THE END OF THE ROAD? PROBLEMS IN THE ANALYSIS OF DISPUTES

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The studies reported in this issue stem from a concerted, well-coordinated attempt to deal with the "hidden" dimension of disputing in the United States. The Civil Litigation Research Project (CLRP) was prompted by conclusions which have emerged in recent years from a variety of research traditions, all focused on issues of dispute settlement, or "dispute processing" as it has been relabeled. The hidden dimension of disputing was one of many issues which emerged from these disparate research traditions. Given the definition of the problem produced by earlier analyses, the decisions made by the CLRP investigators seem reasonable, and the results to date give some answers.

But as I read through the various papers presented here, I sense struggles over unresolved conceptual issues, and I find contradictions which go to the heart of the enterprise. In this review, I will take issue with the way in which the study of disputing has developed. I will argue that contradictions within the CLRP analysis, and dilemmas encountered by the investigators, stem from conceptual weaknesses in the dispute processing paradigm which they have tried to adapt from other contexts. To me, a valuable product of the CLRP enterprise is the exposure of these weaknesses under the harsh discipline of concept operationalization for the purposes of hypothesis testing.

I. THE DISPUTE PARADIGM: BACKGROUND

The current state of thinking about disputing stems mainly from three research traditions: 1) game theory and strategy analysis, especially as developed and applied to labor relations and commercial disputes; 2) anthropological research on disputing in "simple" or non-Western societies; 3) research on the institutions and processes of litigation in "complex" or Western societies. There has been some convergence from these three traditions. Anthropologists, for example,

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sometimes call upon the language of game theory to analyze their observations (e.g., Gulliver, 1979). Students of complex Western social process have discovered, from anthropological literature, the wide variety of dispute settling mechanisms which serve simple societies in place of formal courts, and have looked—with some success—for their equivalents in Western societies.

At the same time these lines of inquiry began converging, some social scientists had become disenchanted with research which assumed that courts fulfill their appointed task of dispute resolution. They began to review the evidence with the view that legal institutions might actually be increasing conflict and/or promoting injustice in some circumstances. They noted problems of *access to justice* (lack of resources might force people to "lump it" [Felstiner, 1974] or look for alternatives to the courts, since they could not afford expensive formal justice). Among cases that do get court processing, conflicts persist or are transformed into new conflicts as a result of the experience of litigation. Moreover, such disputes are often "resolved" by the influences of those very inequalities of power which the legal process is supposed to neutralize (Galanter, 1974).

Seen in this new light, litigation becomes the very narrow end of a filtering funnel. Only a select few of society's disputes find their way through the thickets of diversion and into the courts. Most disputes exit from the flow at some earlier stage. So the question of access—can people get "justice" from the law if they need it—becomes defined as a problem of measuring how much potential "business" there is for the courts (Lempert, 1978; Miller and Sarat, 1981) and how richly the society is endowed with effective alternatives to law, then deciding whether the mix of legal and nonlegal dispute processing mechanisms provides sufficient release of tensions in society (Danzig and Lowy, 1975, answered "not enough" to Felstiner's earlier [1974] "enough"). These are the terms of debate out of which CLRP appears to have grown. In effect, the paradigm likens society to a pressure cooker with dispute processing mechanisms as relief valves preventing social catastrophe.

II. CRITIQUE OF THE DISPUTE PROCESSING PARADIGM

Having reviewed this reasoning, and particularly its culmination in the research strategies reported in this volume,

I am convinced that it creates confusion through inappropriate vestiges of meaning connected with the term *dispute*.

What is a dispute? The anthropological tradition has given us one impression which we have inappropriately transferred to the discussion of conflict in modern industrial society. In the anthropological literature, there are strong presumptions of equality, case discreteness, and individualism in the use of the term *dispute*. Disputes reported in the anthropological literature tend to pit equal individuals against each other—neighbor against neighbor, family head against family head, hunter against hunter, warrior against warrior (see, for example, Malinowski, 1926; Llewellyn and Hoebel, 1941; Gluckman, 1955; Bohannan, 1957; Nader and Metzger, 1963; Nader and Todd, 1978). The basic view is that a "balance" has been upset and must be restored (Nader, 1969). The nature of the task is to produce a settlement in the specific case which permits the group to return to normal. The functionalist assumption, or pressure-cooker model, is that each dispute is a discrete disruption which can be rectified if given appropriate and timely treatment. Disruptions can accumulate, especially where multiplex relationships are involved (Gluckman, 1955). But there is very little recognition in the anthropological literature that "accumulated" grievances may represent systematic inequalities, institutionalized assymetrical developments in a society's relationships.

