THE "NEW FORMALISM" IN DISPUTING AND DISPUTE PROCESSING

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I. INTRODUCTION

The study of disputing and nonjudicial forms of dispute processing has been, until relatively recently (see Sander, 1982), largely ignored inside the legal academy (for exceptions see Mentschikoff, 1961; Rosenberg and Schubin, 1961; Fuller, 1962, 1971).[1] But, at the same time, it has provided an important focus for social scientists interested in law (see Felstiner, 1974; Abel, 1974; Bohannon, 1957; Gibbs, 1967; Guilliver, 1969; Nader and Metzger, 1963). The publication of Goldberg, Green, and Sander's *Dispute Resolution* thus marks an important event in the evolution of scholarship on disputing and dispute processing, one that signals the growing acceptance of such work within the world of legal education and legal thought.[2] The book is presented as a kind of "casebook" that permits law students and lawyers to look beyond and beneath the doctrinal productions of appellate courts, the usual stuff of the law school classroom, to consider a more complete picture of the varied patterns of legal life.

Dispute Resolution pulls together and organizes a wide range of material on the disputing process, but it is more than an ordinary collection. It is animated by and develops a distinctive perspective on the role of courts and nonjudicial mechanisms for processing disputes. This perspective, which I call the "new for-

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[1] Of course one might argue that attention to nonjudicial or quasi-judicial forms of dispute processing has a much longer history in the legal academy than is indicated by these citations. Some might, for example, point to Pound (1906) as opening this area. Nevertheless, the study of nonjudicial dispute processing has never, at least until recently, occupied an important place in legal thought.

[2] There are other signals as well, the most important being the proliferation of courses on nonjudicial techniques of dispute processing and the effort to incorporate that concern into traditional law school courses (see, for example, Carrington, 1984).

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malism," draws upon and draws together several strands in the history of American legal thought. It emerges from and yet is part of a reaction to legal realism and attempts to go beyond the post-realist reconstruction of legal thought often referred to as the "legal process" approach (see Hart and Sacks, 1958). Examining how these strands in the history of legal thought are deployed by or operate in *Dispute Resolution* may help chart the complex ways in which legal thought constitutes, or would constitute, the study of disputing and dispute processing.

This book does more, however, than draw together several strands of legal thought. By trying to open up legal education and legal thought to issues that have been of longstanding interest to the law and social science community, it invites, or appears to invite, an alliance between lawyers and social scientists interested in disputing and dispute processing. Yet, as I will argue more fully below, Goldberg, Green, and Sander imagine the contribution of social science as a rather limited one. While they welcome sociological efforts to evaluate and to suggest improvements in nonjudicial mechanisms for processing disputes, they ignore or neglect some of the most important of the insights of the sociological study of disputing. They selectively incorporate social science and in so doing may underestimate the challenge that the sociological study of disputing poses for their perspective. Exploring the way social science is used in or ignored by *Dispute Resolution* may help clarify the role that the sociology of law might play in the study of disputing and dispute processing as well as suggest points of contrast between it and the new formalism.

II. THE NEW FORMALISM IN *DISPUTE RESOLUTION*

Dispute Resolution is, at first glance, relatively straightforward in its organization and presentation. It contains a large number of well-edited articles describing various methods of dispute processing. There are chapters on negotiation, mediation, adjudication, and what are called hybrid processes (chap. 5). In addition, it presents material that examines the way dispute processing works in family, consumer, environmental, and other disputes. Most of the articles are descriptive; several are written by prominent practitioners. While the book includes many references to work done by social scientists, few of the excerpts reproduced in the collection reflect a sociological perspective on disputing and dispute processing.[3]

The organization of the book and its development of the new formalism owe much to the work of Lon Fuller. His "Forms and

[3] Six of the more than seventy selections included in the book are by social scientists. About 20% of the works cited in the references were written by social scientists or reflect the sociological perspective on disputing and dispute processing.

Limits of Adjudication" (1979) is an effort to identify the distinctive characteristics of adjudication and to use those characteristics to suggest how adjudication differs from other forms of social ordering. Fuller's goal (ibid., p. 357) was to "define 'true adjudication' or adjudication as it might be if the ideals that support it were fully realized." As he saw it, "the 'essence' of adjudication lies in the mode of participation it accords to the affected party" (ibid., p. 365), participation through presentation of proofs and reasoned arguments to an impartial decision maker. While there have been other attempts to define essential characteristics of dispute processing techniques (see, for example, Shapiro, 1981), Fuller's remains the most influential. His work on adjudication has its parallels in mediation (Fuller, 1971) and arbitration (Fuller, 1962); in each, he tried to abstract from history and context to see beyond or ignore variations in local practices.

