THE EMERGENCE AND TRANSFORMATION OF DISPUTES: NAMING, BLAMING, CLAIMING . . .

WILLIAM L.F. FELSTINER
RICHARD L. ABEL
AUSTIN SARAT

The emergence and transformation of disputes, especially before they enter formal legal institutions, is a neglected topic in the sociology of law. We provide a framework for studying the processes by which unperceived injurious experiences are—or are not—perceived (naming), do or do not become grievances (blaming) and ultimately disputes (claiming), as well as for subsequent transformations. We view each of these stages as subjective, unstable, reactive, complicated, and incomplete. We postulate that transformations between them are caused by, and have consequences for, the parties, their attributions of responsibility, the scope of conflict, the mechanism chosen, the objectives sought, the prevailing ideology, reference groups, representatives and officials, and dispute institutions. We believe the study of transformations is important. Formal litigation and even disputing within unofficial fora account for a tiny fraction of the antecedent events that could mature into disputes. Moreover, what happens at earlier stages determines both the quantity and the contents of the caseload of formal and informal legal institutions. Transformation studies spotlight the issue of conflict levels in American society and permit exploration of the question of whether these levels are too low.

I. INTRODUCTION

The sociology of law has been dominated by studies of officials and formal institutions and their work products. This agenda has shaped the way disputes are understood and portrayed. Institutions reify cases by reducing them to records; they embody disputes in a concrete form that can be studied retrospectively by attending to the words used by lay persons and officials and by examining the economic and legal context in which cases occur (Danzig, 1975). But disputes are not things: they are social constructs.[1] Their shapes reflect

[1] Viewing cases as things creates a temptation to count them. But we must be careful in doing so, because litigation rates, like crime rates (see Black, 1970), can be "produced" and manipulated (Seidman and Couzens, 1974). Recognizing this pitfall, researchers in many countries have sought to describe the universe of disputes by examining "legal needs" (see Baraquin,

LAW & SOCIETY REVIEW, Volume 15, Number 3-4 (1980-81)

whatever definition the observer gives to the concept.[2] Moreover, a significant portion of any dispute exists only in the minds of the disputants.

These ideas, though certainly not novel, are important because they draw attention to a neglected topic in the sociology of law—the emergence and transformation of disputes—the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding.[3] Studying the emergence and transformation of disputes means studying a social process as it occurs. It means studying the conditions under which injuries are peceived or go unnoticed and how people respond to the experience of injustice and conflict. In addition, though the study of crime and litigation rates seems to be derived from and to support the conviction that both are too high—that there is a need for more police and longer prison terms (Wilson, 1975; Wilson and Boland, 1978; cf. Jacob and Rich, 1980), that the courts are congested with "frivolous" suits (Manning, 1977)—the study of the emergence and transformation of disputes may lead to the judgment that *too little* conflict surfaces in our society, that *too few* wrongs are perceived, pursued, and remedied (cf. Nader and Singer, 1976: 262).

Our purpose in this paper is to provide a framework within which the emergence and transformation of disputes can be described. The history of the sociological study of disputing displays a backward movement, starting with those legal institutions most remote from society—appellate courts—and gradually moving through trial courts, legislatures, administrative agencies, prosecutors, and the police to a focus on disputes and disputing in society and the role of the

---

1975; Cass and Sackville, 1975; Curran, 1977; Royal Commission on Legal Services, 1979; Royal Commission on Legal Services in Scotland, 1980; Colvin *et al.*, 1978; Schuyt *et al.*, 1978); Tieman and Blankenburg, 1979; Valétas, 1976). Yet these studies also reify the social process of disputing since the measure of need invariably reflects the researcher's theory and values, thereby necessarily distorting the social landscape of disputes (see Lewis, 1973; Griffiths, 1977; 1980; Marks, 1976; Mayhew, 1975).

[2] Another way to define disputes is to adopt the definitions of civil or criminal law, in which case we will see the social world through the eyes of the existing political structure. Such a view accepts conventional understandings as adequate and conventional ideas of justice as acceptable. Alternatively, we can resist the temptation to impose ourselves on the people we study and attempt to learn how disputants themselves define their experiences. Each of these approaches has important consequences in the study of disputing.

[3] We have not, of course, invented either the field or the term "transformation." For earlier discussions, see particularly Aubert (1963), Mather and Yngvesson (1981), and Cain (1979).

citizenry in making law.[4] The transformation perspective places disputants at the center of the sociological study of law; it directs our attention to individuals as the creators of opportunities for law and legal activity: people make their own law, but they do not make it just as they please.[5]

II. WHERE DISPUTES COME FROM AND HOW THEY DEVELOP

We come to the study of transformations with the belief that the antecedents of disputing are as problematic and as interesting as the disputes that may ultimately emerge. We begin by setting forth the stages in the development of disputes and the activities connecting one stage to the next. Trouble, problems, personal and social dislocation are everyday occurrences. Yet, social scientists have rarely studied the capacity of people to tolerate substantial distress and injustice (but see Moore, 1979; Janeway, 1980). We do, however, know that such "tolerance" may represent a failure to perceive that one has been injured; such failures may be self-induced or externally manipulated. Assume a population living downwind from a nuclear test site. Some portion of that population has developed cancer as a result of the exposure and some has not. Some of those stricken know that they are sick and some do not. In order for disputes to emerge and remedial action to be taken, an unperceived injurious experience (unPIE, for short) must be transformed into a perceived injurious experience (PIE). The uninformed cancer victims must learn that they are sick. The transformation perspective directs our attention to the differential transformation of unPIEs into PIEs. It urges us to examine, in this case, differences in class, education, work situation, social networks, etc. between those who become aware of their cancer and those who do not, as well as attend to the possible manipulation of information by those responsible for the radiation.

---

[4] Studies of public knowledge and opinion about law are only partially an exception, for they relegate the public to a largely passive role as receptor of and reactor to law (see Sarat, 1977).