The notion of dispute settlement has thus been decidedly apolitical, although some anthropologists have explored its linkages with political process (e.g., Van Velsen, 1964; Abel, 1973). Even where anthropologists acknowledge inequality between disputants, they have tended to assume that dispute settlement functioned to restore unequal relations to their prior balance of privileges and duties. They have traditionally not dealt with dispute settlement as a means of upsetting those balances or intensifying inequalities.

There is a second legacy which clouds our understanding, and it comes in circular fashion from traditional Western legal theory. Perhaps because early legal anthropologists were concerned to prove that "savages" have law, and do not rely on primordial instincts (e.g., see Malinowski, 1926) certain Western legal concepts have strongly influenced their research.[1] As a result, the notion of the dispute has typically included a focus on the individual as the key actor. Just as

[1] See the debate between Gluckman and Bohannan on this issue in Nader (1969: 349-418.)

Western law has isolated the individual as the paramount possessor of legal rights, and has deemphasized obligations toward traditional groups (tribes, clans, villages, castes, sects, cults, ethnic or racial groups) in its handling of formal legal disputes, so the anthropologists emphasized the individual as the object of attention in the study of disputing in non-Western society. Because they were looking for analogues to Western legal process, many early legal anthropologists treated dispute settlement as analogous to Western formal litigation. Hence while their ethnographies often presented rich detail about the group context from which a dispute emerged, or about the "influences of the group" on the individual's pursuit of disputing objectives, they usually treated the disputing process as centering on local analogues to the Western plaintiff and defendant. They rarely treated the process as a corporate or political action—as an element in shifting relationships between groups, as battlegrounds in strategic maneuvering to reorder power relationships and upset disadvantageous "balances."

In the CLRP papers, we see the Western legal assumptions of individualism coming full circle via the anthropological tradition. Felstiner, Abel, and Sarat make very clear that "the transformation perspective places disputants at the center of the sociological study of law; it directs our attention to *individuals* (emphasis added) as creators of opportunities for law and legal activity; people make their own law, but they do not make it just as they please" (p. 633).

Even when we began to realize that dispute settlement mechanisms often do not settle disputes, and began speaking of dispute "processing" instead, we were still misled by the egalitarian, individualistic history of the term *dispute*. When we began transferring what we thought we had learned from anthropology to our concern with events in industrial societies, the problem was compounded by the fact that the prevailing Western model, adjudicated litigation, also centers on egalitarian, individualistic assumptions. In our merging of the two traditions, we have been remiss in clinging to a vocabulary which belies our recognition of linkages between "dispute processing" methods and inequality, collective action, and structural imbalances in both kinds of societies.

How much sense does it make to use the same term to refer to a domestic quarrel between husband and wife in a rural Mexican village and to the problem faced by a senior citizen when the gas company shuts off the gas in mid-winter

because the welfare agency has failed to pay its client's bill? How much do either of those problems have in common with the case of the renter whose landlord cuts services and repairs in order to force tenants to choose between leaving and buying into condominium conversion? And where do we fit the problems of a black family whose house in a mostly white neighborhood is repeatedly vandalized, or the white parent who objects to having a son or daughter bused twenty-five miles to help achieve school integration? Does a focus on individual divorce cases help us understand why the divorce rate in the United States has risen so fast? Is such a situation created by a remediable lack of access to dispute handling institutions? Or is it the product of technological, economic, and organizational changes which could only be addressed at a more global political level?

If there is anything these cases share, it is certainly not equality between isolated, individual opponents. If the kinds of "disputes" Miller and Sarat identify in the United States have anything in common with those in the anthropological literature, it may be because of the inaccuracy of anthropological reports which ignore the key role of power differentials and conflict strategies in the pursuit of "settlement." I am not convinced that what they share comes from the adequacy of the pressure-cooker paradigm.