Both Fuller's work and the new formalism developed in *Dispute Resolution* suggest that it is possible and desirable to classify dispute processing techniques into discrete and separate clusters (e.g., negotiation, mediation, and adjudication) by identifying the essential attributes of the techniques in each cluster (for other similar attempts see Eckhoff, 1969; Sander, 1982; Marks, Johnson, and Szanton, 1984; Horowitz, 1977; and Cappelletti and Garth, 1978). This essentialism is expressed both directly and indirectly in *Dispute Resolution*. Its indirect expression is seen in the organization of the book; each chapter seeks to define and express the attributes of a different type or style of dispute resolution. Essentialism is expressed more directly in Goldberg, Green, and Sander's introductions to the various processes of dispute resolution. As but one example, the reader is informed that "the mediator, in contrast with the arbitrator, has no power to impose an outcome on disputing parties" (p. 91). While in the abstract this may make sense, such a statement directs attention away from the power that mediators do exercise (Merry, 1982; Silbey and Merry, 1986b), from the characteristics of their exercise of that power, or from the contingencies that shape its exercise.

Essentialism appears yet again when the editors seek to explain why mediation is particularly appropriate in family cases, noting that

> mediation . . . looks to the future and has as its principal goal the repair of the frayed relationship. Second, mediated solutions are more flexible than those brought about by adjudication because they are created by the parties themselves, albeit with the help of the mediator. Third, mediation avoids the winner-loser syndrome, a consideration that assumes special importance where an ongoing relationship is involved. Fourth, the mediation process involves wide ranging inquiry into what the interested parties want to talk about. . . . Finally, mediation gives an enhancing sense of participation to the disputants (p. 314).

In this description the advertised advantages of mediation are taken as its essential attributes. Failure to display these attributes means that a disputing process cannot claim to be mediation; it must be something else. The language of the description masks the basically prescriptive nature of the argument. Thus, the contexts and practices of mediation are given less attention than is the effort to achieve a kind of definitional purity.

Dispute Resolution also promotes a new formalism through its effort to deduce, from the essential attributes of each technique or institution, an understanding of its distinctive capacities and limits and of the kinds of disputes or problems each is best equipped to handle. Thus, Goldberg, Green, and Sander (p. 7) argue that "the central question is what dispute resolution process or combination of processes is effective for resolving different types of disputes" (see also Horowitz, 1977). In this argument, fixed characteristics appear to impose fixed limits such that disputes appropriate for one dispute processing technique may be peculiarly inappropriate for another.

The new formalism displayed in *Dispute Resolution* also contains the ideal of effective resolution, which holds that given the right match of dispute and dispute processing technique, harmony can be restored and problems can have resolutions that satisfy the disputants and are therefore likely to be final (see also Sander, 1982). Thus, the book examines dispute resolution rather than dispute processing (see also Rosenberg, 1981; Marks, Johnson, and Szanton, 1984).[4] This emphasis on resolution suggests a preference for an image of social life in which harmony prevails; conflicts are idiosyncratic; and mediation, arbitration, adjudication and other dispute processing techniques work to resolve problems (see Rosenberg, 1971).

For the editors of *Dispute Resolution*, the processes through which conflict emerges seem relatively certain. Thus while the first chapter is entitled "The Disputing Universe," it is almost entirely devoted to the presentation of a preliminary map of the range of dispute processing mechanisms (see pp. 8–9, Table 1-1)

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[4] One should note, however, that in his earlier work Sander (1982) spoke about "dispute processing" rather than "dispute resolution." In that work he drew directly upon the early sociological literature on disputing, especially that by Felstiner, who noted (1974: 63 n. 1) that his

> aversion to "dispute settlement" is based on the conviction that a significant amount of dispute processing is not intended to settle disputes, that a greater amount does not do so and that it is often difficult to know whether a dispute which has been processed has been settled or even what the dispute was about in the first place. . . . It does not then seem to make sense to talk about a "settlement" process when . . . it is often impossible to determine what is to be settled or whether that result has been achieved.

Felstiner's use of "dispute processing" embraces a view of indeterminacy that Sander seems to move away from as he substitutes "resolution" for "processing."

and an analysis of the factors that determine which mechanism is most effective for dealing with particular disputes. Thus the new formalism developed in *Dispute Resolution* begins with the already formed dispute. There is no evidence that Goldberg, Green, and Sander or other proponents of the new formalism are interested in the complex ways in which disputes emerge and develop and the extent to which many disputes, or potential disputes, are repressed and fail to make themselves available for processing. The dispute as presented for resolution is taken as fixed and unchanging. Like other contemporary formalists, Goldberg, Green, and Sander (pp. 10–11) seek to catalogue the characteristics of disputes just as they seek to catalogue the characteristics of dispute processing mechanisms (see also Sander, 1982; Council on the Role of Courts, 1984: 112–121).

Finally, the editors of *Dispute Resolution* focus on what might be called the question of "allocation" (Sarat, 1981): How can disputes and dispute processing techniques be matched? How can an understanding of the essential attributes of different forms of dispute processing "be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes" (Sander, 1982: 26; see also Cappelletti and Garth, 1978: 52)? Contemporary formalists like Goldberg, Green, and Sander approach the subject of disputing and dispute processing with a desire to find a way to channel disputes and match disputes with appropriate dispute processing techniques. They assume that the nature and characteristics of disputes and dispute processing mechanisms are sufficiently stable to allow each dispute to be assigned to the most appropriate resolution technique. In their discussion of adjudication, for example, the editors (p. 150) announce that "our goal is to understand better what tasks courts are particularly well suited to perform and what tasks they are less well suited to perform." For those who examine dispute processing from the perspective of judicial administration, "one consequence of . . . [this effort] is that we will have a better sense of what cases ought to be left in the courts for resolution, and which should be 'processed' in some other way" (Sander, 1982: 26). Thus the study of disputes and dispute processing is, in the new formalism, but one aspect of the more general social activity of managing disputes and designing devices to resolve them.