[5] Cf. Marx (1976: 72): "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given, and transmitted from the past."

Our perspective is influenced by the work of anthropologists who have observed forum choice in non-Western societies (e.g., Nader and Todd, 1978); economists concerned with responses to consumer dissatisfaction (e.g., Hirschman, 1970); and others who have measured or observed the way individuals manage personal problems (Gellhorn, 1966; Levine and Preston, 1970; Abel-Smith *et al.*, 1973; Morris *et al.*, 1973; Friedmann, 1974; Burman *et al.*, 1977; Smith *et al.*, 1979; Cain, 1979; Macaulay, 1979; Nader, 1980b).

There are conceptual and methodological difficulties in studying this transformation. The conceptual problem derives from the fact that unPIE is inchoate, PIE in the sky so to speak. It can only be bounded by choosing someone's definition of what is injurious. Frequently this will not be a problem. An injurious experience is any experience that is disvalued by the person to whom it occurs. For the most part, people agree on what is disvalued. But such feelings are never universal. Where people do differ, these differences, in fact, generate some of the most important research questions: why do people who perceive experience similarly *value* it differently, why do they *perceive* similarly valued experience differently, and what is the relation between valuation and perception? From a practical perspective, the lack of consensus about the meaning of experiences does not interfere with any of these tasks, since their purpose is to map covariation among interpretation, perception, and external factors. But if, on the other hand, the research objective is to provide a census of injurious experiences, then the lack of an agreed-upon definition is more serious. In a census, the researcher must either impose a definition upon subjects and run the risk that the definition will fail to capture all injurious experience or permit subjects to define injurious experience as they wish and run the risk that different subjects will define the same experience differently and may include experiences the researcher does not find injurious.

The methodological obstacle is the difficulty of establishing who in a given population has experienced an unPIE. Assume that we want to know why some shipyard workers perceive they have asbestosis and others do not. In order to correlate perception with other variables, it is necessary to distinguish the sick workers who do not know they are sick from those who actually are not sick. But the very process of investigating perception and illness by inquiring about symptoms is likely to influence both. These social scientific equivalents of the uncertainty principle in physics and psychosomatic disease in medicine will create even more acute problems where the subject of inquiry is purely psychological: a personal slight rather than a somatically based illness.

Sometimes it is possible to collect the base data for the study of unPIEs by means of direct observation. For instance, house buyers injured by unfair loan contracts could be identified from inspection of loan documents. On other occasions, hypotheses about the transformation of unPIE to

PIE could be tested directly by inference from aggregate data. Assume that 30 percent of a population exposed to a given level of radiation will develop cancer. We study such a group and find that only ten percent know they are sick. We hypothesize that years of formal schooling are positively associated with cancer *perception*. This hypothesis can be tested by comparing the educational level of the known ten percent with that of the balance of the population. For as long as schooling is not associated with developing cancer, the mean number of school years of the former should be higher than that of the latter. Nevertheless, in many cases it will be difficult to identify and explain transformations from unPIE to PIE. This first transformation—saying to oneself that a particular experience has been injurious—we call *naming*. Though hard to study empirically, naming may be the critical transformation; the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision (cf. Cahn, 1949; Barton and Mendlovitz, 1960). For instance, asbestosis only became an acknowledged "disease" *and* the basis of a claim for compensation when shipyard workers stopped taking for granted that they would have trouble breathing after ten years of installing insulation and came to view their condition as a problem.

The next step is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or social entity. By including fault within the definition of grievance, we limit the concept to injuries viewed both as violations of norms and as remediable. The definition takes the grievant's perspective: the injured person must feel wronged and believe that something might be done in response to the injury, however politically or sociologically improbable such a response might be. A grievance must be distinguished from a complaint against no one in particular (about the weather, or perhaps inflation) and from a mere wish unaccompanied by a sense of injury for which another is held responsible (I might like to be more attractive). We call the transformation from perceived injurious experience to grievance *blaming*: our diseased shipyard worker makes this transformation when he holds his employer or the manufacturer of asbestos insulation responsible for his asbestosis.

The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy. We call this

communication *claiming*. A claim is transformed into a dispute when it is rejected in whole or in part. Rejection need not be expressed by words. Delay that the claimant construes as resistance is just as much a rejection as is a compromise offer (partial rejection) or an outright refusal.

The sociology of law should pay more attention to the early stages of disputes and to the factors that determine whether naming, blaming, and claiming will occur. Learning more about the existence, absence, or reversal of these basic transformations will increase our understanding of the disputing process and our ability to evaluate dispute processing institutions. We know that only a small fraction of injurious experiences ever mature into disputes (e.g., Best and Andreasen, 1977: 708-711; Burman *et al.*, 1977: 47). Furthermore, we know that most of the attrition occurs at the early stages: experiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible. A theory of disputing that looked only at institutions mobilized by disputants and the strategies pursued within them would be seriously deficient. It would be like constructing a theory of politics entirely on the basis of voting patterns when we know that most people do not vote in most elections. Recognizing the bias that would result, political scientists have devoted considerable effort to describing and explaining political apathy (see Di Palma, 1970). Sociologists of law need to explore the analogous phenomenon—grievance apathy.

The early stages of naming, blaming, and claiming are significant, not only because of the high attrition they reflect, but also because the range of behavior they encompass is greater than that involved in the later stages of disputes, where institutional patterns restrict the options open to disputants. Examination of this behavior will help us identify the social structure of disputing. Transformations reflect social structural variables, as well as personality traits. People do—or do not—perceive an experience as an injury, blame someone else, claim redress, or get their claims accepted because of their *social position* as well as their individual characteristics. The transformation perspective points as much to the study of social stratification as to the exploration of social psychology.