It seems to me that because of this baggage of assumptions about individualism, rule-boundedness, and balance-restoring characteristics in disputing, the research strategies and rationales reported in this volume have reached an impasse. The impressive richness and variety of research ideas in the papers by Felstiner, Abel, and Sarat, and Miller and Sarat, are, I submit, achieved *despite*, rather than because of, their attempts to stick with the language of disputing. It pushes them to the brink of reductionism and internal contradiction.

Miller and Sarat, for example, reject Gulliver's distinction between a disagreement and a dispute on the grounds that most disputes exist as strictly dyadic relationships which never "go public," but which nevertheless are part of the potential population of disputes which could eventually erupt into litigation. Gulliver's distinction may not be the best, but Miller and Sarat's alternative is reductionistic because they provide no guidance for distinguishing between nondisputing and disputing relationships. If we called all dyadic difficulties "disputes," even those private cases which Gulliver termed disagreements, then we would have to include nearly all of

human interaction. One of sociology's major theoretical traditions tells us that everything social, even reality itself (Berger and Luckmann, 1967), is a product of negotiation, and that all things social should be thought of as a process of bargaining (Thibaut and Kelley, 1959; Blau, 1964). From this perspective, the most routine experiences become sessions in negotiation. Even humor and joke telling are treated as exercises in bargaining (Emerson, 1969).

If we stretch the term *dispute* to include all dyadic bargaining, as Miller and Sarat at first suggest, we would have no way to address the issues of access to justice, alternative dispute mechanisms, or the levels of disputing in society as a social problem. Every instance of human interaction would be a candidate for dispute processing analysis. Disputing would be indistinguishable from all human interaction.[2]

The CLRP authors have dealt with this problem in two ways, one practical and the other theoretical. We see the former in Miller and Sarat's operationalization of the term *dispute* for the purposes of the survey which produced their data. They stray quite far from the openness implied in their rejection of Gulliver's disagreement/dispute distinction. Indeed, they end up with an operational definition and a research agenda which seem to violate Felstiner, Abel, and Sarat's ban on "reifying" the dispute process by measuring "legal needs" (Felstiner *et al.*, 1981: 631 ftn. 1). The demands of survey research drove them so far back from the brink of reductionism that they arrived at a working definition openly derived from formal legal categories (civil disputes of a value over one thousand dollars). Despite the Felstiner, Abel, and Sarat warning, Miller and Sarat are counting cases. I see this as a contradiction within the project, and I believe it stems

[2] Mathematical sociology, building on Simmel's (1955) theories, provides an alternative to the CLRP approach which is so different that I will only briefly mention it here. Mayhew and Levinger (1976) have shown that population growth alone can be a very powerful predictor of growth in institutions designed to control conflict in society. Courts, police, lawyers, psychiatrists, religious and lay counsellors all proliferate at a rate which is a logarithmic function of the rate of population growth. The reason for the accelerated pace of growth in these institutions is that they must deal with the geometrically rising level of *interaction density*—the geometrically increasing numbers of potential contacts and alliances and, therefore, conflicts which population growth produces. Mayhew and Levinger would aproach the problem of "access to justice" as a simple mathematical problem: have institutions designed to deal with conflict expanded at a rate which keeps them ahead of the conflict potential created by population growth? If the population growth curve can be measured, say Mayhew and Levinger, then a very precise growth curve of conflict resolving needs can be projected. Any gap beween the projected and actual curves is the gap in "access to justice."

from contradictions in the dispute processing paradigm. More about that below.

The second method they use for handling the problem of definition is to associate disputing with the notion of injustice. A dispute, as they define it, is a process of naming, blaming and claiming. The perceived injurious experience (P.I.E.) is an essential step in the creation of the dispute, and it clearly means the stirring of a sense of injustice.

Such an equation of disputing with injustice creates several problems. First it reinforces the egalitarian image of disputing, because it suggests that disputes occur only when an imbalance has been created (and felt) in relationships which, before the dispute, were accepted as satisfactory *even if unequal*. It treats the worker-victim of asbestosis in an insulation factory, the cheated buyer of mass-produced defective housing, and the social security pensioner made destitute because of "clerical error" as reactors—passive occupants of static positions of inequality prior to their "disputes." This implication of balance in the midst of inequality is not altered by their use of the term "dispute transformation," because when they put that perspective into practice in their research, they continue to treat discrete disputes as having finite points of origin. While I doubt that it was their intention, this perspective puts them uncomfortably close to an acceptance of Rawls' *difference principle* (1971: 76) which states that social or economic inequality is just if it makes both sides in an unequal relationship better off than they would be without the inequality.