III. THE POLITICS OF THE NEW FORMALISM

Dispute Resolution is not, however, a neutral, disinterested effort at analysis and criticism. It is a work of advocacy with a clear set of political commitments. The politics of its new formalist perspective are perhaps most fully revealed in Chapter 13, "Overcoming Impediments to the Use of Alternative Dispute Resolution

Processes," which reveals the book's understanding of the place and meaning of disputes in the social order and its commitment to the professional project of advancing alternative dispute resolution.

As to the former, Goldberg, Green, and Sander seem to see disputes as problematic in and of themselves, as socially undesirable events. They see disputing as pathological, not as indicative of emergent political struggles for valued ends or as symptomatic of deeper social problems requiring structural change.[5] They worry (p. 6) that "the price of increased access to dispute resolution mechanisms may be a substantial increase in the number of disputes brought forward for resolution." Increased disputing is for them the downside that accompanies the success of the alternatives movement. On the other hand, expanded nonjudicial dispute resolution may be valuable, in their view, because it will help end disputes, alleviate pathology, and restore harmony to a basically consensual social order.[6]

Dispute Resolution seeks to bring greater awareness of alternative dispute resolution to law students and lawyers. The editors (p. 489) state explicitly that one of their goals is "to enlarge the dispute resolution perspectives" of that audience. By enlarging the horizons of lawyers and future lawyers, Goldberg, Green, and Sander (p. 485) seek to overcome a major barrier to the use of nonjudicial means for resolving disputes, namely the ignorance of those who play a major role in screening and routing disputes:

> No discussion of the impediments to the use of alternative dispute resolution process would be complete without considering the role played by lawyers. . . . [M]ost disputes that cannot be resolved by the disputants themselves are presented to lawyers. In most instances, we suspect, the client is unaware of the existence of alternative dispute resolution processes. Hence, if such processes are to be utilized, it will typically be as a result of the lawyer's suggestion and encouragement.

By focusing attention on overcoming impediments to the use of alternative dispute resolution techniques, the question posed in *Dispute Resolution* is not whether such impediments *should* be overcome or whether disputes should be moved quickly to resolution, but *how* they might be overcome (for a similar perspective

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[5] This view reflects a preference for harmony and social order that in turn is based on the association of order with peace and fairness and of disorder with violence and unfairness. As Peller argues (1985: 1185), "these metaphoric connections . . . silently exclude the possibility that disorder can be peaceful and that order can be violent. . . . The rhetorical structure of argument excludes the possibility that the ordinary, regular, 'integrated' order of things may institutionalize violence." From another perspective, disputing, by disrupting such an order, can be seen as a socially valuable, politically progressive activity.

[6] Those who take a different view are labeled "radical" (p. 490).

see Vermont Law School, 1984). This question embraces the perspective of the providers of dispute resolution services. Thus, Goldberg, Green, and Sander (ibid.) ask,

> If alternative dispute resolution is an idea whose time has come, why has it not spread more rapidly and widely? Why is it that although the users of neighborhood justice centers appear satisfied with the process, many of these centers are starving for business? Why is there such an abundance of individuals who want to provide mediation services, yet so few customers?[7]

They hope that their focus on overcoming impediments to the use of alternative dispute resolution will help answer these questions by enlisting law students and lawyers in promoting the use of nonjudicial means of resolving disputes and in advancing the goals of the alternative dispute resolution movement.

> Other law professors share this hope and believe that the appearance of *Dispute Resolution* presents us with an important opportunity to redirect the way we think of legal processes. In virtually all law schools, law is taught from the appellate opinion and procedure is taught from the rules for conducting trials and litigation which precedes the trial. A broader conception of dispute resolution gives us the opportunity to teach future lawyers that their function may be more complex (and worthwhile) then simply engaging in traditional litigation (Menkel-Meadow, 1986: 303; see also Carrington, 1984; Minow, 1984; Spiegelman, 1987).

From this perspective the "crucial issue in the teaching of dispute resolution is to make the 'peripheral' concerns of alternative dispute resolution (ADR) a 'core' concern" (Menkel-Meadow, 1986: 304).

IV. THE NEW FORMALISM AND AMERICAN LEGAL THOUGHT

Dispute Resolution can indeed be welcomed for its expansion of the scope of issues and disputing processes examined in the law school curriculum. It suggests that the legal academy may be ready to pay attention to the bottom layers of what Hart and Sacks (1958: 312) once called the "Great Pyramid of Legal Order."[8] Yet,

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[7] One should note, however, that this question can also arise among those who take the perspective of the potential user (see Nader, 1980; Buckle and Thomas-Buckle, 1982).

