Sociological Jurisprudence Revisited,
A Review (More or Less) of Max Gluckman

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Only such equally pervasive social relationships as those identified with religion, the family and political organization have been exposed to attention comparable to that focused by students of human institutions on the legal system and law. In recent years, this fascination with the operation of the legal process has been reflected not only in the writings of jurists (such as Frank1) and professors of law (such as Llewellyn2), but also in the writings of philosophers (such as Northrop3), political scientists (such as Pritchett4), sociologists (such as Riesman6) and anthropologists (such as Barton6). The legal process has been subjected to the scalpel of Herbert, the auger of ter Haar and the unidentified blunt instrument of Boudin. The self-conscious psychoanalysis of the legal process made by members of the faith sits side-by-side with the various shades of awe, curiosity, distrust and active distaste that characterize lay observers. And, although it may be hard to believe in the light of such disabilities, it is probably accurate to maintain that knowledge about law, the legal profession and their relationships to society as a whole is gradually being augmented.

One of the major contributions to this increased knowledge comes from the literature of ethnology. Operating in a substantial

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5. Riesman, Law and Social Science, 50 Yale L.J. 636 (1941).
8. Ter Haar, Adat Law in Indonesia (1948).
number of comparatively simple cultures, anthropologists have been able to provide the breadth of more or less independent observations that the student of comparative legal systems finds difficult to locate among the major nation-states of contemporary society. The methodological problems of comparative anthropology are by no means simple; but, in principle, the observations reported in field studies of pre-literate societies provide one of the richest sources of comparative material currently available for the study of social institutions. Ethnology is not the only source of such material, of course, and in frequent instances is not the most appropriate. But it is something that cannot be ignored by the student concerned with the legal process.

Into this hopper of anthropological research Professor Max Gluckman has thrown a study of the Barotse, a major African society.10 It is the first of a proposed triad by the same author that will eventually (as presently projected) include books on the role of Barotse courts in the social life of the culture and on the central ideas of jurisprudence in the society. The methods and other details of the study are sketched below. It may be desirable before proceeding to such specifics, however, to mention briefly the ethnological literature dealing with primitive legal systems on the one hand and the legal and legal-philosophical literature dealing with contemporary systems on the other. Such a review is particularly appropriate for the consideration of Professor Gluckman’s treatise because it lies in both traditions and vigorously attempts to fuse them. In this sense, the volume is patently an ambitious one.

It is impossible to discuss in detail and uneconomically to make more than a quite limited list of the studies of specific primitive legal systems that are currently available. A recent bibliography by Hoebel11 cites specific studies of legal institutions in the cultures of the Haya, Ifugao, Kalinga, Mathona, Hopi, Akan, Bantu, Segedi, Bapedi, Pima, Comanche, Shona, Nuer, Abelam, Yurok, Naskapi, Cheyenne, Malabar, Nabaloi, Iroquois, Tlingit, Dinka, Tsonga, Ashanti, Kiowa, Moro, Tswana and Chibcha. In addition, there are a number of studies in which particular features of substantive law are considered in comparative terms.

The most distinctive feature of these studies (taken as a body—there are some exceptions) is that they represent manifestations of a point of view that identifies anthropology as primarily, if not exclusively, a descriptive science. The observational skills of the individual writers can vary substantially, but the goal implicitly accepted by virtually all of them is to make a photographic image of the phenomena as they occur in the culture under examination. The methodological problems as they perceive them are the problems of observation rather than the problems of inference, interpretation or theoretical conceptualization. There is, of course, always the problem of inference implicit in any attempt to determine legal rules on the basis of case histories or the information gathered from informants. Typically, however, the inference is consciously limited. The observation that in a particular situation divorce occurs with social approval leads to the inference that under other “comparable” situations divorce will also be approved. At best, such studies can identify those characteristics of legal situations that the members of the society deem to be generally and legitimately relevant. At worst, they can artificially impose on the interpretation of the culture the unique artifacts of Anglo-Saxon or European law. With varying success, they attempt a codification of the customary law.

Recently, an attempt has been made by Hoebel to draw together several of the better case studies into a comparative treatment.12 Relying extensively on previous field work by himself and others, Hoebel formulates several propositions concerning the historical development of law and the function of law in society. However, except for a few points in terminology, Hoebel does not relate his book and the empirical information contained in it to the tradition of legal inquiry into the legal process that has recently been dominant within the ranks of the practitioners of the art.

To be sure, the Darwinism of Hoebel does reflect interests that have motivated legal scholars. Maine is the most obvious name that comes to mind.13 And the interest in the function of law crops out frequently in legal literature—usually in a quasi-sociological, quasi-definitional, quasi-rationalizing way. But one can distinguish such general interests from the more specific intellectual debates that fill contemporary law journals. These lat-
ter discussions have been more concentrated on disputations over "sociological jurisprudence," "legal realism" and related aspects of applied positivism.

Legal scholarship of this variety has been sharply impaled on the goal of a normative solution to legal procedures. As in several other social sciences, most notably economics and political science, legal study has sought to understand the processes involved primarily in order to perfect them. Moreover, to paraphrase a remark made originally about studies of another institution, most studies of the judicial process have been made by individuals who either are, have been or wish they were judges. As a consequence, one must be somewhat careful about stating the character of the major disputes involved in contemporary legal theory and particularly to distinguish between the empirical and the normative aspects of those disputes. What is (or ought to be) the role of social attitudes in judicial determination? What is (or ought to be) the conception of "justice" held by judges? By non-judges? Is the law (ought it to be) certain in its applications? In general, what are (or ought to be) the factors involved in judicial decision-making?

Thus, we can distinguish what might be called the theory of jurisprudence, or judicial determination, from theories of the history and function of law as a social institution. In general, current interest in the legal profession appears to be focused on the former rather than on the latter. And from this point of view, Professor Gluckman's book is both more relevant to the student of legal processes and also a more ambitious attempt to span the gap between the legal theorist and the sociologist than is the work of Professor Hoebel. To whatever extent successful, Professor Gluckman seeks to apply his own intellect to the problems of jurisprudence against the backdrop of a specific case study of Barotse legal institutions.

Although one may perhaps quarrel with the judgment, it is not hard to see how A. L. Goodhart could, in good conscience, write in the foreword to the Gluckman study that "no legal philosophy, however pure or abstract, will in the future be able to disregard the facts which he has presented in so clear and convincing a manner." The author himself is appropriately more modest but notes that "most anthropological studies of law seem to me to have overlooked basic jurisprudential points." The judgment, with the usual mild exceptions, is correct. As a result, despite its title, The Judicial Process Among the Barotse is more than just one more addition to a catalog of anthropological case studies and raises more problems of genuine interest to legal theory than a typical anthropological study. It warrants consideration both on the level of an examination of the Barotse and on the level of jurisprudence.

II

As a case study, the study reflects research Professor Gluckman executed on field trips to Northern Rhodesia in 1940, 1942, 1944 and 1947. Its focus is on the central political-legal institution of the Lozi, the dominant group among the Barotse. This institution is the council, or kuta. Since so much of the discussion here depends on the character of this institution, it may be warranted to spend some time describing its constitution and operation. In fact, there exists a hierarchy of kutas through which appeals lie to the main kuta at one of the main capitals of the kingdom. However, for our purposes it will suffice to describe one of the main kutas since the important characteristics of their regional counterparts are similar.

A kuta, which is not simply a court since it has—or constituent parts of it have—both administrative and legislative functions to perform, consists of a group of office-holders who hold their positions in the kuta by virtue of their offices (to which they are named by the king acting in council) rather than specifically by virtue of attributes of their person. In general, there are three sets of councilors represented: First, there is a group of political leaders with wide general functions and powers, the indunas. The highest ranking induna is head of the kuta and (aside from the king) clearly the most powerful man in the group. Second, there are a number of "stewards," less powerful but still important individuals with more specific primary responsibilities concerned with the royal household. Third, there are the royal princes.