Finally, attention to naming, blaming, and claiming permits a more critical look at recent efforts to improve "access to justice." The public commitment to formal legal equality, required by the prevailing ideology of liberal legalism, has

resulted in substantial efforts to equalize access at the later stages of disputing, where inequality becomes more visible and implicates official institutions; examples include the waiver of court costs, the creation of small claims courts, the movement toward informalism, and the provision of legal services (see R. Abel, 1979c). Access to justice is supposed to reduce the unequal distribution of advantages in society; paradoxically it may amplify these inequalities. The ostensible goal of these reforms is to eliminate bias in the ultimate transformation: disputes into lawsuits. If, however, as we suspect, these very unequal distributions have skewed the earlier stages by which injurious experiences become disputes, then current access to justice efforts will only give additional advantages to those who have already transformed their experiences into disputes. That is, these efforts may accentuate the effects of inequality at the earlier, less visible stages, where it is harder to detect, diagnose, and correct (cf. R. Abel, 1978: 339).

III. THE CHARACTERISTICS OF TRANSFORMATION

PIEs, grievances, and disputes have the following characteristics: they are subjective, unstable, reactive, complicated, and incomplete. They are *subjective* in the sense that transformations need not be accompanied by any observable behavior. A disputant discusses his problem with a lawyer and consequently reappraises the behavior of the opposing party. The disputant now believes that his opponent was not just mistaken but acted in bad faith. The content of the dispute has been transformed in the mind of the disputant, although neither the lawyer nor the opposing party necessarily knows about the shift.

Since transformations may be nothing more than changes in feelings, and feelings may change repeatedly, the process is *unstable*. This characteristic is notable only because it differs so markedly from the conventional understanding of legal controversies. In the conventional view of disputes, the sources of claims and rejections are objective events that happened in the past. It is accepted that it may be difficult to get the facts straight, but there is rarely an awareness that the events themselves may be transformed as they are processed. This view is psychologically naive: it is insensitive to the effect of feelings on the attribution of motive and to the consequences of such attributions for the subject's understanding of behavior (Loftus, 1978).

A focus on transformations also expands, if it does not introduce, the notion of *reactivity*. Since a dispute is a claim and a rejection, disputes are reactive by definition—a characteristic that is readily visible when parties engage in bargaining or litigation. But attention to transformations also reveals reactivity at the earlier stages, as individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behavior, and expectations of a range of people, including opponents, agents, authority figures, companions, and intimates. For instance, in a personal communication, Jane Collier has pointed out that "in hunter-gatherer societies a man cannot overlook his wife's infidelities or *other men* will begin to treat him as if he was unable to defend what he claimed as his. In agrarian societies, such as Spain, a man or woman cannot afford to overlook anything that might be construed as an insult to honor because *others* will then begin treating that person as if they had no honor" [emphasis added] (cf. Starr, 1978: 174-175).

Even in ordinary understanding, disputing is a *complicated* process involving ambiguous behavior, faulty recall, uncertain norms, conflicting objectives, inconsistent values, and complex institutions. It is complicated still further by attention to changes in disputant feelings and objectives over time. Take the stereotypical case of personal injury arising out of an automobile accident. A conventional analysis (e.g., the one often borrowed from economics) assumes that the goals of the defendant driver are to minimize his responsibility and limit the complainant's recovery.[6] A transformation view, on the other hand, suggests that the defendant's objectives may be both less clear and less stable. Depending on his insurance position, his own experience, his empathy for, relationship to, and interaction with the injured person, and the tenor of discussions he may have with others about the accident and its aftermath, the defendant may at various times wish to maximize rather than minimize both his own fault and the complainant's recovery or to take some intermediate position.[7] A transformation approach would seek to identify these

[6] Our point is not that economic *theory* would necessarily have any difficulty in coping with these complications or others, but that economic *analysis* as practiced often ignores them and is content with psychological oversimplification. See, e.g., Phillips and Hawkins, 1976.

[7] Automobile guest statutes, which make it difficult for a gratuitous guest injured in an automobile to hold his host liable for damages, were enacted with precisely these factors in mind. See *Brown* v. *Merlo* (106 Cal. Rptr. 388, Sup. Ct., 1973); *Schwalbe* v. *Jones* (128 Cal. Rptr. 321, Sup. Ct., 1976); *Cooper* v. *Bray* (148 Cal. Rptr. 148, Sup. Ct., 1978).

activities and their effects in order to account for such shifts in objective.

To grasp the role of an institution or official in an ongoing conflict, as well as the meaning and outcome of the conflict for the people involved, requires insight into the origins, context, life history, and consequences of the conflict—insight that can only be obtained from the participants. This is the theory of the extended case method in legal anthropology (see Turner, 1957; Van Velsen, 1964; Mitchell, 1956; Epstein, 1967). If to this view we add attention to transformations, we realize that the sequence of behaviors that constitute generating and carrying on a dispute has a tendency to avoid closure. People never fully relegate disputes to the past, never completely let bygones be bygones (R. Abel, 1973: 226-229): there is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, color later conflict. Furthermore, there is a continuity to disputing that may not be terminated even by formal decision. The end of one dispute may create a new grievance, as surely as a decision labels one party a loser or a liar. Even where such labeling is avoided, it is rare that any process explores and resolves all aspects of all disputant grievances, and new claims may emerge from the recesses of untouched dissatisfactions (see Turk, 1976: 286; Graber and Colton, 1980: 17).

IV. SUBJECTS AND AGENTS OF TRANSFORMATION

One way to organize the study of the transformations of PIEs, grievances, and disputes is to identify what is being transformed (the subjects of transformation) and what does the transforming (the agents of transformation). Unfortunately, it is not possible to present subjects and agents in a simple matrix, since every factor can be construed as both.