[8] This way of thinking has been very influential among both social scientists writing about dispute processing and formalists. See Galanter (1974) and Miller and Sarat (1981). The "Great Pyramid" was based on a conception of the relationship of one type of legal procedure—adjudication—to the universe of disputing and dispute processing. Hart and Sacks (1958: 312) saw adjudication as playing a relatively small role in dealing with society's grievances, claims, and disputes, most of which never take full form or are never articulated. As Hart and Sacks wrote (ibid.), "the overwhelming proportion of

even from the perspective of the history of legal thought, the book does not seem to be a radical departure. It emerges from and is continuous with one major effort to reconstitute and reconstruct legal thought in the aftermath of legal realism.[9] It is, from this perspective, an extension of the so-called legal process approach (ibid.)[10] to an apparently more disputatious world.[11]

The legal process approach and other postrealist reconstructions (see Tushnet, 1980) have tried to build upon the major insights of realism, especially its critique of judicial decision making, without embracing its apparent moral relativism and what some see as its nihilist tendencies (White, 1978). As is widely known, American legal realism challenged modes of legal thought that prevailed around the turn of the century by demonstrating the incoherence of the categories of legal thought that organized rights and duties and by attacking the political purposes served by that way of thinking (see, for example, Cohen, 1935).

In traditional legal thought—what is often called nineteenth-century legal formalism[12]—decisions in contested cases were seen

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things which happen and do not happen in American society pass without any later question."

[9] Postrealist developments in legal scholarship have moved in two very different directions. The first, most often associated with critical legal studies, attempts to explore and expand the "deconstructive" side of the realist project, especially its critique of rules (see Peller, 1985; Boyle, 1985; Singer, 1984). Yet some believe that even this effort to extend that project carries with it the legacy of formalism (Munger and Serron, 1984). The second, and mainstream, efforts have tried to overcome the moral relativism implicit in the realist critique by self-consciously idealizing law (White, 1978: 140) or developing the technocratic policy focus of realism (see Ackerman, 1984; for a critique of these efforts, see Tushnet, 1980).

[10] For a description of the legal process approach, see Mensch, 1982; White, 1978; Brest, 1981; and Tushnet, 1979.

[11] Goldberg, Green, and Sander (p. 4) see the growth of an interest in alternative dispute resolution as one response to "an increased volume of legal claims, many of which had not been previously recognized."

[12] There are, of course, many ways of defining nineteenth-century legal formalism. But let me begin by noting that legal formalism, as opposed to formalism in the study of dispute processing, is a more inclusive category. It is a way of thinking about legal doctrine and organizing the legal world with roots going back to the late nineteenth century (Mensch, 1982). A minimal definition would suggest that legal formalism

> consists in the attempt to accomplish substantively rational results—i.e. to achieve outcomes that "maximize" a set of conflicting purposes—through the substantively rational formulation and mechanical application of rules rather than through substantively rational decision process. . . . [It] is a characteristic of any legal system that can be described in the following way: (a) The purpose of the system is to serve the conflicting ends of a legitimately representative lawmaker; (b) a substantively rational law-making process produces a body of rules designed to achieve these ends; (c) rule appliers apply rules to cases presented to them by disputing private parties. (Kennedy, 1973: 358–359).

A somewhat fuller definition would point to the tendency of nineteenth-century judges to see the law as organized around a few general and inclusive conceptual categories (e.g., contract and property) that were thought to refer

as flowing from an abstract description of some category of legal rights and a process of deductive reasoning in which the facts of the case were subsumed into the appropriate category of rights (Kennedy, 1980). Realists undermined confidence in this formalism by emphasizing the indeterminacy of facts (Frank, 1949) and, perhaps more importantly, by demonstrating the circular character of the supposedly deductive logic of judicial decision making (Pound, 1923; Llewellyn, 1930). The realists argued that

> there will be a right if, and only if, the court finds for the plaintiff or declares the statute unconstitutional. What the court cites as the reason for the decision—the existence of a right—is, in fact, only the result. Moreover, in every dispute, both sides' interests and goals can be asserted and formulated in terms of right. . . . Thus instead of a preexisting right that compels a particular result, there are, in fact, conflicting (and contradictory) rights between which the court must always choose. It is that legal choice which then determines the result and forms the so-called right (Mensch, 1982: 27).

By showing that legal decisions always involved choices, realists sought to blur the distinction between law and politics and thus to challenge the operative, albeit hidden, political biases of nineteenth-century legal thought, in particular the preference for the private, the voluntary, and the individualistic (as in liberty of contract). This challenge worked to open up legal argument to conflict about substantive goals and to politicize judicial decision making.