Case procedure can best be described in Professor Gluckman's own brief summary:

The litigants, supported by their witnesses and kinsmen, sit before the judges against the posts which hold up the roof. The plaintiff, with-


15. Id. at xxi.
out interruption, states his case with full and seemingly irrelevant detail. The defendant replies similarly. Their witnesses, who have heard their statements, then speak. There are no lawyers to represent the parties. The kuta, assisted by anyone present, proceeds to cross-examine and to pit the parties and witnesses against one another. When all the evidence has been heard, the lowest induna on the right gives the first judgment. He is then followed by councillors on the three mats (indunas, princes, and stewards) in ascending order of seniority across from one mat to the other, until the senior councillor-of-the-right gives the final judgment. This is then referred to the ruler of the capital, who confirms, rejects, or alters it, or refers it back to the kuta for further investigation and discussion. It is this final judgment by the last induna to speak which, subject to the ruler's approval, is binding.¹⁸

It is in the context of this specific institution that Professor Gluckman examines the judicial process of this particular society and against which he considers some central issues of legal theory. Since "process" is one of the magic words of contemporary social science, it is necessary to make specific what he means by the judicial process before one can anticipate adequately the foci of his attentions. This is particularly true because although the phrase is borrowed in its entirety from Cardozo¹⁷ and used in approximately the sense in which Cardozo used it, it represents a distinctly different type of interest than most sociologists, I daresay, would expect. By the judicial process Professor Gluckman means the mode of reasoning by which the kuta makes a judicial determination. This is clear both when he makes an explicit definition¹⁸ and where he differentiates it from an interest in judicial practice;¹⁹ it also seems to be the import of his somewhat more obscure discussions of the functions of the process.²⁰

In general, the goal is to identify a "system" of rules—some logical—which can "explain" the decisions reached by the kuta. Gluckman does not state his task in precisely those terms, but it seems fair to characterize it in such a manner. To what extent he recognizes the somewhat ambiguous position in which this places him as a student of human behavior is never quite clear. He consistently eschews recourse to anything except explicit motivational statements. Thus, the at-first-blush paralyzing observation that is made concerning his rules of motivational inference has to be examined in the light of his object.

As . . . [the significance of the case for certain royal rights] did not come to my mind, I feel it was not present in the minds of either judges or litigants. The sister and their sons did not plead this as a reason that they be allowed to fish the dams: and I therefore consider that we may conclude it was not significant in influencing the judges' decisions.²¹

Taken at face value, this is an incredible statement unless one is willing to reject out of hand virtually everything that is known about human motivation.²² Actually, in this case it is simply an explicit statement of the author's decision not to go beyond the manifest explanations for their behavior that the judges provide. Some of the other directions in which Gluckman might have gone are indicated below, but it is not the intention here to criticize the writer simply because he focused upon other aspects of the judicial decision-making than I might have. The intention, in fact, is quite the reverse. In order to meet the author on his own ground, it is necessary to be quite clear what he did and did not intend to interpret in his work. From Professor Gluckman's definition of the judicial process, it is plain that he operates in an area much closer to traditional legal theory than one would ordinarily anticipate in a volume such as this, and further from the currents of behavior theory.

To explore the judicial process as thus defined Professor Gluckman utilized two standard techniques of anthropological field research. He observed directly the actions of the kuta in a number of specific cases tried before it during his stay in Loziland. Thus, he attempted to record a complete transcript of a trial before the kuta—the pleadings, the testimony of witnesses, the examination by the judges and the opinions as they were offered. This, as he points out, was not ordinarily an easy task since, even ignoring the considerable language barrier, the transcription of spoken Lozi by hand (and without the benefit of shorthand) involves one in some type of condensation. The records of the trials that are presented in the book suffer from this problem; but they still represent a major advance over the type of case reporting that typifies early excursions of anthropologists into native courts.

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¹⁶. Id. at 15.
¹⁸. GLUCKMAN 218.
¹⁹. Id. at 32-33.
²⁰. Id. at 24, 49.
²¹. Id. at 105.
²². For an introduction to the literature on motivation, see Studies in Motivation (McClelland ed. 1955).
In addition to direct observation, Professor Gluckman relied on summaries of cases given to him by tribal informants and (to a much smaller degree) on responses to direct questions. As he points out, many of the studies of primitive law rely precisely on such summaries. But in the single case in which he makes a detailed comparison between the record of a trial as he made it and the summary provided him by a Lozi informant, there are striking differences in the narratives. The complicated question of perceptual bias that arises in this case need not be explored here in detail. Professor Gluckman is aware of the difficulties he faces in the analysis of his material, and his discussion is suitably cautious with respect to the persuasiveness of the data he presents.

In general, therefore, the methodology of observation and the interpretation of data is well above the acceptable level in anthropological research. The data give evidence of being carefully collected, carefully evaluated and carefully presented. It is true that Professor Gluckman, like many students of primitive people, appears to have identified closely with his subjects, a fact which draws him into occasional statements about which a less involved person might have exhibited less certainty. But, in general, the rose-colored glasses appear to affect primarily the obiter dicta of the book rather than the meat of its conclusions.

As a case study of the Barotse, therefore, the book is both an interesting and important contribution to legal ethnology. Insofar as one can judge from the text itself, it represents a judicious portrait of the Barotse kuta and its operation. As has been already indicated, however, the major import of the work is more than this. It represents an important attempt by a professionally trained anthropologist to elucidate the study of jurisprudence. This reviewer will perhaps be excused, therefore, if he devotes the remainder of his discussion not to the unique attributes of the Barotse and Professor Gluckman’s description of them but rather to the major problems in jurisprudence that he raises and to the answers he suggests.

III

What are these major problems? No one would be so foolish as to suggest the possibility of arriving at an exhaustive list of areas important in recent legal inquiry. The fundamental and/or esoteric debates that form the basis for those papers in legal journals that are not exhaustingly technical represent a broad range of interests; a fairly unsystematic search of them suggests the difficulty of providing a universally acknowledged definition of major foci. The well-read lawyer, if not an expert in any field, is at least a novice in many.

Nevertheless, there are some recurrent themes in recent treatments of jurisprudence that are sufficiently distinct as to be identifiably important. Not all of these themes are considered by Professor Gluckman, but a number of them are. In particular, the ones considered by him fall into a constellation of interests related to identifying the rules of judicial determination. Let me identify five problems that seem to me to include the major arguments made by Gluckman in his application of the Barotse data to the theory of jurisprudence.

Problem No. 1: To what extent are the features of the judicial process and legal reasoning invariant throughout the cultures of the world? Insofar as we can exhibit invariances we can claim a reasonable a priori case for the functional necessity of the procedures.

Problem No. 2: What is the role of certainty and uncertainty in the judicial process? The lawyer, in company with many other social scientists, is reluctant to abandon the “richness” of ambiguous concepts.

Problem No. 3: Is there room in a modern theory of judicial determination for such concepts as “justice” and “The Law”? The idealistic formulation of legal reasoning in terms of such concepts has recently been defended with renewed vigor against the positivist attack.

Problem No. 4: Granting that the norms of society do enter into judicial decision-making, specifically how do they enter? Until such specifics of application are defined neither the empirical nor the normative propositions implicit in sociological jurisprudence can have particular impact.

Problem No. 5: What are the relevant questions that research into the judicial process ought to answer? With the increasing

25. See, e.g., LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).
26. See, e.g., D’ENTREVES, NATURAL LAW (1951); Kesler, Natural Law, Justice and Democracy, 19 Tul. L. Rev. 52 (1944).
interest in research into the actual operation of legal institutions, the time is appropriate for an examination of the types of questions that can be properly and productively examined in such research.

I wish to examine each of these problems in turn in the remaining sections of this review.