Parties

Neither the identity nor the number of parties is fixed. New information about and redefinition of a conflict can lead a party to change his views about appropriate adversaries or desirable allies. Both may also be changed by officials of dispute processing agencies. The new parties, especially if they are groups like the NAACP, ACLU, or Sierra Club, may adopt a lawsuit as part of a campaign to use the courts as a mechanism of social change (see Casper, 1972: ch. 5; Weisbrod *et al.*, 1978; Tushnet, n.d.) or to mobilize political activity (Handler, 1978), although social and political movements may also lose

momentum as a collective struggle is translated into an individual lawsuit (e.g., school desegregation; see Wollenberg, 1977). Parties may be dropped as well as added. A grievance that was originally experienced collectively may be individualized in the process of becoming a dispute; tort claims as a response to harm caused by unsafe conditions and disciplinary hearings as a response to labor disputes are examples.

Obviously, the parties to a conflict are central agents, as well as objects, in the transformation process. Their behavior will be a function of personality as it interacts with prior experience and current pressures. Experience includes involvement in other conflicts; contact with reference groups, representatives, and officials; and familiarity with various forms of dispute processing and remedies. For instance, among the newly enrolled members of a prepaid legal services plan, those who have previously consulted a lawyer are more likely to use their membership privileges than are those who have not (Marks *et al.*, 1974: 63-64). Personality variables that may affect transformations include risk preferences, contentiousness, and feelings about personal efficacy, privacy, independence, and attachment to justice (rule-mindedness). Both experience and personality are in turn related to social structural variables: class, ethnicity, gender, age (see Curran, 1977; Griffiths, 1977; Best and Andreasen, 1977: Table 15).

The relationship between the parties (cf. Black, 1973) also has significance for transformations: the sphere of social life that brings them together (work, residence, politics, recreation)—which may affect the cost of exit (see Felstiner, 1974: 79-80, 83-84)—their relative status (see Starr, 1978; R. Abel, 1979a: 245-246), and the history of prior conflict shape the way in which they will conduct their dispute. In addition, strategic interaction between the parties in the course of a conflict may have a major transformational role. An unusual example is the party who seeks proactively to elicit grievances against himself: the retail seller who asks purchasers about complaints (Ross and Littlefield, 1978: 202), the employer who provides an anonymous suggestion box, even the neurotic spouse or lover who invites recriminations. But more common are the new elements disputes take on, the rise and fall in animosity and effort that occurs in response to or in anticipation of the "moves" of the opposition.

Attributions

Attribution theory (see Kelley and Michela, 1980: 458) asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious. People who blame themselves for an experience are less likely to see it as injurious, or, having so perceived it, to voice a grievance about it; they are more likely to do both if blame can be placed upon another, particularly when the responsible agent can be seen as intentionally causing or aggravating the problem (see Vidmar and Miller, 1980: 576-577; Coates and Penrod, 1981). But attributions themselves are not fixed. As moral coloration is modified by new information, logic, insight, or experience, attributions are changed, and they alter the participants' understanding of their experience. Adversary response may be an important factor in this transformation, as may the nature of the dispute process. Some processes, such as counseling, may drain the dispute of moral content and diffuse responsibility for problems; others, like direct confrontation or litigation, may intensify the disputant's moral judgment and focus blame. Thus the degree and quality of blame, an important subject of transformations, also produces further transformations.

Scope

The scope of conflict—the extent of relevant discourse about grievances and claims—is affected both by the objectives and behavior of disputants and by the processual characteristics of dispute institutions. A hypothetical case frequently used in mediator training involves a man's wife and his lover. The wife has hit the lover with a rock, and the latter has complained to the police; at arraignment the judge has referred the women to mediation. The discussion there focuses initially on the rock incident and then expands to include the battle for the man's affections. The scope of this dispute is thus complicated by the confrontation between the women during the rock incident, narrowed to that incident alone as the dispute is handled by police and court, and then broadened to re-embrace the original conflict plus the rock incident through interaction between the disputants and the mediator. Some types of dispute processing seek to narrow the disputes with which they deal in order to produce a construction of events that appears manageable. Others are alive to context and

circumstance. They encourage a full rendering of events and exploration of the strands of interaction, no matter where they lead. The scope of conflict, in turn, affects the identity of the participants, the tactics used, and the outcomes that become feasible.

Choice of Mechanisms

The grievant's choice of an audience to whom to voice a complaint and the disputant's choice of an institution to which to take a controversy are primarily functions of the person's objectives and will change as objectives change.[8] Mechanisms may also be determined by exogenous factors such as the whims of court clerks (see Felstiner and Williams, 1980: 19; cf. R. Abel, 1969: Table III and accompanying text; 1979d: 188) and lawyers who prefer not to try cases (see Rosenthal, 1974: 110, 115) or who cool out consumers in order to maintain good relations with retailers (Macaulay, 1979: 137).[9] Once a mechanism—court, administrative agency, mediator, arbitrator, or psychotherapist—is set in motion, it determines the rules of relevance, cast of actors, costs, delays, norms, and remedies.

Objectives Sought

A party may change his objectives in two ways: what he seeks or is willing to concede and how much. Stakes go up or down as new information becomes available, a party's needs change, rules are adjusted, and costs are incurred. Delay, frustration, and despair may produce a change in objectives: victims of job discrimination frequently want the job (or promotion) or nothing at the outset but later become willing to settle for money (see E. Abel, 1981; Crowe, 1978). As Aubert (1963: 33) noted, the relationship between objectives and mechanisms is reciprocal: not only do objectives influence the choice of mechanisms, but mechanisms chosen may alter

---

[8] Objectives, on the other hand, will also be influenced by audiences. Lloyd-Bostock notes:

> It is not that the victim does not know his legal rights or how much he *could* receive. In a situation which is unfamiliar, he lacks specific norms of his own and does not feel competent to generate them for himself from more general principles because there is a range of possibilities. What he *feels* is, therefore, often largely the result of what his lawyer, trades union, the police, friends and others have suggested to him since his accident (1980: 24).