In response to the realist challenge and its successful demonstration of the political character of legal decision making, the post-World War II legal process approach developed three characteristics: First, it incorporated the realist effort to blur the distinction between legal judgment and policy choice. Second, it sought to demonstrate that the increased flexibility that accompanied the death of belief in preexisting categories of rights could be a virtue in legal decision making. Third, while it conceded the realist demonstration that conflict inevitably surrounds claims of substantive right, it tried to shift the focus of legal argument from substantive rights and legal doctrine to the characteristics of legal institutions and legal processes. As Hart and Sacks wrote (1958: 3), institutions and procedures "are obviously more fundamental than the substantive arrangements in the structure of society . . . since they are

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to and describe a structure of rights and obligations that governed social relations. The judge presented with a dispute could and should objectively and neutrally identify the category of rights involved and reach a result by applying the preexisting rights to the facts at hand. In this view, law in general and judging in particular were impartial and autonomous rather than political and purposive. Law thus was a way of adjusting the free play of private relations rather than of constituting and/or constructing those relations. The job of the judge was, on this account, one of classification and deduction (see Mensch, 1982; White, 1978; Boyle, 1985; Singer, 1984; Peller, 1985; Kennedy, 1980).

at once the source of the substantive arrangements and the indispensable means of making them work effectively."

In the legal process version of postrealist legal thought, American society was held together by a widespread consensus on the fairness and legitimacy of the institutions and procedures through which law is made, administered, and applied.[13] In the world that Hart and Sacks (1958) occupied, there was a sense that political and social stability rested on a shared social investment in existing legal procedures. Their effort was to try to understand the characteristics and operations of those procedures and to focus legal scholarship on the how and why of the legal process. Their effort was to selectively incorporate elements from realism and, in so doing, to effect a radical departure from prerealist thought—from nineteenth-century legal formalism and its political biases.

The legal process approach did not succeed in this effort (see Peller, 1985: 1183–1187), however, for it carried forward, even as it tried to move beyond, important elements of prerealist legal thought.[14] Consider, for example, Hart and Sacks's (1958) attempt to identify the different capacities of courts, legislatures, and administrative agencies, which occupies a large part of their work. Like Goldberg, Green, and Sander, they drew heavily upon Fuller's (1979) then-unpublished, "Forms and Limits of Adjudication" (thus giving early evidence of the alliance of the legal process approach and the new formalism). They concluded, a priori, that adjudication, legislation, and administration were distinctive and separate legal processes and that "different procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions" (Hart and Sacks, 1958: 3). By emphasizing the invariability of the fit between procedures and problems, they rather ironically reintroduced important elements of nineteenth-century formalism, in particular its conceptualism and rigidly deductive approach. However, an important transformation occurred as we move, by way of the legal process reconstruction of legal thought, from nineteenth-century formalism to its contemporary variety. No longer was formalism substantive and doctrinal; no longer was it taken up in discussions of the appropriate fit between categories of legal rights and particular cases. It is today a means of talking about institutions and processes; it now appears in discussions of the appropriate match between legal problems and the procedures available for dealing with them.[15]

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[13] This view was not confined to the legal academy; it informed many of the best known and most widely respected descriptions of American political life by historians and political scientists. See, for example, Hartz, 1955; Boorstin, 1953; and Dahl, 1961.

[14] For an analysis of the way postrealist legal thought often carries traces of legal formalism, see Kelman, 1981; see also White, 1984.

[15] This line of argument was suggested to me by Susan Silbey.

Nineteenth-century legal formalism has been transformed, and it reappears in postrealist attire.

Dispute Resolution takes this development one step further by elaborating the legal process paradigm to explain the full range of informal dispute resolution techniques and by shifting attention from a comparison of adjudication, legislation, and administration to a comparison of adjudication with negotiation and mediation. Here its contemporary formalism displays vestiges of nineteenth-century formalism.

Like nineteenth-century legal formalism and like the position of Hart and Sacks, *Dispute Resolution*'s new formalism begins by embracing a kind of nominalism and conceptualism. This is most clearly seen in its embrace of Fuller's (1979) essentialism, its resulting insistence that dispute processing techniques can and should be divided from one another, and its assumption that those divisions correspond, in a relatively clear way, with a realm of real, objective, determinate things. Take, at the extremes, the book's discussion of negotiation and adjudication. There is a rough parallel between this discussion and the nineteenth-century formalist view of the legal categories of contract and tort: Negotiation (and mediation) resemble contract with its emphasis on will, voluntariness, and agreement; adjudication (and arbitration) resemble tort in its emphasis on the imposition of external standards in situations in which private bargaining seems inappropriate or impossible.

Like the conceptualism of the nineteenth century, this conceptualism is not politically neutral. The editors of *Dispute Resolution* speak about dispute resolution processes in a vocabulary of public and private, in which the public/private distinction is unproblematic. This way of speaking is itself part of the reification of categories that was characteristic of nineteenth-century formalism (Peller, 1985: 1202). Just as the realm of contract was to be preferred to tort in a conception of law in which the former was said to coincide with free will and governance by consensual rule and the latter with coercion and post-hoc determinations imposed by state authority, so negotiation with its private and voluntary character is to be preferred to adjudication. The escape to the private realm of agreement, to a restored and harmonious consensus, is to be preferred to the public realm with its compulsions, divisions, zero-sum decisions, and shattering social effects.[16]