IV

The day when it was fashionable—or even permissible—for one to dismiss casually the whole study of primitive societies as irrelevant for the analysis of contemporary institutions has, I trust, passed. In recent years careful comparative studies of primitive cultures have tested hypotheses based on, and generated new propositions for, other types of research. There is no reason to believe that legal institutions will not also be successfully analyzed by means of the same techniques. Insofar as this is possible, it will involve the establishment of connections between specific practices, institutions, etc. in primitive cultures and in contemporary societies. It will involve identifying a specific phenomenon in one culture and providing a rationale for believing that it is comparable to another specific phenomenon in the culture being compared. The student of comparative legal institutions and practices wishes, therefore, to be able to describe the extent of similarity between different cultures in terms of their legal systems.

Professor Gluckman’s study is not a major comparative study, but it does make a comparative analysis of the Barotse system on the one hand and the Anglo-Saxon and Roman systems on the other. And it does make some general propositions on the basis of comparison. In particular, Gluckman argues: “On the whole, it is true to say that the Lozi judicial process corresponds with, more than it differs from, the judicial process in Western society.” Since such a proposition raises some basic problems in comparative anthropology and comparative law, I think it warrants close attention. The sentence quoted above is the second sentence in Professor Gluckman’s concluding chapter. Similar sentiments are echoed in the foreword by A. L. Goodhart and in the squib on the fly-leaf of the book jacket. It is an appealing hypothesis that there exists a basic similarity between these two

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27. See, e.g., Simmons, The Role of the Aged in Primitive Society (1945); Writing a Child, Child Training and Personality (1953).
28. Gluckman 357.

apparently quite different cultures. Against the claims of cultural relativism, one can now cite the facts of intercultural similarity. It is so appealing that Professor Gluckman appears to be carried away at one point when he writes, “I am delighted in every way that this report bears witness to some similarities of social life everywhere, and to the basic similarity of all human beings in very varied conditions.”

What are the similarities on the strength of which the basic isomorphism between the Barotse judicial process and that of Western societies is established? First, Lozi judges utilize the same sources of law as those appealed to by Western judges. They rely on statute, legal precedent, social custom, natural laws and conceptions of equity. The statutes (excluding those of the British which fall into a special case) are largely unwritten but, at least the major ones, are recognized as specific statutory law to be interpreted and followed. Precedents include previous decisions of the kutas and specific instances of praiseworthy behavior on the part of individuals. The former are not recorded and tend to be remembered only vaguely. The latter tend to be of considerable importance.

Second, they utilize a series of rules comparable to standard rules of Western court procedure. They receive testimony from the parties under criteria of relevance, credibility and cogency. They distinguish direct, circumstantial and hearsay evidence. They insist that both sides be heard in court.

Third, they utilize a number of judgmental criteria and presumptions well known to Western law. The concept of the “reasonable man” permeates the system. They do not recognize action arising from an immoral agreement and leave the parties as they stand in cases of equal guilt. In general, they operate under a presumption of innocence in criminal or quasi-criminal cases.

On the other hand, another impressive list of differences between Western law and the procedures and law of the Barotse can also be found in Professor Gluckman’s description. The law on which they rely is largely unwritten. They have little statutory interpretation in the Western sense. Cases are heard without benefit of counsel and without formal pleadings. There is no fiction of judicial ignorance. The rules of relevancy pertaining to evidence are substantially different from the rules of Western courts.

29. Id. at 327.
In the light of these similarities and differences, what can be said concerning Professor Gluckman's judgment that the Barotse judicial process is more like Western systems than it is different? I wish to argue two points. First, the proposition itself is in principle an extremely tenuous one and borders on meaninglessness. Second, the evidence cited by the author gives only weak support to the proposition when it is put into meaningful form.

What does it mean to say that object A is more like object B than it is unlike object B? Let me pursue this question by posing a specific example. I will advance the following proposition: On the whole, it is true to say that an umbrella corresponds with, more than it differs from, a blackboard. In support of the proposition, I can note that there are three fundamental similarities between an umbrella and a blackboard. First, they are both manufactured. They do not grow naturally nor can their growth be stimulated by artificial means. Although the process of manufacture differs in detail in the two cases, it involves in both cases the transformation of raw materials into a finished product. Second, both an umbrella and a blackboard are primarily utilitarian in use. It is true that the aesthetic qualities of umbrellas and blackboards are sometimes noted, but in neither case is an aesthetic raison d'être claimed. Third, both objects are essentially two-state objects. An umbrella can be either up or down; a blackboard either written on or erased. Other comparatively minor similarities might be added.

On the other hand, it is true that in some relatively unimportant respects the umbrella and the blackboard differ. The specific use by means of which their utilitarian character is manifested differs somewhat. Ordinary umbrellas are typically a different size from ordinary blackboards and almost always assume a different general shape. A blackboard is usually heavier than an umbrella.

The point need not be labored. Between any two objects one can cite a whole class of similarities and dissimilarities. Similarly between any two legal systems one can identify any number of similarities and any number of dissimilarities. To form a plausible-sounding case for the converse of Professor Gluckman's proposition one need change not a single bit of the evidence he adduces. All that is necessary is to alter slightly the literary form of the presentation.

In part, this is unfair to Professor Gluckman's point, however, since the author introduces another factor in support of his position that the similarities are more fundamental than the differences. The argument can be paraphrased as follows: In studying the Barotse, an attempt was made to identify the fundamental characteristics of the system. Independently, others have attempted the same job with respect to Western systems, particularly in the United States. Not only, Professor Gluckman argues, do I find a set of similarities between the two systems but I also find that those similarities occur on characteristics that have independently been deemed basic to the respective systems.

Put in terms of the umbrella-blackboard example the argument is that if two independent judges characterized the important aspects of these objects and then compared notes, and if they then found similarities between these important aspects, a more significant result would be obtained than in the case of arbitrary listing by a single observer of similarities and dissimilarities. The argument, of course, has merit; but one must be a bit cautious in defining the nature of that merit. The reported fundamental attributes of an object are clearly a function of the observer as well as the object. One can almost conceive of two economists independently characterizing the umbrella and the blackboard and arriving at a description of fundamental attributes that would be quite consistent with the earlier discussion with respect to their basic similarity, since the attributes cited above "fit" into the standard economic categories. But if the objects were described by two psychiatrists, one can just as easily imagine arriving at quite the opposite conclusion since the latent sexual symbolism in the umbrella is striking whereas little comparable symbolic import is manifest in the blackboard.

Thus, the proposition is relative to the frame of reference of the observers. Moreover, in order for it to be legitimate even to that extent certain conditions must be met. "Important" and "unimportant" attributes must be unambiguously identified by the independent observers. Agreement must be general throughout the "important" attributes, not restricted to a few of them. In the present case, it is not at all clear that either condition is successfully met.

For the moment, however, let us suppose that the comparison

30. Ibid.
was made much more carefully than it, in fact, was. Let us suppose that Gluckman and Cardozo agreed, in advance, on a set of attributes with respect to which they would examine the two systems—Barotse and American. And let us suppose that they agreed, in advance, on a set of weights to be attached to these various observations. Then within those constraints they could give some meaning to a proposition that implied quantitative features to a two-object comparison. Although it is not logically necessary, one would normally expect that the attributes would be of such a character that it would be possible to imagine a system that did not conform to them. If the attributes are so general as to permit any set of facts to be made to conform to them, the meaning of "similarity" tends to vacuousness.

It is on this latter score that Professor Gluckman runs into further difficulty even after other problems are assumed away. He recognizes the fact that on the basis of surface characteristics it is not obvious that the similarities between Barotse proceedings and Western proceedings are dominant over the dissimilarities. Consequently, he seeks to probe deeper and go beyond such "superficialities." In particular, he seeks to define the inherent "logic" of the system. Most generally, the logic he discovers is in Lozi courts certain antecedent conditions (which can be called "facts") are transformed by certain rules (which can be called "laws") into outcomes (which can be called "decisions"). Indeed, he finds that this process seems to be implicit in many processes that are not usually considered as judicial in nature. But Gluckman has cut too deep. Not only does his "logic" cover the cases he cites, but it also covers, or can be made to cover, the specific counter-example he mentions and indeed virtually any decision-making process one wants to identify. Recently, students of decision-making have been pointing out that there are analytical similarities between a wide range of types of decisions. These similarities bear a substantial resemblance to the similarities that Gluckman pinpoints. If "precedent" can be expanded to include in

31. Id. at 224–25.
32. Id. at 225. The case suggested is one in which one party can prevail simply by stating unilaterally a right and defending it by force. In such a case the "facts" are that Party A claims X. The "rule of law" is that if A (being a party with superior force) claims X, he gets it. The "decision" is that A gets X.

stances of praiseworthy behavior on the part of members of the society, it can certainly cover also the prior experience of a rat in a T-maze.