[9] To generalize, when clients encounter lawyers in one-shot relationships (e.g., divorce, criminal defense, personal injury), the lawyers' primary allegiance is often to others (insurance claims agents, police, judges, other lawyers), whereas clients who deal regularly with lawyers demand and receive greater loyalty (see R. Abel, 1981; Galanter, 1974: 114-119; 1981).

objectives. Because courts, for instance, often proceed by using a limited number of norms to evaluate an even more circumscribed universe of relevant facts, "the needs of the parties, their wishes for the future, cease to be relevant to the solution" (Aubert, 1963: 33). Even where a legal remedy is anticipatory—alimony, worker's compensation, or tort damages for future loss—the legal system frequently prefers to award a lump sum rather than order periodic payments. Finally, the experience of disputing may stimulate a participant to take steps to avoid similar disputes in the future, or to structure his behavior so as to place him in a stronger position should a dispute occur (e.g., Macaulay, 1966: 167, 204).

Ideology

The individual's sense of entitlement to enjoy certain experiences and be free from others is a function of the prevailing ideology, of which law is simply a component. The consumer's dissatisfaction with a product or service may have been influenced by the campaigns of activists, like Ralph Nader, who assert that consumers have a right to expect high quality.[10] Legal change may sometimes be a highly effective way of transforming ideology to create a sense of entitlement. This is the sense in which, contrary to conventional wisdom, you *can* legislate morality. Although it would be foolish to maintain that after *Brown* v. *Board of Education* every minority child had a sense of entitlement to integrated education, made a claim against segregation, and engaged in a dispute when that claim was rejected, surely this has happened more often *since* than before 1954. Following a recent television program in Chicago in which a woman subjected to a strip search during a routine traffic citation described her successful damage claim against the police department, *hundreds* of women telephoned the station with similar stories. In this instance, a legal victory transformed shame into outrage, encouraging the voicing of grievances, many of which may have become disputes. When the original victim chose a legal mechanism for her complaint, a collective grievance against police practices was individualized and depoliticized. When she broadcast her legal victory on television, the legal

[10] This belief may explain why consumers from higher socioeconomic strata exhibit a higher level of dissatisfaction with their purchases—it is not the goods and services that are worse but the expectations that are more demanding, partly as a result of the consumer movement which, in its composition, is exclusively middle-class. See Best and Andreasen (1977: 707-709).

dispute was collectivized and repoliticized. Ideology—and law—can also instill a sense of disentitlement. The enactment of worker's compensation as the "solution" to the problem of industrial accidents early in this century may have helped convince workers to rely on employer paternalism to ensure their safety and relinquish claims to control the workplace (Weinstein, 1967).[11]

Reference Groups

Disputes may be transformed through interaction with audiences or sponsors. A tenant's dispute with a landlord may be the cause around which a tenants' association is formed; a worker's grievance against a foreman may become the stimulus to a union organizing drive or a rank-and-file movement within an existing union. This transformation may not only make an individual dispute into a collective one: it also may lead to economic or political struggle displacing legal procedures. This is especially important in the remedy-seeking behavior of disadvantaged groups. The movement from law to politics, and the accompanying expansion of the scope of disputing, are prompted and guided by the reaction of a wide social network to individual instances of injustice. Absent the support of such a network, no such movement is likely to occur (Scheingold, 1974: ch. 12). Whether that support is provided depends on a number of independent variables: the subculture of the audience—which will define the experience as injurious or harmless, encourage or discourage the expression of the grievance, and prefer certain dispute processing strategies; and the social composition of the audience—whether it is made up of peers or superiors. These variables, in turn, are influenced by social structural factors—for instance, whether the network in which the individual is situated is open or closed (Bott, 1955). In an open network, where ego is related (separately) to the members but they are not related to each other, the audience is likely to respond individually, often seeking to resolve the dispute through the exercise of superordinate influence. In a closed network, where everybody is related to everybody, the likelihood of a collective response is much greater.

---

[11] OSHA, which is based on the proposition that private paternalism proved inadequate, may have the opposite effect (see, e.g., Mendeloff, 1979).

Representatives and Officials

Lawyers, psychotherapists, union officials, social workers, government functionaries, and other agents and public officials help people understand their grievances and what they can do about them. In rendering this service, they almost always produce a transformation: the essence of professional jobs is *to define the needs of the consumer* of professional services (Johnson, 1972: 45). Generally, this leads to a definition that calls for the professional to provide such services (Larson, 1977: xvii; R. Abel, 1979b: 86-88; Illich, 1977; 1980).

Of all of the agents of dispute transformation lawyers are probably the most important. This is, in part, the result of the lawyer's central role as gatekeeper to legal institutions and facilitator of a wide range of personal and economic transactions in American society (Parsons, 1962). It is obvious that lawyers play a central role in dispute decisions. Yet relatively few studies of lawyer behavior have been informed, even implicitly, by a transformation perspective (but see Blumberg, 1967; Macaulay, 1979; Cain, 1979; Rosenthal, 1974). We know more about the structure of the bar (see, e.g., Laumann and Heinz, 1977) and about particular ethical problems in the practice of law (see Carlin, 1966; Freedman, 1977) than we do about how lawyers interact with clients and what difference it makes.

Critics of professionals argue that they "create" at least some of the needs they satisfy (see, e.g., Illich, 1977). Lawyers exercise considerable power over their clients. They maintain control over the course of litigation (Rosenthal, 1974: 112-113) and discourage clients from seeking a second opinion or taking their business elsewhere (Steele and Nimmer, 1976: 956-962). There is evidence that lawyers often shape disputes to fit their own interests rather than those of their clients. Sometimes they systematically "cool out" clients with legitimate grievances. In consumer cases lawyers may be reluctant to press claims for fear of offending potential business clients (Macaulay, 1979).[12] In defending the accused criminal, lawyers may prefer negotiating a plea bargain to trying the case (see Blumberg, 1967: 110-115; see generally *Law & Society Review*, 1979). In tort litigation they prefer to settle, and may offer package deals to claims adjusters (see Rosenthal, 1974: 103; Ross, 1970: 82; Schwartz and Mitchell, 1970: 1133). In other

[12] For the inhibiting effect of such attitudes on *pro bono* representation, see Ashman (1972: 43); see generally Handler *et al.* (1978: ch. 5, 6).

cases they may amplify grievances: some divorce lawyers recommend litigation for which a substantial fee can be charged, rather than engage in difficult, problematic, and unprofitable negotiations about reconciliation (see O'Gorman, 1963: 146).