Finally, *Dispute Resolution* (pp. 8–9) evokes nineteenth-century formalism and its politics in its characterization of adjudication, arbitration, mediation, and negotiation as " 'primary' dispute

[16] This preference for the private over the public is also seen in Hart and Sacks's (1958: 312) belief that grievances could best be handled through what they called "private" processes, namely "agreement and formal release; arbitration; and the decision by private associations of their own internal disputes."

resolution processes" and private judging, expert fact finding, mini-trial, ombudsman, and summary jury trial as " 'hybrid' dispute resolution processes."[17] Moreover, the organization of chapters 2–4 in the section on primary processes, beginning with negotiation and moving to mediation and adjudication (including arbitration), again expresses Goldberg, Green, and Sander's sense of the primacy of the private, voluntary, and apparently noncoercive and conveys an image of disputants confronting an open array of dispute processing alternatives from the perspective of a rational utility-maximizer reluctantly driven from the private order of negotiation.

To note that *Dispute Resolution* shares with other postrealist efforts in the legal academy an inability to shed the vestiges of nineteenth-century formalism and that it seems to reflect the political tilt of that style of thought is, of course, only one way of talking about this book.[18] At this point I'd like to turn from the effort to locate *Dispute Resolution* in legal thought and legal education and consider it from the perspective of the sociology of law and, in particular, the sociological perspective on disputing and dispute processing. I do this because I believe that there may be important points of opposition between several elements, and the implicit political commitments, of the sociological perspective and the new formalist perspective of *Dispute Resolution* (see, for example, Cain and Kulscar, 1981–82).

V. SOCIOLOGICAL PERSPECTIVES ON DISPUTING AND DISPUTE PROCESSING

The opposition between the new formalism and sociological perspectives is one that the editors of *Dispute Resolution* seem eager to deny. In many places Goldberg, Green, and Sander note with regret the relative paucity of empirical data on dispute resolution; they use language that is familiar to sociologists working on dispute processing. For example, in determining which processes should be used for which disputes, they talk about the "relationship between the disputants" and "the power relationship between the parties" (pp. 10–11). Moreover, the editors (pp. 534–538) say they want to encourage empirical research, listing six questions that they claim could be usefully addressed:

1. Is there an adequate empirical basis for the claimed advantages of alternatives?
2. If the alternatives to adjudication have all the advan-

[17] The separation of the primary from the hybrid is reminiscent of Hart's (1961) distinction between primary and secondary rules and Hohfeld's (1913) analysis of rights.

[18] The power and pull of formalism in dispute processing and the vestiges of legal formalism that it carries forward have influenced a wide variety of work on dispute processing, including some of my own early writings (see Sarat and Grossman, 1975; see also Trubek, 1981).

tages claimed for them, why are they not more widely used?

3. Can we develop a satisfactory taxonomy of dispute resolution processes, matching disputes to appropriate dispute resolution processes?
4. Can we develop a sophisticated cost/benefit analysis for the various dispute resolution processes?
5. Is there a danger that in our preoccupation with finding the appropriate dispute resolution process, we will lose sight of the need for fair outcomes?
6. Is there a danger that the availability of alternatives will cause the shunting of low and middle-income disputants to a form of second-class justice . . .?

This is a surprising, and surprisingly limited, array of questions, many of which are hardly phrased to enable a clear sense of how empirical research would or could provide an answer. At best they seem to imagine empirical research as restricted to questions of utilization and outcome. It is thus not surprising that the editors (p. 538) suggest that even the empirical research they envision will "have a limited effect on the resolution of the underlying legal and policy-oriented questions . . . ." Yet they (ibid.) believe that

> empirical data can be influential in changing policy, particularly to the extent that existing policy is based on factual misconceptions. In a field as comparatively new as dispute resolution, such misconceptions are certain to abound. Hence, the opportunity exists for empirical researchers to make a significant contribution to resolving at least some of the impediments to the expanded use of alternative dispute resolution processes.

The role of empirical research is, in this view, largely one of correcting mistakes and educating policy makers (see Sarat and Silbey, 1988). In addition, those who conduct empirical research are imagined as allies who can help Goldberg, Green, and Sander facilitate the utilization of nonjudicial dispute processing techniques. *Dispute Resolution* assigns to social scientists a rather narrow project of implementation research that will be captive of the political assumptions and commitments of the alternative dispute resolution movement (for a similar view, see Rosenberg, 1981).

Should sociologists interested in disputing and dispute processing accept this imagining and this description of their role? Is the contribution of the sociological perspective largely derivative, or can (and should) it challenge the assumptions and policy preferences of the contemporary formalists? These are the key questions that a confrontation with the perspective that animates *Dispute Resolution* poses for sociologists.