That these similarities between different decision-making situations are important for decision theory is true despite the extreme generality of their formulations. But one should be hesitant about using them to prove important propositions. Their status is rather that of underlying analytical categories. Whenever we observe a decision-making situation, we will attempt to identify certain specific attributes of that situation that can be treated as instances of a particular type of variable. Thus, we observe whether in one system what has been identified as a "precedent" contributes to the outcome in the same manner as what has been observed in another system. To take a somewhat comparable case from the physical world, it is quite important for theory that both mass and distance can be expressed in terms of real numbers; and once they are so expressed, they can both be subjected to the same mathematical operations. But one would feel constrained to put severe limitations on the proposition that, therefore, mass and distance are basically similar. They are, but in a very special way which makes each in turn also basically similar to any other attribute that is open to real number measure.

The point to all this is not simply that a specific book appears to be weak in this respect. Rather it is that there is a basic issue in the methodology of comparative anthropology or comparative jurisprudence that warrants some discussion. First, a comparative science must escape from the tyranny of "essences." At a suitable level of generality all things are "essentially the same." An attribute that does not differentiate among the objects being examined has some uses of the type previously indicated; but for many of the purposes to which we ordinarily apply comparative analysis, it is useless. For example, the "logic" of the decision-making process does not provide an answer to the following question: Which is more like Western judicial decision-making—the Barotse judicial system or an IBM 701 electronic computer? In general, in comparative analysis we wish to be able to scale items in terms of their similarity to a standard item. This means that although we may feel a desire to avoid simple-minded comparisons of obvious explicit characteristics, a flight to too great generality vitiates the entire project.
Second, comparisons in comparative jurisprudence (as in any other comparative science) are relative to a specific list of attributes. There are an infinite number of possible properties on which objects can be compared out of which typically only a quite limited number are (or can be) chosen. Stated thus baldly, the statement seems trivial. Yet it is violated repeatedly not only in the book presently under discussion but also in a variety of other comparative studies. The English scholar cites a long list of linguistic similarities between sections of Chaucer and an obscure French poet and concludes that Chaucer must have read the French writer’s works. The economist reports a number of isomorphisms between the business statistics of 1927–28 and 1947–48 and makes an appropriate prediction. Examples could be multiplied easily.

One of the reasons why comparative jurisprudence is not always entirely satisfactory is that there is little agreement on what are the relevant attributes on which to make a comparison. This, in turn, seems to stem from ambiguity about what is to be done with the comparison after it is made. Depending on one’s attitude toward such things, the reaction to being told that things are “basically similar” may be joy, nausea or some intermediate sentiment; but ordinarily such stimulation of affect is not the reason for pursuing the comparison. So long as the motivating force is simply intellectual curiosity, any set of attributes will satisfy as well as any other. But if we have any long-run pretensions to the pursuit of knowledge, the comparison process serves primarily as a mode of establishing a ranking of items in terms of a specific variable that enters into a theoretical scheme. Since students of comparative jurisprudence are not always explicit in their research goals, they have difficulty in anchoring the set of attributes on which they compare systems to a suitable rationale.

V

Although the comparative aspects of Professor Gluckman’s book are important, much of the discussion of basic legal problems can be treated without any specific reference to the problems of comparative analysis. Among these, one of the major contributions attempted is an examination of the roles of certainty and uncertainty in the judicial process. The basic proposition is that the certainty of the law is maintained by the uncertainty of its concepts, and considerable time and effort are devoted to this paradox. As Professor Gluckman points out, the problems associated with the ambiguity of central concepts in law have concerned students of jurisprudence for many years. On that score, if on no other, his attempt to resolve the problem deserves attention.

Before proceeding to a consideration of the elements of Professor Gluckman’s analysis, however, a brief note is in order since it may shed light on some of the peculiarities of that analysis. Like many other scholars, Professor Gluckman has what might be called a passion for paradoxes. In the present work, in addition to the proposition above, we are told that the Barotse have a conception not only of the reasonable, ordinary man but also of the “reasonable wrongdoer”; and that because in the kuta legislature and court are inseparably bound, a complete dichotomy is made between legislation and adjudication. In another work, Professor Gluckman has argued that frequently peace is maintained through ceremonial violence. There is nothing wrong with paradoxes; one is quite prepared to believe that something appealing most strongly to one’s common sense is more common than sensible. But because of the strength of their appeal, paradoxes must always be somewhat suspect. They are a bit like the surprise ending in the mystery story. Improbable things do happen, but they are improbable. Consequently, one is justified in being somewhat skeptical when one suspects that this most appealing disease has infected a scholar.

With such preliminaries aside, we can consider the Gluckman thesis. It faces up to the dilemma that has often plagued legal theorists. The dilemma can be stated in two propositions about the beliefs of participants in a society that Professor Gluckman shows are as common among the Barotse as they appear to be in Western societies. First, it is widely believed and frequently stated among laymen that the principles of law are well known, at least among lawyers and/or judges, precise and unchanging. As with many beliefs held by laymen about a specialized sector of society, this belief has been recorded by practitioners in the field with a mixture of reverence and cynicism. Legal scholars have

34. Gluckman 137.
35. Id. at 254.
been most hesitant in recording unambiguous judgments on the wisdom of such beliefs on the part of laymen, and the society of legal technicians taken as a group has certainly never presented a united front on the question. Second, it is widely believed and frequently stated that the outcome of specific legal litigation is chancy. In terms of the facts that are ordinarily considered relevant by a lawyer (i.e., the facts that might go into a legal brief), the result of legal action is predictable only within very large limits of error. In short, law is both certain and uncertain.

As Professor Gluckman points out, a number of students of jurisprudence have commented in wonderment at the way in which those legal concepts that are *prima facie* most fundamental are also the most general and vague in their definition. Others, belonging primarily to the realist school, have made a full scale attack on the ambiguity of basic legal concepts. Professor Gluckman’s position is neither. As he writes,

At least the juristic sociologist—and the sociological jurist—cannot merely castigate semantic weakness in forensic argument; he must examine the role of these obscurities in the social process. They may be generally—as often they are, patently, politically—useful. It may be that the very nature of the judicial process prevented judges from adopting wholesale Hobbes’ attempt to clarify the conception of rights and duties, though this would not deny its value for jurisprudential analysis.

It is Professor Gluckman’s contention that the generality of concepts and the uncertainty of application have an important function in legal reasoning. He argues that it is possible to construct a hierarchy of concepts within a system of legal reasoning such as either that of the Barotse or that of Western society. Each concept at a given level secures its operational meaning from concepts at a lower level that are attached to it in a specific case. Consider, for example, the definition of “domicile” in Anglo-Saxon law. The case is analogous to the relationship between pure mathematics and applied mathematics. Pure mathematics exists as a logical system subject to the rules of logic but not open to change on the basis of empirical data. Applied mathematics, however, requires the specification of a set of critical correspondences between observable phenomena and formal items in the mathematical analysis. The “fit” of the empirical world to the mathematical model is subject to investigation and a particular model may be rejected as not “fitting,” although the mathematics of the model itself is not thereby questioned. The same model or mathematical proof may be given any number of empirical referents.

In the social sciences a number of such “certain” concepts of multitudinous reference can be found. In economics, the concept of profit maximization in the theory of the firm is of this character. In psychology, the benthamite pleasure-pain calculus and its more modern counterparts tend to be of this character. The concept of freedom in political science, of reference group in sociology and of diffusion in anthropology frequently tend to be in each case the *sanctum sanctorum* of a system of analysis. Like legal concepts, each of these concepts maintains itself in part by the ease with which it assimilates unto itself as many empirical referents as are necessary to keep the propositions utilizing the concepts inviolate.