Lawyers may affect transformations in another way—by rejecting requests for assistance or providing only minimal help and thereby arresting the further development of a dispute, at least through legal channels. Limited data suggest that lawyers respond differently to different categories of clients. This differential lawyer response contributes to variation in dispute behavior between poor and middle class, corporate entities and individuals, normal and deviant, members of ethnic majorities and minorities, and young and old (Maddi and Merrill, 1971: 17-19; Handler *et al.*, 1978: ch. 5; Lochner, 1975: 449-453; Curran, 1977: 149-152).

Of course, lawyers also produce transformations about which we may be more enthusiastic. They furnish information about choices and consequences unknown to clients; offer a forum for testing the reality of the client's perspective; help clients identify, explore, organize, and negotiate their problems; and give emotional and social support to clients who are unsure of themselves or their objectives (see Mnookin and Kornhauser, 1979: 985).

One of the reasons that data about lawyers and dispute transformation are so incomplete and atheoretical is the paucity of observational studies of lawyer-client relationships.

> Research on lawyer-client relationships is long overdue . . . while there have been hundreds of studies of doctor-patient communication, including many which relied mainly on observation, there are hardly any parallel studies of lawyer-client communication. . . . Only about fifteen years ago did social scientists begin to investigate what lawyers do. . . . However, none of these studies emphasized direct observation of lawyers' handling of clients as the main topic and method of study. Rosenthal's more recent, pioneering research (1974) made lawyer-client relations its main focus, but it too employed interviews as the primary source of data (Danet *et al.*, 1980: 906).

Since Danet and her associates wrote these comments, two studies of lawyer-client relations have been published. Cain (1979: 335) reports that "in the sixty-seven of the eighty-two cases which I observed and recorded the client announced his need and set the objective for the solicitor." Her lawyers thus translated client objectives expressed in everyday discourse into legal language and, when successful, delivered the objective the client originally sought. The minority of cases in which the solicitor refused to accept the client's objectives are

explained (1979: 344) in terms of the practitioners' lack of professional integration and dependence upon a patron.

Macaulay's (1979) recent study of the way lawyers handle consumer problems with product quality reports quite different results. Macaulay suggests a civil equivalent to what Blumberg (1967) termed the "practice of law as a confidence game" in criminal courts. Consumers bring to lawyers their grievances against retailers based on lay perceptions of negligence, defect, or fraud. Most often the amount of money involved is relatively small. Typically (although not always) the lawyer "cools out" the client, convincing him or her that the grievance is not serious, cannot be remedied, or simply is not worth pursuing. "Those few [consumers] who do seek legal services will get only what the lawyer sees as appropriate—some will get turned away with little more than token gestures, while a very few will recover their full statutory remedies through legal action" (Macaulay, 1979: 130).

Enforcement personnel—police, prosecutors, regulatory agencies—may also produce transformations: seeking disputes in order to advance a public policy or generate a caseload that will justify increased budget demands; discouraging disputes because of personnel shortages; or selectively encouraging those disputes that enhance the prestige of the agency and discouraging those that diminish its significance or call for skills it lacks or are thought to be inappropriate (see Skolnick, 1966: 196; Wilson, 1975).

Dispute Institutions

The transformation effects of dispute institutions have been analyzed at some length (e.g., R. Abel, 1973). Courts, which fall at one extreme along most of the dimensions useful for describing dispute institutions, may transform the content of disputes because the substantive norms they apply differ from rules of custom or ordinary morality, and their unique procedural norms may narrow issues and circumscribe evidence.

> A highly personal and idiosyncratic situation from the point of view of the parties is . . . classified as an instance of a general category. . . . Once the issues are narrowed in this way there is no need to inquire into the general situation. . . . Most of the time . . . [what is preferred] is not to know why anything has happened, but rather *what* occurred, or even more narrowly, what can be *shown* . . . to have occurred (Moore, 1977: 182-183).

Courts may transform disputes by individualizing remedies.[13] Some of the victims of a defective product may want to force the manufacturer to alter the production process. But because courts award only money damages for unintentional torts, even those victims' concept of an acceptable outcome is transformed from a collective good (safety) into individual enrichment, a transformation greatly encouraged by the lawyer's interest in creating a fund out of which his fee can be paid.[14]

Because of the monopoly exercised by lawyers, the esoteric nature of court processes and discourse, and the burdens of pretrial procedure, the *attitude* of disputants may be altered by their minimal role in the courtroom and the way they are treated there (Simon, 1978: 98, 115). In effect, their "property" interest in the dispute is expropriated by lawyers and the state (Christie, 1977). The rediscovery of the victim in the criminal prosecution is one recognition of this. Furthermore, delays caused by court overload or foot-dragging by an adversary may transform what disputants would otherwise consider a useful procedure into pointless frustration.

The nature and potential transformational effects of courts can be seen best if we contrast litigation with another technique for handling conflict—psychotherapy. Like law, therapy individualizes conflicts and remedies. In most other ways, however, it sharply contrasts with courts and lawyers. Disputants are encouraged to describe the conflict and express their feelings about it in whatever terms they find comfortable. Since mental health professionals are trained to use anger to reduce hostility, disputants will not need to deny their feelings. The nonjudgmental posture and reflective responses of the therapist should provide emotional support for disputants, who are urged to examine the pattern of their own responses to the behavior of others. They may find, for instance, that progress toward a solution may be obstructed not by the dilatory tactics or opposition of an adversary but rather by their own reluctance to act. One objective of the process is to increase

---

[13] Even class actions are often merely collections of individual disputes, aggregated for reasons of convenience and efficiency, rather than a form of collective action aimed at achieving a group objective, such as a shift in control over production decisions.