Second, the equation of disputing with the sense of injustice excludes a host of relationships in which the issue of justice is irrelevant, but in which parties expect the involvement of "dispute processing" institutions to be useful. When I.B.M. and Xerox square off against each other in court over the issue of controlling shares of some market in computer hardware, the issue of justice may be very remote. The battle is a cold-blooded struggle over a limited resource. In India, I found many cases where lawsuits over debt payments were similarly devoid of passion. Neither side would have defined their involvement in terms of perceived injustice, except when "performing" as witnesses in court. To them, the issue was simply who would have control over the money and for how long. It seems to me entirely possible that many of the cases one finds in "dispute processing" institutions, whether formal or not, may be simple strategic confrontations over

limited resources, with both sides claiming prior "rights" or the violation of some principle of "justice" only because that is the appropriate language for those fora, not because it is what the partisans feel. They initiate dispute processing action when they feel the time is right to "go after" whatever resource they seek to control and think that legal (or dispute processing) action can help them secure control. In such cases, the language of *justice*, far from being a support for equality, may be seen as an ideological basis for unequal distribution. Its primary function is to legitimize the authority of the distributing agent.

You might argue that these kinds of cases are different from those that do arouse passions over the question of justice. Where justice is an issue the pressure-cooker model seems to be the key—too many people feeling too much injustice might produce an explosion. I doubt that such a hypothesis could be demonstrated. Moreover, I think that model leads to a dead-end in research once we discover that it cannot be demonstrated. It forces us to ignore all disputing behavior which is not accompanied by protestations of injustice (as Felstiner, Abel, and Sarat have done), assume the existence of feelings of injustice even where not demonstrated (as Miller and Sarat have done), or waste our time trying to distinguish between authentic and inauthentic claims of a sense of injury (a task for lawyers, judges, and mind readers, but not for social scientists).

What we do need to know is how the mechanisms for dispute processing, both formal and informal, got created, modified, and incorporated into the strategies of competing interests. How do existing institutional forms, including personnel, rules of procedure, and the ideology which determines at least the language of combat, reflect previous battles? How are those forms used now to establish, maintain, or overthrow advantages? Is the lack of "access to justice" a chronic state necessitated by the internal logic and resource limits of our legal and social systems (Friedman, 1967), or is it a condition developed and maintained by various groups with a stake in its consequences? Johnson's analysis in this volume, for example, supports the view that contingencies affecting the income of lawyers affect their "accessibility" and level of service to clients.

We also need to study the effects of the group or class context from which individual disputes spring. Is the individual ". . . the creator(s) of opportunities for law and legal

activity," as Felstiner, Abel, and Sarat assert, or do individuals become involved in disputing as agents of collectivities? Why accept conventional Western legal myopia by focusing on the perceptions, attributions, attitude changes, and actions of individuals when their actions may be shaped primarily by the internal dynamics of groups to which they belong.

It would be unfair to characterize the participants in this project as insensitive to questions of inequality, the complexity of disputing relationships, or the influences of secondary social forms on conflict-laden relationships. On the contrary, these issues seem to be at the heart of their interest in the subjects addressed in this special issue. While they speak of many kinds of disputes, for example, the archetype at the heart of their project appears to be the lone individual faced with the arrogance and impersonality of corporate power. This, I submit, is partly why they define disputes as *reactive*, and why they are willing to adopt the reactive notion of disputing from the anthropological tradition. It is certainly why they tilt toward the position that more disputing in the United States would be good (p. 651). Certainly they are aware of the institutionalized injustice of corporate domination over individuals.

The problem is that they adhere to the language of dispute settlement while practically annihilating the concept in order to escape its functionalist trappings. Then, under the pressure of making practical choices in research design, they circle back and end up in the same thicket of unwanted meanings. To me, the choices which this project has helped to clarify are these: either we abandon the language of dispute settlement (including variations such as "dispute processing" and "dispute transformation") in favor of a vocabulary which does not lure us back into functionalist research strategies (as I think has happened in the CLRP case), or we acknowledge the ideological nature of dispute settlement as a concept and treat its appearance in assorted social settings as an object worth studying in itself.

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