With respect to legal concepts, the point has been made before. It is frequently alleged, for example, that one of the reasons for the survival of the United States Constitution lies in the generality of its language. The argument probably has some merit, though it occasionally lapses into an excessively legalistic analysis of historical events. More generally, as Professor Gluckman points out, in a legal system—as in any analytical system that comes very easily to mind—we can distinguish rules for determining what part of the system has to be sacrificed in the face of difficulty. One of the foundations for uncertainty in litigation is that the identification of specific referents for the basic concepts is not given the same sanctity that the basic rules are afforded. One of the consequences of this uncertainty is that the need to alter the basic rules arises only rarely. In this way, the basic rules are “certain” and the Gluckman thesis is correct.

In two respects, however, the seductiveness of the paradox tends to conceal its meaning. The first arises from the somewhat unusual notions of “certainty” that are involved. When we say in this context that the basic legal rules are certain although their specific referents are indeterminant, what have we said? Specifically, what is certain? Consider one of the better known examples of legal uncertainty—the fourteenth amendment to the

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40. *Id.*
41. *Id.* at 330.
42. See, e.g., BROGAN, POLITICS IN AMERICA 33 (1954).
United States Constitution, in particular the clause: "... nor shall any state deprive any person of life, liberty, or property, without due process of law." This particular rule is "certain." No court will negate it. However, as any person even mildly interested in constitutional interpretation can report, the concepts of "person," "deprive," "property" and "due process of law" have all had long histories of uncertainty with respect to their referents. The rule that is certain, therefore, can be rephrased as follows: "No $u$ shall be $x$ of $y$ without $w$, where $w, x, y, z$ can assume any values within a wide range." The due process rule can do most wondrous things without changing its literary form.

The semantic attack on legalisms is well known, and Professor Gluckman properly points out that the sociologist's objective is to explore the consequences of these verbal ambiguities rather than poke fun at them. But his analysis suffers from his failure to pursue it beyond this point. Granting that one of the consequences of uncertainties at the level of specific cases is that judges and lawyers can mouth the same words ad infinitum, so what? I would suggest that the "paradox" is either itself a play on words or simply a proposition in phraseology. My suspicions that it is the former stem from the fact that Professor Gluckman does not pursue the implications of the stability of phraseology and from a revealing concluding observation by him. "I hope my flexible use of 'certainty' here does not negate entirely the value, or the resolution, of this paradox." For reasons perhaps related to the paradoxitis previously mentioned Professor Gluckman has been induced to enter into a discussion that makes sense only as it mirrors at the conscious level the unconscious motivations of the legal profession. Consequently, although his analysis is based on a sound treatment of the interplay between basic concepts and empirical referents, his conclusion is couched in terms of a problem that is virtually meaningless.

The second way in which the general discussion of this "paradox" in the context of the social role of legal ambiguity leads to unwarranted conclusions stems from the obscurities of functional analysis. Since he is considerably more careful in this respect than are many persons operating in the same tradition, Professor Gluckman should not be considered as the major object of these comments; although some of his remarks are subject to unfortunate misinterpretations by the unwary.

Imagine that we are given a social system (e.g., a nation-state) which, in order to survive, must satisfy certain requirements specified by its environment. As observers of this social system, we can perhaps identify these requirements and the institutions through which they are met. We can then say that the function of an institution from the point of view of the society is the satisfaction of a particular survival requirement. Similarly, we can identify sometimes the functional needs of any given institution (i.e., those requirements that must be met for it to survive as an institution) and the mechanics by which they are met. However, sloppy linguistic habits plus an underlying rationalistic bias can transform this reasonable analysis into a series of unjustified statements.

A full discussion of the problems of functional sociology is not in order here, but one specific type of fallacy requires discussion because it is one into which participants and students of the legal process can easily fall. Professor Gluckman's propositions about the interrelationship between concepts and referents are functional statements with respect to the survival requirements of specific legal institutions. Although he never presents his propositions in quite this form, I think it is fair to him to state his proposition as being that flexible uncertainty in legal concepts is a necessary condition for the survival of legal institutions. Note that this is not the same proposition as one with which it might be confused, to wit, that flexibility in law is a necessary condition for the survival of the society. Professor Gluckman occasionally appears to confuse these two propositions," but his evidence bears only on the first—not on the second. To cite a somewhat inflammatory analogy, if we can imagine a disease that makes the consumption of human flesh mandatory for the survival of an individual inflicted, it would be legitimate to say that such a diet was functional from the point of view of the individual. But it does not appear to follow directly that cannibalism would be functional for the society to which the individual was attached.

The second type of confusion that lurks beneath the discussion of legal adaptability is equally striking. Even if we conclude that

43. Gluckman 326.
44. Books and notes on functional analysis can be found throughout recent anthropological and sociological literature, starting with the works of Malinowski and Radcliffe-Brown. For a useful introduction to the pitfalls of functionalism, see Minton, Manifest and Latent Functions, in Social Theory and Social Structure 21 (1949).
45. Gluckman 330, 333.
flexibility in law is necessary for the survival of society, it does not necessarily follow that the specific institutions we observe fulfilling this function in a particular time and place are the only institutions that can do so. The functional necessity of institutions is an extremely difficult proposition to establish. Even if cannibalism is functional for a society, it is not obvious whether judges should prepare the menu or be on it.

This last point is important in view of the implicit assumptions one encounters in the literature of sociological jurisprudence and legal realism. I daresay most people would probably concede that flexibility in the norms of relationships among members of a society is both necessary and desirable. I do not mean to imply that there is no disagreement on this point or even that the proper position is trivially obvious. But it does seem to me that there are few current writers who argue that society should have no mechanisms for effecting changes in the system. Nevertheless, the burden of the argumentation among recent legal scholars appears to be on this point. This in itself is not particularly significant except insofar as the evidence on this point is taken as evidence for the quite separate point that the judicial system should form a conscious mechanism for inducing change. It probably is not true that all that lies between Western society and damnation are the courts. It may not be true that the courts form the best defense against damnation. Worst of all, it may not even be true that a conscious contribution on the part of the courts is even a positive aid to that defense. In the long run, society may be better off if the courts behave more like automatons and less like gods even though society requires somewhat different behavior somewhere in the system.

I do not mean to commit myself (having learned the danger of commitment long ago) on the question raised above. It does seem important, however, to insist that functional analysis such as that practiced by Professor Gluckman and the quasi-functional arguments of recent legal scholars be closely defined. The language of such studies is so appealing—and so ambiguous—that it frequently confuses basic issues in jurisprudence.

VI

If one restricts his attention to only certain parts of the Gluckman thesis, much of what has been said does not apply to him. What is unfortunate about the volume is that unexceptionable statements gradually slip over into questionable judgments and irrelevant dicta. This becomes quite clear when one considers the extension of the certainty-uncertainty analysis into a discussion of “justice” and “The Law.” Professor Gluckman argues that Cardozo has failed to distinguish two different tasks performed by judges, the first being the support of “The Law” and the second the giving of “justice” in specific cases. His problems arise in his explication of “justice” and “The Law.” These concepts permeate the book, although explicit meanings for them must be pulled together from a number of passages and from the context in which they are used.

The search for the ethical laws of nature has recently been re-instituted by natural law philosophers after a fairly brief period of containment by positivist sentiments. Similarly, in anthropology the extreme positions of cultural relativism are undergoing re-examination, and some attempts are being made to discern universal ethical rules by means of comparative anthropology. In Professor Gluckman’s work one can literally see this struggle going on.