[14] We acknowledge that in making money damages the quintessential remedy, courts are, in a sense, giving people what they "want." But what people "want" is powerfully structured by legal institutions and the media. Although it is difficult to document this process in action, we know that at the turn of the century, before money compensation for injuries was commonplace, workers demanded radical improvements in industrial safety, and only the intransigence of employers compelled them to accept the workers' compensation system instead (cf. Eastman, 1978).

the disputant's understanding of the motives, feelings, and behavior of others. Thus, where the outcome of successful litigation is usually an order directed to an adversary, the outcome of a successful psychotherapeutic intervention may be a change in the client.

In between courts and psychotherapy there are many other dispute institutions—arbitration, mediation, administrative hearings, and investigations—that use ingredients of each process in different combinations but always effect a transformation.[15]

V. THE IMPORTANCE OF STUDYING TRANSFORMATIONS

The study of transformations approaches disputing through individual perceptions, behavior, and decision making. Yet this perspective is useful in studying dispute institutions as well, since "broad patterns of court usage are created by the cumulative choices of individual actors" (Collier, 1973: 251; see also R. Abel, 1979d: 169). Other dispute institutions are also reactive, their caseloads largely determined by the decisions of individuals rather than by institutional planners (Felstiner, 1975: 699). Even proactive institutions are to some extent dependent upon the perceptions, grievances, and ongoing disputes within the population they seek to reach (cf. Black, 1973).

Because transformation studies begin with the individual, they enable researchers to examine perceptions, grievances, and conflicts that are never institutionalized as disputes (cf. Steele, 1977: 672-675). Unarticulated grievances, lumped claims, and bilateral disputes certainly are numerically more significant than are the cases that reach courts and administrative agencies but are rarely studied by researchers (but see Miller and Sarat, 1981; Strauss, 1978).[16] By directing attention to dispute antecedents, the study of transformations should illuminate both the ways in which differential

---

[15] Regardless of whether one is ultimately deterministic, random events necessarily play an important role in transforming *particular* experiences, grievances, and disputes.

> A third theme in Koch's review of disputes between neighbors is the importance of chance, of consequences which nobody intended becoming causes of further conflict which nobody sought. A few nuts are stolen, but no scuffle is intended; injuries occur, but no killing is intended; discovered trying to steal a pig in retaliation, the thief is killed . . . (Felstiner, 1976: 1020).

[16] Gulliver's recent book on negotiations (1979), for instance, does not even concern itself with disagreements until they have been transferred to a public domain. All of his references to disputes in the U.S. are labor cases submitted to government mediation.

experience and access to resources affect the number and kinds of problems that mature into disputes and the consequences for individuals and society when responses to injurious experiences are arrested at an early stage (e.g., depoliticization, apathy, anomie).

Evaluation research on the effectiveness of different forms of dispute processing would also be improved if it considered transformations. Conventional evaluation is inclined to explore the attitude of disputants when a process has run its course (see, e.g., Davis *et al.*, 1980b: 50, 54; Cook *et al.*, 1980: 45). Lacking a baseline—the content of the original problem, the nature of the claim as first expressed, or the earlier forms the dispute may have assumed—the evaluator cannot make an independent assessment of the final condition. Nor can one tell how far, at each stage, the process departed from some standard—what the disputant would have liked at that point or perhaps what a professional believes the disputant could have obtained (see, e.g., Rosenthal, 1974; Baldwin and McConville, 1977). This is not to say that the effectiveness of a dispute process is necessarily measured by its ability to uncover and deal with the origin of the dispute. The disputant may no longer view the original problem as important, since a central tenet of transformation theory is that a transformed dispute can actually become *the* dispute. But whether or not such a transformation has taken place, judgments about effectiveness could be improved by the detailed dispute histories that can best be captured by transformation studies.

Much research on disputing in the U.S. measures and explains decisions made by parties by interviewing participants after the dispute is over (see, e.g., Trubek, 1981). This methodology has important limitations, since it requires the respondent to recall the events of a terminated dispute (see Bohannan, 1957: vii). One problem is the distortion in recall when the respondent is questioned about motives and interaction. The errors arise less from the mechanical difficulty in remembering details of past events than from the tendency of subsequent experience to distort those memories. When asked to explain why he acted or failed to act, it is difficult for a respondent to formulate an answer that is uncolored by the consequences of the course he actually chose. Similarly, when asked what he expected an opposing party to do, a respondent's answer is likely to be influenced (to an unknown degree) by the actual behavior of the opponent. Yet such inquiries are necessarily central to an adequate explanation of

disputing behavior. Most steps in disputing have alternatives: whether to make a claim, hire a lawyer, accept an offer, appeal, prosecute, or mediate. The best available evidence of the dynamics of these decisions is likely to be the testimony of those who made them, but that evidence is unreliable if markedly retrospective. One aim of transformation research, therefore, is to produce direct and reliable data about motives and interactions by studying them contemporaneously. Only in this way is it possible to catalogue the antecedents of a dispute before the issue is publicly joined, to examine the form in which claims are made and, earlier still, the way in which grievances and injurious experience are first perceived.

Disputing involves the creation and revision of perceptions and attitudes about oneself, one's opponent, agents, dispute content, dispute process, and dispute institutions and personnel. Transformations result from these social psychological processes and are themselves responsible for some of them. Ruhnka and Weller (1979), for example, found that positive attitudes toward, and support for, small claims courts vary inversely with the extent of respondent's experience in such courts, and that this relationship is equally true for "winners" and "losers"; other researchers have found similar inverse relationships with attitudes toward other courts and lawyers (Curran, 1977: 234-239) and the criminal process (Casper, 1978; see generally Sarat, 1977). Transformation research, by focusing on agents and studying attitudes longitudinally, should be able to document this negative shift in opinion and develop hypotheses about *why* it occurs.