Unfortunately the answers to these questions are, to judge from available research, rather mixed. Some sociologists interested in disputing and dispute processing seem content with the role assigned to social science in the formalist perspective. Thus much energy has been devoted to the evaluation of existing dis-

pute processing techniques, mediation programs, or experiments in alternative dispute resolution (see, for example, Felstiner and Williams, 1982; Roehl and Cook, 1982; Davis, 1982). While such efforts have provided valuable insights into the disputing process, they are all too easily appropriated by the new formalism and joined to its political agenda. However, other work in the sociology of disputing and dispute processing points in different directions and challenges the goals and politics of the new formalism in a way that opens the field of inquiry to possibilities neglected by contemporary formalist understandings (Cain and Kulscar, 1981–82; Kidder, 1981; Harrington, 1985a; Trubek, 1984). There are, I believe, at least five such possibilities suggested by the existing sociological work on disputing and dispute processing:

1. *The sources of disputes are as important as the disputes themselves.* Some sociological work on disputing and dispute processing takes as its starting point the dispute itself and its origins; it seeks to examine the source of disputes in a universe of grievances (Felstiner *et al.*, 1981) and to discover why so many grievances are never articulated as disputes (Bumiller, 1987; Sarat, 1984). Grievances and disputes are accordingly subjective, unstable, complicated, incomplete, and constituted through dispute processing techniques. Thus "a theory of disputing that . . . [looks] only at institutions mobilized by disputants and the strategies pursued within them . . . [is] seriously deficient. It . . . [is] like constructing a theory of politics entirely on the basis of voting patterns when we know that most people don't vote in most elections" (Felstiner *et al.*, 1981: 636).

This proposition suggests that *Dispute Resolution*'s new formalism begins at the wrong place by taking disputes as given. As a result, that perspective suggests that we have too many disputes in society and that the job of those interested in dispute processing should be to design institutions to resolve disputes and thus restore social harmony. However, focusing on the emergence of disputes suggests that the problem is less one of resolving already articulated disputes than of designing social processes that facilitate or encourage disputes that are all too rarely articulated. Here perhaps energy should be invested in overcoming barriers to disputing rather than in overcoming barriers to using alternative dispute processing techniques (Sarat, 1984).

2. *Disputes, even after they emerge and are articulated, are indeterminate. They do not exist in fixed form prior to the application of particular dispute processing techniques; they are instead constituted and transformed as they are processed.* These propositions are at the heart of the sociological interest in dispute transformation (Felstiner *et al.*, 1981; Mather and Yngvesson, 1981; Yngvesson and Mather, 1983; Sarat and Felstiner, 1986). As Mather and Yngvesson (1981: 776–777) assert, an assumption fundamental to the transformation approach is that a

> dispute is not a static event which simply "happens," but that the structure of disputes, quarrels, and offenses includes changes or transformations over time. Transformations occur because participants in the disputing process have different interests in and perspectives on the dispute; participants assert these interests and perspectives in the very process of defining and shaping the object of the dispute. What a dispute is about, whether it is even a dispute or not, and whether it is properly a "legal" dispute, may be central issues for negotiation in the dispute process.

From this viewpoint it may not be wise to approach the study of disputing and dispute processing as the search for the ideal fit between a fixed dispute and a fixed array of dispute processing techniques (for a similar argument in a different context, see Simon, 1984).

3. *Dispute processing techniques are internally inconsistent and adaptive. They are transformed by and adapt to the problems that are brought to them.* For example, there is ample evidence that mediation is practiced in very different ways in different contexts and by different mediators (Gulliver, 1977; Nader and Todd, 1978; Merry, 1982; Silbey and Merry, 1986b). Neither disputes nor dispute processes mean the same things in different places or at different times (Merry, 1982; Auerbach, 1983). Mediators employ different practices and strategies to process disputes. At their extremes this may mean that mediators have less in common with each other than with those employing analytically distinct dispute processing techniques such as negotiation or arbitration.

In addition, sociological research suggests that dispute processing techniques are not fixed and rigid in their form. They adapt and respond to the demands made upon them. The nature of the problems with which each of these processes deals as well as the demands and needs of the disputants "impinge on each[,] . . . subtly shifting it and consequently transforming legal processes" (Silbey and Merry, 1985: 3; see also Council on the Role of Courts, 1984: 82). In this sense, dispute processing techniques are objects as well as agents of transformation.

4. *The boundaries between and differences among dispute processing techniques are shifting and often blurred.* If one compares the ideal typical model of adjudication to the ideal typical model of mediation, the differences are of course stark. But if one compares the usual plea bargain or negotiated settlement with the practice of mediation in criminal or family matters, the picture is quite different. Similarities in both form and function emerge as processes that in their abstract description seem antithetical work in similar ways (see Galanter, 1983; Harrington, 1984; Silbey and Merry, 1986a: 3–4).

Dispute processes are flexible and adaptive, their boundaries are blurred, and their capacities are uncertain (Cavanagh and Sarat, 1980; Galanter, 1984). Both disputes and dispute processing

are indeterminate: Disputes shape dispute processes and dispute processes reshape and remake the disputes they process. Disputes and dispute processes have complicated and uncertain life histories whose meanings are emptied by a search for the essential attributes of either. Neither disputes nor dispute processing exist as entities with positive content separate from the contexts and discursive practices through which they are constructed. In place of the determinacy and the necessity signified by the formalist insistence on essentialism, some sociological work emphasizes the open-endedness of practices and the contingent construction of dispute processing.