Let me illustrate this by reference to the statement about Cardozo made above. What is meant by the “maintenance of ‘The Law’”? I will suggest two possible meanings, either one of which will find some support in the book under examination and in the general literature of jurisprudence. First, “maintenance of ‘The Law’” can mean the reinforcement of the popular belief in the certainty and majesty of judicial pronouncements. On this showing, “The Law” is a myth, but a useful one from the point of view of society and legal institutions. Even if it is not true, it is important to believe that there is something other than air in the gilt package labeled “Law.” Second, “maintenance of ‘The Law’” can mean the defense of a set of underlying ethical principles upon which the social order is based. As has been indicated above, Pro-

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46. See e.g., LASSWELL, Legal Education and Public Policy, in THE ANALYSIS OF POLITICAL BEHAVIOR 21 (1948), and the works cited therein.
47. Ibid. See also FRANKFURTER, The Zeitgeist and the Judiciary, in LAW AND POLITICS 3 (1939).
fessor Gluckman’s resolution of the certainty-uncertainty paradox makes very little sense at all if this second meaning is attached to “The Law.” On the other hand, Professor Gluckman himself is extremely reluctant to embrace the first meaning.

Time after time in the book we are given testimony in support of the fact that most people among the Lozi believe that there exists a certain body of rules—“The Law”—that judges ought to, and usually do, enforce. Interestingly enough, almost all of the citations on this point are made in the context of the reports of the uncertainty of litigation. That is, the clear implication is that despite all evidence to the contrary, people believe in “The Law.” Moreover, this belief extends to the judges and influences their behavior. Members of the kuta believe that they should and do pursue “The Law”—even when they change it considerably to fit a particular case—and their behavior is different from what it would be if they did not believe this to be their function. The general conclusion reached is that “the certainty of law in a stable society is a fact accepted by almost all members of the society.”

But somehow Professor Gluckman balks, at least partially, at the Frank conclusion that this reflects simply a widespread myth. The most explicit basis for his testimony is given in a series of statements that I feel I must report verbatim for fear of misrepresenting them.

These propositions raise fundamental epistemological problems of how rules exist, in which I do not need, as an anthropologist, to become involved. I consider that it is sufficient for me to state that empirically law, both in its most general sense as a corpus juris and also as particular legal rules, influences the behavior of both Lozi judges and public. The rules of law are spoken in everyday relationships and in judgments, and some exist as widely known maxims. They form a large part of my field data. Indeed, it is a fact of everyday common-sense experience that there is law in the general sense as a body of rights and duties. As Durkheim said of religion in a similar context, “a human institution cannot rest upon an error and a lie.”

I will submit that the whole of the first part of this passage begs the question it is designed to answer. There is little dispute (and certainly none from Frank) that people in general and judges in particular believe that there is something called “Law” that exists in the abstract, that is certain despite the uncertainty of specific applications, and to which obedience is due. That there are a set of maxims that are characterized as “The Law” few people will deny. But the essential point that Professor Gluckman wants to make against Frank (since there is no argument at a different level) must be precisely an epistemological one. In fact, the striking feature of the series of sentences quoted above is that they begin by assuming the question of epistemology and conclude by attempting to settle it by a short aphorism that given any halfway reasonable interpretation is untrue and not representative of Durkheim to boot.

On his own evidence, Professor Gluckman simply cannot do anything but support the general position that he apparently finds disagreeable. The result is a curious mixture of empirical generalizations concerning the Barotse with which one can take little exception and ambiguous interpretations that one can only find somewhat frustrating.

A similar malaise affects the treatment of the concept of justice. Throughout the book it is argued both that the concepts “just” and “unjust” have meaning to the members of the society so that they can evaluate judges and decisions as being just or unjust and also that such concepts have sufficient clear empirical content as to permit generalizations of the following sort: “I never heard, or recorded for the past, an inequitable decision in favour of the powerful by the whole kuta.” Is the concept of equity so precise as to permit one to offer such statements as meaningful ones? In particular, to what extent are judgments on the “justice” of court decisions simply convenient intra- and inter-personal devices for avoiding the conflict implicit in the enforcement of injustice? Insofar as they are the latter we should expect to find that perceptions of the justice of a decision would be primarily ex post with respect to the actual determination of the kuta. A most telling comment in this regard is Professor Gluckman’s own observation on his perceptions: “Though I had made a detailed study of Lozi custom, as I sat in court I occasionally felt myself forced into thinking ‘not proven,’ or so bewildered that I could not sort out the truth.

51. See pp. 517–18 supra.
52. GLUCKMAN 203, 239.
53. Id. at 234.
54. Id. at 352.
55. FRA K, LAW AND THE MODERN MIND (1930).
56. GLUCKMAN 348. But see id. at 353.
57. Id. at 352.
58. Id. at 218.
most invariably as the judges expounded their reasons, I found these were sound.\textsuperscript{59}

Suppose that you were to ask me at the close of a trial and before the judge or jury delivered a verdict, "What do you consider to be the relative justice of the possible verdicts?" And suppose that I replied that I could not say until after I had heard the court's decision. Could one not make a reasonable inference that my "sense of justice" was significantly dependent on the court's ruling? Actually, Professor Gluckman reports that the Lozi are generally more discriminating than he, and do distinguish "just" and "unjust" decisions. But he does not provide sufficient information on these discriminations for one to determine what sorts of factors are at work. Consequently, the determinants of the sense of justice that he reports remain ambiguous.

It is true that where part of the judgment process is the creation of alternative verdicts, the ex post character of justice perception may have more than one explanation. Judges may suggest alternatives that were not perceived, and therefore not evaluated, by the observers; and Professor Gluckman presents some evidence for this phenomenon.\textsuperscript{60} But the whole phenomenon of rationalization through the perception of justice after the fact is one that entirely escapes the author's attention.

I do not mean to imply that a sort of moral nihilism is required by the student of the sense of justice; but it does seem "just" to insist that a certain amount of sophistication about the factors influencing individual perceptions be reflected in treatments of this phenomenon of the judicial process. In this respect, as in many others, Professor Gluckman does substantially improve on the writings of many persons working in the same area. But, after all, that is rather a weak standard; and we can legitimately insist on more.

If I understand recent writers who wish to save the terms "Law" and "justice" from the positivist hell of meaninglessness, they do not intend to accomplish this feat by means of metaphysical wizardry but rather through forms of analysis which, while not completely acceptable to the empiricist, are at least more consistent with his framework than earlier explications. It would be a task well worth doing if someone with such an orientation were to take the data and impressions of Professor Gluckman and recast them into a more consistent analysis of "justice" as a concept for jurisprudence.

VII

If the discussion of the roles of "justice" and "The Law" in the judicial decision-making process is unclear, most of the comments on the ways in which social norms impinge on judicial decisions fortunately are not. Professor Gluckman is at his best when he is closest to the empirical data with which he is familiar, and his investigation of this feature of the Barotse system is quite rewarding.

It has now become quite customary to allege that courts are sensitive to public opinion, the social mores in which they operate. But few students of the process of judicial decision-making have gone beyond something comparable to Mr. Dooley's famous observation that the Supreme Court follows the election returns.\textsuperscript{61} Such general statements may have some debating value with anyone so unaware as to deny them, but insofar as sociological jurisprudence has pretensions to the serious study of the process, it must go considerably beyond the general proposition. The ubiquity of social norms makes necessary a careful specification of the mechanisms through which they operate.

Characteristically, Professor Gluckman somewhat detracts from his analysis by an attempt to include virtually the entire discussion under a single rubric, which thereby becomes almost meaningless. Moreover, he further confuses the issue by providing a label for that rubric that has extensive connotations in Western law—the "reasonable man." At the risk of being ungenerous, I would suggest that the frequent use of the term "reasonable man" by Professor Gluckman is simply rhetoric related to his unfortunate attempt to strengthen his claim of a "fundamental similarity" between Lozi and Western law. The similarities between the systems lie in the procedures used, and the extension of the "reasonable man" concept to many types of reasoning not ordinarily considered part of the concept in Western law simply confuses the issue.