We noted earlier that transformation studies render problematic one of the most fundamental political judgments about disputing—that there is too much of it, that Americans are an over-contentious people, far too ready to litigate (e.g., Rosenberg, 1972; Ehrlich, 1976; Kline, 1978). The transformation perspective suggests that there may be too *little* conflict in our society. Many studies are "court-centered." They assess conflict from the point of view of courts which perceive their resources to be limited (cf. Heydebrand, 1979). From this viewpoint, any level of conflict that exceeds the court's capacities is "too much." Things look very different, however, if we start with the *individual* who has suffered an injurious experience. That is what the transformations point of view makes us do. It encourages inquiry into why so few such individuals even get some redress. So the transformation perspective naturally prompts questions that have been largely

ignored thus far: why are Americans so slow to perceive injury, so reluctant to make claims, and so fearful of disputing—especially of litigating?[17] One hypothesis tentatively advanced in some early research is that the cult of competence, the individualism celebrated by American culture, inhibits people from acknowledging—to themselves, to others, and particularly to authority—that they have been injured, that they have been bettered by an adversary (e.g., Best and Andreasen, 1977: 709; Menkel-Meadow, 1979: 40).[18]

Transformation studies should also enable us to be more specific about the "culture" of different dispute processing agents and institutions (cf. Friedman, 1969). For instance, the conventional wisdom maintains that divorce lawyers exacerbate conflict, mistrust, and stress. The current interest in custody mediation is more a reflection of skepticism about the usefulness of lawyers (and the adversary process that is their stock in trade) than a failure of confidence in the wisdom of family court judges. Yet *all* lawyers do not mismanage custody cases. Transformation studies that observe lawyer-client interactions over time could tell us which values, experiences, techniques, contexts, or personalities differentiate constructive lawyers from those who tend to complicate an already difficult problem (see Kressel *et al.*, 1979: 255). They could also tell us when clients (and not their lawyers) use litigation for purposes of perpetuating family conflict rather than resolving it (e.g., the "Lesser" case in Goldstein and Katz, 1965: 518-559).

VI. CONCLUSION

The importance of studying the emergence and transformation of disputes should not blind us to its difficulties. Since the study of transformations must focus on the minds of respondents, their attitudes, feelings, objectives, and motives (as these change over time), it must be longitudinal and based

---

[17] See Bohannan (1967), Moriarty (1975), Nader and Singer (1976: 282). For an analysis of the civil litigation rates of African countries, see R. Abel (1979d: 190-195). For historical studies showing declining litigation in the United States, see Grossman and Sarat (1975), Friedman and Percival (1976a); but see Lempert (1978). See generally *Law & Society Review* (1974-75).

[18] In testing this hypothesis, it might be useful to compare Far Eastern societies with even lower levels of litigation, usually explained by the desire to avoid giving offense rather than the fear of receiving it (see, e.g., Kawashima, 1969; Hahm, 1968), with societies displaying much higher levels of disputing, such as those in the Mediterranean and parts of Africa, where culture mandates an immediate, public response to any affront (see, e.g., R. Abel, 1979b; Starr, 1978; Peristiany, 1965). For a fascinating study of attitudes toward injury in a non-Western culture, see Upham (1976).

upon a high level of rapport between researcher and informant. The difficulties in such research are considerable: the most obvious problems arise in devising techniques that minimize reactivity to researcher suggestion while providing researchers with adequate signals about the timeliness of a new wave of interviews.

In order to identify the salient influences on transformations, it is necessary to select for research substantive areas of disputing where high levels of variance can be expected. But different substantive fields are likely to exhibit variation at different stages. For instance, there is probably a low level of PIEs in the relationship between lay persons and professionals but a high level in landlord-tenant interactions; a low level of follow-through on consumer disputes but a high level in claims concerning serious personal injuries. As a result, the development of an empirical understanding of transformations will require many studies with limited objectives rather than a few large-scale projects. Several substantive areas deserve immediate attention, not only because they satisfy these requirements but also because they have been the subject of earlier research that can provide historical data, a baseline for comparison, tentative hypotheses, and methodological guidance. Those fields are personal injury, especially auto accidents (e.g., Conard, 1964; Franklin *et al.*, 1961; Hunting and Neuwirth, 1962; Widiss, 1975; Burman *et al.*, 1977; Royal Commission, 1978; Walker and Maclean, 1980; Lloyd-Bostock, 1980; Genn, 1980); consumer disputes (e.g., Whitford, 1968; Whitford and Kimball, 1974; Steele, 1975; 1977; Best and Andreasen, 1977; Macaulay, 1963; Ross and Littlefield, 1978; Hannigan, 1977; Caplovitz, 1963; 1974; King and McEvoy, 1976; National Institute of Consumer Justice, 1972a; Small Claims Court Study Group, 1972; Warland *et al.*, 1975; Nader, 1980); and family conflict (e.g., MacGregor *et al.*, 1970; Marshall and May, 1932-33; Gellhorn, 1954; Virtue, 1956; Parnas, 1970; Chambers, 1979; Mnookin and Kornhauser, 1979; *University of Pennsylvania Law Review*, 1953).

Although the emergence and transformation of disputes is personal and individualized, it has an important political dimension. Ultimately what we are concerned with is the capacity of people to respond to trouble, problems, and injustice. We believe that the study of dispute processing has been too removed from the actual difficulties and choices that accompany the recognition that one's life is troubled and that relief from trouble is uncertain, contingent, and costly.

Recognition and action may not be appropriate or desirable in every instance. We do believe, however, that a healthy social order is one that minimizes barriers inhibiting the emergence of grievances and disputes and preventing their translation into claims for redress.

For references cited in this article, see p. 883.