggle become easy, the group will be fluid. Within each of these groups a set of *mores* will be established for the purpose of maintaining peace and order. The nature of the *mores* will again be determined by the struggle for existence. It will vary from group to group. To be sure all groups will agree to the Ten Commandments and other broad social principles, but some will be in fundamental conflict as to property and security. The entrance on the part of man into one group means an acceptance of the standards within, but a declaration of war upon those without. That is essentially the reason man enters the group. If this position be correct, it necessarily follows that there can be no solution to the inter-group problem by way of the judicial process. What then are the possible courses of action?

First. Courts, as such, should be restricted to the settlement of purely intra-group disputes. If this is done, they will continue to retain the respect of the public as independent arbitrators and will not find themselves in the embarrassing positions that the Supreme Court of the United States found itself in during the spring of 1937, when it was forced to reverse openly decisions made by it less than

one year before. They must retreat from the "backfield" to the role of referee.

Second. The administrative field should be carefully studied along lines heretofore suggested to determine just where and to what extent disputes arising therein are intra-group and where and to what extent inter-group. The mere existence of conflict of interest does not in itself suggest that the "umpire device" cannot be used. It is only where the nature of the conflict is basic—that is, where the conflict closely approaches the maintenance *mores*—that the "umpire device" fails us. Where there is a reasonable ground to believe that the dispute is not of such a basic nature as to make amalgamation of the several groups into one group, or to say it in another way, to establish commonly accepted *mores,* then some sort of an independent administrative device such as the Interstate Commerce Commission should be permitted to develop and such an institution should be compelled to act in accordance with the well-established rules of judicial procedure with full right of judicial review.

Third. Where, after study, it is determined that the nature of the conflict is close to the maintenance *mores* and that there is no possibility of ever establishing a common set of *mores,* we should openly abolish all attempts at judicial control, and recognize the problem as being purely political. For example, the present attempt to superimpose the judicial process upon the National Labor Relations Board seems clearly wrong. The use of the judicial device in an instance of this kind tends to strengthen the barriers already existing between the two groups. If, on the other hand, we recognize the problem as being purely political, we can treat it as such, and establish the proper democratic control devices around it. Decentralized political control, the force of public opinion, and the ballot box may be a far more effective means of regulation than an unrealistic attempt at judicial process. Let us take another illustration. Suppose our study reveals that there are certain insurmountable barriers in the field of utility regulation which make the judicial process as it is now practiced in the several "commissions" unworkable. Then is it not the better policy to establish T. V. A. projects and finance municipal light plants, all of which are subject to the democratic political process and to the control of the forces of public opinion? If after a period of time common *mores* do develop, the judicial process can then be re-established.

The distinction between each of the several propositions set forth

herein is admittedly one of degree. Not only that, but the degree of difference will probably change from time to time. Such is the principal thesis of this paper. But whether these hypotheses are sound or not does not materially alter the basic problem. There is a definite need for realism in the study of public administration. It is suggested that the approach here outlined would at least be helpful.

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