If one ignores this blight in the presentation (an exercise of discipline undoubtedly easier for the non-lawyer than for his legal cousin), Professor Gluckman's description sheds considerable light on the process of judicial reasoning. His analysis points to three ways in which social norms enter into the reasoning (considered

\textsuperscript{59} Id. at 95.
\textsuperscript{60} Id. at 189.
\textsuperscript{61} F. Dunne, Mr. Dooley: Now and Forever 162 (1954).
abstractly) of judges in the Lozi courts: as a determinant of what behavior ought to be punished, as basis for the evaluation of testimony and as a structure within which inference from testimony to unobserved events can be made. I know of no other study in which these processes are delimited so neatly or in which the operation of norms through them in a particular instance is indicated so clearly.

Consider first the determination of punishable wrongs on the basis of norms. This is probably the effect that is most clearly brought to mind by the general proposition concerning the relationship between norms and judicial behavior. Judges bend the legal requirements for action to conform to the standards acceptable to the society within which they operate. Professor Gluckman focuses attention on two attributes of this process that are sometimes forgotten. First, generally and most particularly in a society having clearly defined social positions, norms are relative to the role being performed.62 The function that relates group approval to individual behavior or attributes is distinctly different for different roles. As a result, the judicial system treats differently with the same behavior according to its determination that the individual is acting in one role or another.

In addition, Gluckman distinguishes—though not quite in these terms—different shapes of group approval functions and different critical values in such functions.63 Suppose that we imagine a plot of group approval against an individual attribute. Then we can imagine a number of different types of norms and variations in the slope of the plot near the ideally preferred value. As Professor Gluckman points out it is necessary to separate norms with sharply peaked graphs (i.e., those in which small deviations from the norm result in substantial loss of approval) from those with more gentle approaches to maxima (where small deviations result in only small loss of approval).64 A taxonomy of norms that does not recognize this type of distinction will be of little use to legal science, or to almost any science that uses the norm concept. More important, a theory of norms is badly needed that not only recognition this distinction but also explains why some norms assume one form and some another.

With respect to critical values on group approval functions, Gluckman reports that the Barothe differentiate the model of the upright man from the model of the man of sense.65 Roughly this conforms to a distinction between the model citizen and the modal citizen and seems to imply that there are critical values in a group approval function, perhaps characterized by approximate discontinuities. The naive view of social norms as reflecting either approval or disapproval of behavior is replaced by a recognition that a society typically distinguishes between its requirements for membership and its requirements for sainthood.

The second way in which social norms enter into judicial determination lies in the evaluation of testimony. In a general sense, this belongs to the section on inference below, but with respect to estimating the truthfulness of testimony it can be considered separately. The norms of Barothe society are permissive with respect to lying in only special circumstances. Specifically, although it is not clearly "approved," it is permissible to lie in one's own testimony if one is accused of wrongdoing and also in testimony given in the trial of a relative. The society in general and the kuta in particular are generous in the latitude they allow individuals placed in such difficult positions, and expect that ordinarily the testimony of a defendant and his relatives will be untruthful if the truth would be damaging to the case.66 As Professor Gluckman correctly points out, such judgments on the part of the kuta are clearly dependent on a particular constellation of attitudes in the society and could be replaced by quite different presumptions if the social norms were altered somewhat.

Because of the presumptions with respect to the truthfulness of the testimony of a party to a dispute and his relatives, there is an asymmetry about the value placed on such testimony. Where testimony supports the apparent interests of the party concerned, it may or may not be true and is given little weight. Where testimony fails to support the apparent interests of the party concerned (e.g., where a witness testifies that his relative is in the wrong), it is almost certainly true and is given considerable weight.67 Such

62. The particularism-universalism dimension of social norms has recently been re-emphasized in the sociological theory of Talcott Parsons. See Parsons, The Social System (1951). Among the Barothe where norms tend to be particularistic, the importance of this distinction for legal analysis is clarified.
63. See March, Group Norms and the Active Minority, 19 AM. SOCIOL. REV. 733 (1954).
64. GLUCKMAN 155.
65. Id. at 125.
66. Id. at 93, 131.
67. Id. at 110.
presumptions are not unknown to the Western lawyer certainly (consider the different credence given to a plea of "guilty" as opposed to a plea of "not guilty" by a defendant), but their familiarity should not be allowed to conceal the extent to which they are based on commonly shared assumptions about human motivation that are treated by the judicial system as laws of behavior comparable to the physical laws of the universe as understood by the society.

Finally, the norms of the society are used generally for purposes of inference in much the same way as they are used for purposes of validating evidence. Professor Gluckman's report on the Barotse gives abundant evidence for the extent to which the structure of circumstantial evidence is based on elaborate sets of expectations concerning human behavior that comprise a substantial part of the norm structure of the society, and reminds one of the sometimes forgotten similar dependence in Western law. The kuta uses socially determined assumptions concerning the amount of time that should elapse between specific actions in the marriage contract, concerning the sexual implications of the form of gift-giving and behavior in crossing a river, and concerning the behavior of an unjustly accused person. It infers from the fact that a man carried the dress of a woman across a river that he had intercourse with her, and from the fact that a decision was not appealed that it was correct.

The judges observe what they are permitted to observe and make inferences from those observations about behavior they have not observed. The inferences are based on the rules of social behavior. Note in particular here that given the social norms among the Barotse and the stability of the system, all of the inferences mentioned above are very likely to result in quite valid conclusions, although at least some of them would be dubious in contemporary American society. It would be interesting to explore the extent to which the rules of judicial inference from circumstantial evidence practiced by juries and judges in Anglo-Saxon courts would be invalid in the kuta, because of their dependence on social norms not shared by the two cultures. As a priori need, one wished he knew a great deal more about how Anglo-Saxon juries and judges do, in fact, reason from circumstantial evidence.

Finally, it may be well to point out that although the Gluckman analysis advances knowledge with respect to the integration of social norms and judicial determination, it leaves a great deal unexplored. Most strikingly, the study of the impact of norms must advance beyond the stage of simply observing instances in which they have effect. Specifically, which norms have what effect in what circumstances? Where there is a conflict of norms, what determines a choice among them? Where individual behavior cuts across normatively established stereotypes, what determines the response of judges to that behavior?

VIII

The last few points made with respect to the research needs of the study of judicial decision-making form a reasonable background for a general examination of the question. Up to this point, I have tried, admittedly with only partial success, to meet Professor Gluckman and the range of interests he represents on their own ground because I have considerable sympathy with his plea when he quotes a quip by Israel Zangwill: "I have... to apologize to my critics for this book not being some other book, though it shall not occur again, as my next book will be." Consequently, I have attempted to defer my comments on the subject of "what was not covered but might have been" until this section.

The student of judicial decision-making faces a situation familiar to any scientific study of a decision-making organization or organism. Essentially, we observe the output of the judicial system in the form of decisions made by the courts, and we seek a theory that will permit us, on the basis of some observable variables, to predict future outputs within a reasonable range of error. The problem for the student of legal processes is to identify the relevant variables to be considered and to define a function that will transform their values into the decisions rendered by the legal system.

It is obvious that for any unique decision a function can be defined after the fact that makes that decision a function of any set of antecedent conditions one wishes to specify. Thus, if one wishes
to do so, he can "explain" any judicial decision in terms of legal precedents, social attitudes, the basal metabolism rates of judges or some combination of these. Any given instance has an infinite number of "explanations" that are consistent with the data. Because there are so many such \textit{ex post} hypotheses in the repertoire of any reasonably imaginative person, we rightly conclude that the probability of any one of them being confirmed ultimately is relatively small compared to the probability of confirmation attaching to hypotheses that are both consistent with the outcome and also were formulated before the fact.\textsuperscript{73} Laymen as well as scientists are somewhat skeptical of theories having little predictive power.

In general, it is true that theories of legal determination have little predictive power. Although law journals are filled with complex analyses of past decisions, they are conspicuously void of predictions concerning specific future ones. I am aware that any lawyer can make successful predictions concerning some possible cases and that some lawyers can do so over a wide range of situations. At the extremes, it is rather general knowledge whether a given set of facts does or does not constitute "a case." But all of the observations on all sides concerning the chances of litigation give testimony to the fact that over a considerable number of circumstances a predictive theory does not presently exist.