This, of course, challenges efforts to define the essential attributes of mediation, arbitration, and adjudication, to understand the characteristics of disputes that make them suitable for processing by one or another of those techniques, and to channel disputes into the processes most suited to cope with them. Thus the effort to identify a dispute that is appropriate for mediation or adjudication seems compelling only if one assumes that the characteristics of mediation or adjudication are fixed and are not shaped in important ways by the disputes that mediators or judges process. It only seems compelling, moreover, if one assumes that disputes are also relatively fixed in their content and meaning and that they are not altered in response to or transformed by dispute processing techniques.

Concepts like mediation or adjudication should not be used as if they referred to fixed, concrete entities,[19] for they are embedded in varying social practices that only take shape and definition as they are processed. The language of the new formalism uses those terms as if it could proceed on the basis of something prior, something external to the disputing process itself, to match disputes and dispute processes. For contemporary formalists the mediator who exercises power or advances a zero-sum solution is not doing mediation. Formalism thus presents a nonfalsifiable portrait of dispute processing techniques in which all that sociologists can do is to evaluate practices in light of ideal types.

5. *Disputes are more often processed than resolved, and in that processing, mediation, and arbitration as well as other so-called informal dispute processing techniques serve as important*

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[19] The full articulation of the sociological agenda awaits the kind of rejection of essentialism that animated Cohen's criticism in "Transcendental Nonsense and the Functional Approach" (1935). As Cohen said in his argument about conceptualism (ibid., p. 82),

> Legal concepts . . . are supernatural entities which do not have a verifiable existence except to the eyes of faith. . . . It follows that a legal argument can never be refuted by a moral principle nor yet by an empirical fact. Jurisprudence, then, as an autonomous system of legal concepts, rules and arguments must be independent both of ethics and of such positive sciences as economics or psychology for in effect it is a special branch of the science of transcendental nonsense.

vehicles for maintaining the political status quo. The language of dispute resolution suggests finality where sociologists, with their insistent use of dispute processing, recognize openness (Felstiner, 1974). Furthermore, "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. . . . There is a continuity to disputing that may not be terminated even by formal decision" (Felstiner *et al.*, 1981: 639). Those who try to evaluate the effectiveness of dispute processing by inquiring whether agreements have been kept (see, for example, Vidmar, 1984; McEwen and Maiman, 1986) may be asking the wrong question. Instead they should look for ways in which disputes are displaced, rephrased, or simply repressed.

But just as some sociologists insist on looking beyond the formal resolution of a dispute, so do they insist on probing for the latent effects of the development of dispute processing techniques (Abel, 1982; Felstiner and Williams, 1978; Harrington, 1985b; Cain and Kulscar, 1981–82). Here the emphasis is on how those techniques serve social control purposes and inhibit the development of coherent political opposition by individuating grievances (see Kidder, 1981).

Sociological research calls into question the distinction between the private and the public and the voluntary and the coercive, which is so much a part of the vocabulary of formalism (Harrington, 1980; Yngvesson and Mather, 1983; Merry, 1982; Abel, 1982). This work suggests that the private and voluntary world of negotiation and mediation cannot exist prior to and independent of the public and coercive world in either the weak sense associated with the phrase "bargaining in the shadow of the law" (Mnookin and Kornhauser, 1979) or in the stronger sense tied to the concept that all private practices are constituted by and through the public sphere (Olsen, 1985). Negotiation is riddled with norms and values reflective of the public order and exists only as a "derivative effect of the social, public power manifest in the privilege . . . [of one disputant] to force the other to unpleasant alternatives" (Peller, 1985: 1222; see also Galanter, 1983). The dichotomy and hierarchy implicit in the separation of free will and coercion collapse when it is realized that these concepts are inevitably relational.

V. CONCLUSION

These five elements of existing sociological work on disputing and dispute processing suggest differences, some might say sharp and fundamental differences, between that work and the new formalism developed in *Dispute Resolution*. Sociologists emphasize greater indeterminacy, variability, and open-endedness than is suggested by the style or content of that perspective. In the end, how-

ever, social scientists may greet *Dispute Resolution* with mixed emotions.[20] While the book does open new perspectives and opportunities within legal education and thus may make possible a fuller dialogue between the sociology of law and the legal academy,[21] this welcome widening of the field of vision may be bought at a rather high cost.

Dispute Resolution seems to carry forward important elements of nineteenth-century formalism that give little room for anything more than a sociology of disputing confined to evaluation research. In so doing it may discourage the full development of distinctly sociological perspectives. Moreover, the book ignores or masks significant political and normative issues raised—at least provisionally—in some sociological work concerning the place of disputes and disputing in advancing desirable political changes, the difficulty of separating public and private spheres, and the problems associated with privileging an individualistic, voluntarist vision of social life. In the end, we need to retain the broadened perspective the book makes possible while resisting the tendency of the book and its formalist perspective to ignore the critical insights of much sociological work on disputing.

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[20] This line of argument was suggested to me by David Trubek.

[21] This dialogue is, for me, in itself a mixed blessing, for it presents its own dangers. For a fuller statement, see Sarat and Silbey (1988).

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