On the surface, it seems unlikely (though possible) that a predictive theory of judicial action can be constructed exclusively on the basis of the variables utilized in most theoretical treatments of court decisions, to wit, the rationale for the decision explicitly provided by the judges and the implicit "logic" inferred therefrom. In fact, of course, similar doubts about the predictive potentialities of such variables have been standard throughout the legal profession for some time.\textsuperscript{74} Unfortunately, however, the search for alternative models of judicial decision-making has not proceeded much beyond a preliminary, programmatic stage. One notable recent exception is the Chicago Law School project for the study of jury behavior which, in addition to its ill-fated eavesdropping

on federal juries, has utilized an assortment of experimental and semi-experimental techniques for observing jury activities. In the early unpublished reports of the Chicago group there have been reported some highly interesting tests of common aphorisms concerning the behavior of juries.

What are some of the alternatives to the theory of judicial reasoning? The type of theory most frequently suggested—and mentioned briefly in Professor Gluckman's treatise\textsuperscript{75}—would relate the behavior of judges, juries, etc. to their personalities, prior experiences, social group identifications, etc. For example, Professor Gluckman records his impression that a judge who had been plagued by troublesome children of his own tended to discriminate against children who were alleged to have mistreated their parents, and that a judge who was excessively jealous of his own wife was more likely to convict on charges of adultery than were his associates.\textsuperscript{76} Similarly, biographical-interpretive reports on assorted judges have to varying extents attempted to interpret a judge's activities on the bench in terms of such variables.\textsuperscript{77} Although some of these attempts are manifestations of behavior theory at its worst (frequently representing an extreme bastardization of psychoanalytic theory), one should not be lulled into belittling the attempt to understand the judicial process by understanding the motivations and pressures on the participants.

Such a study, however, cannot succeed unless students of the legal process are prepared to go beyond casual analysis. To cite a quite comparable area of interest, there has been for some time a general proposition in political behavior theory that hypothesized a relationship between individual characteristics and voting habits; but it has only been recently when detailed multivariate analysis has been introduced that anything even remotely resembling a theory of voting behavior has been possible.

In addition, a theory of individual predispositions, important as it is, is not the only type of theory that is necessary. Most obviously, there are a set of variables of interpersonal influence associated with the decision procedures themselves. Individual judges

\textsuperscript{73} This type of argument, common in most elementary texts on scientific methodology has recently been given a more careful exposition than usual in Simon, \textit{Prediction and Hindsight as Confirmatory Evidence}, 22 \textit{Hum. Sci.} 227 (1955).

\textsuperscript{74} See, e.g., \textsc{Frank, Law and the Modern Mind} (1930).

\textsuperscript{75} Gluckman 322-23.

\textsuperscript{76} Id. at 322.

\textsuperscript{77} See, e.g., \textsc{Mason, Brandeis: A Free Man's Life} (1946); \textsc{Purdy, Charles Evans Hughes} (1951).
and individual jury members do not render responses in a booth cut off from the rest of the world. They are part of a differentiated decision-making group operating in the context of a larger social system. Where are the models of behavior within this decision structure? The Supreme Court and a grand jury are both small groups. They have unique features to be sure, but the mode of approach presently being used in small group research is, within limits, usable in the investigation of legal institutions; and some of the empirical results and theoretical models may well carry over directly.

Let me illustrate the type of investigation I have in mind by considering the Barotse kuta. It will be recalled that kuta procedure involves questioning by judges during the trial period. During this questioning stage, participation in the process is at the option of the judges. Subsequently, there is a decision period during which the judges announce their decisions in order beginning with the lowest status judge and ending with the highest status judge, with only the decision of the latter “counting.” It will be noted that from the point of view of the explicit situation much of this procedure seems exceptionally pointless. In particular, what is the function of the “irrelevant” judgments announced by the lesser judges? The whole procedure can be viewed in the same terms as a committee discussion in a less structured situation. The leader—the highest ranking judge—is not simply recording his judgment. In particular, were we able to perceive his private judgment at the end of the trial and before the first judge’s decision, we would expect it, at times, to differ from the judgment he finally renders. Similarly, any judge other than the first is reacting not only to the record of the trial but also to the announcements of the preceding judges.

The decisions arising from such a situation will presumably only be explicable if variables explicitly introducing interpersonal influence through social interaction are utilized. Moreover, it will be noticed that here we have in a “real world” situation something almost directly comparable to the Asch experiments on perception. Professor Gluckman has recorded some of the trials with sufficient detail to give a flavor of this process in action, but his focus is not on the social influence process involved. As a result, the data relevant for such an examination are not all recorded.

Suppose that we had a decision situation in which each member of the court had to choose among a fixed set of alternative decisions, e.g., “guilty” or “not guilty.” Then it might be reasonable to use a working model in which each judge’s decision is represented as a function of the preceding decisions. Presumably, we would anticipate a model in which the weights attached to the several antecedent decisions would be larger for more recent decisions than for earlier ones. In the Barotse case we would expect such a characteristic of the weights for at least three reasons. First, the more recent decisions are fresher in a given judge’s mind. Second, the more recent decisions are those of higher status judges. Third, the more recent decisions already reflect the previous ones. In any event, it is at least conceivable that a study of the ordering of decisions would permit some estimation of the coefficients in the model, or alternatively might suggest another possible model of the process. In either case, the study of the decision process would not only shed light on the particular case but would be potentially an important source of information for general decision-making theory.

Moreover, situations such as these are not limited to cultures such as that of the Barotse. Although it may be a few weeks before it is open to complete investigation along these lines, one of the most intriguing subjects for a study of social interaction is the United States Supreme Court. Hopefully, the Chicago studies will provide important information on the interaction within a jury. A moment’s reflection will suffice to recall a number of other legal institutions in which opportunities for subtle influence through communication explicitly directed to other purposes are obvious. These cues provide an important part of the environment to which participants in the process react, and they represent aspects of the situation that deserve at least some attention on the part of theorists of the judicial process.

Finally, I should like to call attention to a phenomenon that has frequently been ignored in decision-making theory, not only of the judicial variety but of other varieties as well. It is frequently tempting to construct a model with the assumption that all of the alternatives are given. That such a model conforms to many social situations is quite readily conceded. However, it does not conform
to all situations. In decisions by judicial institutions, as in decisions by other institutions and by individuals, it is frequently the case that search for new alternatives is possible. Professor Gluckman provides a striking example of a judge who solved a serious problem for the kuta by creating an alternative not previously considered by the other judges.\(^7\) Once one recognizes that this additional dimension is frequently present, he can direct attention to a host of important theoretical problems in the analysis of influence. Under what conditions will an institution or an individual attempt to expand the set of alternatives considered? What are the mechanisms that induce the acceptance of a new alternative? Who is likely to pose new alternatives? What are the higher mental processes involved in “discovering” alternatives?

The judicial process affords an important area in which to explore these fundamental questions, and the questions themselves are intrinsically important to the understanding of that process. For example, I would hazard the guess that a great deal of what is commonly called judicial brilliance on the part of judges can be traced to an unwillingness to be limited to a defined set of alternatives and an ability to escape such limits when this appears necessary.

Although for the reasons previously mentioned it is not a basis for legitimate criticism on my part, I am disappointed that Professor Gluckman did not attempt to exploit the Barotse data along these lines. More important, I hope it is neither hopelessly presumptuous nor entirely fanciful to imagine the day arriving when distinguished students of law and distinguished law journals will devote serious attention to developing and testing a theory of individual and group decision-making in a legal context. When this day arrives, research on the judicial process will form an important basis for the general theory of interpersonal influence and will foreshadow a behavioral legal theory. To be sure, such expectations involve the considerable risk of assuming similarity between the subject matter of interest to the legal scholar and the foci of his brethren in the behavioral sciences. But, after all, it is probably true to say that judges correspond with, more than they differ from, people.

\(^7\) Gluckman 189.