EVERYDAY DISPUTES AND MEDIATION IN THE UNITED STATES: A REPLY TO PROFESSOR FELSTINER*

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In a recent article in these pages Professor W.L.F. Felstiner (1974) made a substantial contribution to the literature on dispute processing by analyzing the role of avoidance as a means of ending disputes, and by correlating the ubiquity of this technique with differing forms of societal organization. In brief, his insight—richly developed in the article—is that the tendency to walk away from contentious situations is greater in "technologically complex, rich societies" than in "technologically simple, poor societies." This is because the organization of richer societies minimizes the importance and the intertwining (multiplexity) of family and other group ties and maximizes social, occupational and geographic mobility. In contrast, citizens of poorer societies are bound closely to the individuals in their communities and thus have a greater need and capacity for resolving—rather than walking away from—disputes with those individuals.

From this observation Professor Felstiner goes on to criticize a proposal (Danzig: 1973) which urges that existing American court systems be complemented by the creation of fora where the process of mediation may flourish. Though he is modest and tentative in his criticisms, essentially three arguments can be teased out of his text: First, insofar as many disputes in the United States never come to the attention of the court system (because of the costs, the slowness, the alien nature of that system, etc.,) that is not something which we ought particularly to worry about. "Much of the slack may be absorbed by avoidance." (1974: 86). Second, even if it were desirable to construct a mediational system in the United States, such a system would be very much more costly, difficult to operate, and imperfect, than comparable systems in other, less technologically complex, poorer societies. In other societies, Felstiner observes, mediated disputes are usually between group members who share values

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and experiences both with each other and with the mediator. In the United States, where group definition and cohesion is weaker, the mediator is "unlikely to share significant intimate experience with the disputants" (1974: 87). Thus, according to Felstiner we are in a situation where, by and large.

> Mediation is no longer feasible because, whatever the shared general social and cultural experience, no specific mediators nor occupants of specific social positions will possess as a matter of existing experience sufficient information about the particular perspectives and histories of the particular disputants to be able efficiently to suggest acceptable outcomes. (1974:79).

Third, Felstiner suggests that this absence of group cohesion will make it more difficult for an American mediator to be respected as an authority. Moreover, "a successful transplant" of foreign experiences may be impeded by the absence in the United States of "a particularly strong respect for authority" (1974: 87) which has been said to exist in other cultures from which the examples of mediational achievements have been drawn.

We think that despite the quality of Professor Felstiner's theoretical analysis of the role of avoidance in handling disputes in technologically rich, complex societies, he is quite mistaken about the possibilities for mediation in America. The following pages discuss what we regard as the errors implicit in the arguments just summarized. In succeeding sections we argue, first that Professor Felstiner minimizes the difficulties and overlooks many of the costs of avoidance, and second that he overlooks the gap between the present demand for mediation and its supply. In a third section we argue that Professor Felstiner misperceives an important aspect of the nature of mediation because of his almost exclusive use of what we shall call a "third party perspective," and this bias in perspective causes him to exaggerate the difficulties associated with mediation in this country. As a complement and corrective to his approach we suggest the adoption of a "disputant's perspective." From this intellectual base we urge extensive experimentation with mediative techniques in America.

I. ON AVOIDANCE

We think that in moving from his academic analysis to his policy perceptions Professor Felstiner abuses his analytic framework. At the outset (1974: 64) he structures the problem before him on the no doubt correct premise that "dispute processing cannot be explored using a real empirical base because the data do not exist." He therefore constructs two models of types of societies and argues that in one type, "technologically simple,

poor societies," adjudication and mediation will have a significant role and avoidance will be difficult, while in the other type, a "technologically complex, rich society," the reverse will be true. In constructing these models, Professor Felstiner readily concedes (1974: 64) that he is guilty of "one-sided accentuation" (others may say exaggeration) of the characteristics of each society.

A crude error that often follows from the elaboration of such constructs, is that the author becomes so engrossed in his models that he forgets that they correlate only imperfectly with reality. Though the model of a technologically complex rich society may suggest universally high mobility or the end of the extended family, obviously there are pockets in any actually existing technologically complex rich society where such phenomena do not obtain. To the extent that an analyst treats a society as uniformly of one character or another he will go astray.

Professor Felstiner is too sophisticated to make this mistake. He concedes (1974: 86) that at present we do not know "the degree to which avoidance [in America] is as much an empirical reality as a sociological possibility," and, further that (1974: 84), under any conditions, "there are pockets within a technologically complex rich society where social organization is more like that postulated for a technologically simple poor society" and that in such pockets avoidance may be infeasible and mediation correspondingly more useful. This concession is quite important, because the proposal which we endorse and Professor Felstiner criticizes (Danzig, 1973: 8,48) quite explicitly argues that mediational services will be useful only in some American settings and not in others. So long as readers give Professor Felstiner's article careful attention on this point, they will see that at the outset a difference between his view and ours is not over the *existence*, but simply over the *magnitude* of the mediational need and opportunity in the United States.

Professor Felstiner's analysis is structured in a manner which tells us little in absolute terms about the magnitude of mediational need in the United States. At most, his typology tends to show that avoidance is eas*ier* and *less* costly in technologically complex rich societies than in their poorer counterparts. Obviously, a comparative proposition of this sort cannot sustain an "inference" that avoidance preempts any need for mediation in a given rich society. The key question is not whether demand for mediation is higher in technologically simple poor societies, but rather whether the current demand for media-

tion in rich societies in general, and our society in particular, is greater than the current supply. Put another way, the critical comparative question confronting those who would shape United States policies on this matter is how the costs and benefits of avoidance *in this society* compare with the costs and benefits of mediation *here*.

Insofar as Professor Felstiner's discussion touches on this central policy question, we think it is misleading. To him there is "a lesser need" (1974: 89) for institutionalized dispute resolution in the United States because avoidance is so common.

> Note for instance, the unexceptional nature in the U.S. of adolescent children limiting contacts with their parents to perfunctory matters because matters of importance have proved to be too contentious, of friends curtailing their relations because of past quarrels, of consumers switching their trade from one retail merchant to another after a dispute, of casual workers (gas station attendants, waitresses, dishwashers, gardeners, housekeepers) quitting jobs because of problems with employers, of children moving out of their parents' houses because of unreconcilable values and of neighbors who visit less because of offensive pets, obstreperous children, loud parties and unseemly yards. (1974: 76)

But what are the costs of this avoidance? Obviously transaction costs measurable in dollars and cents are associated with the rupturing and reconstructing of each of the relationships described. High job turnovers, frequent residential relocations, and empty rooms in paternal homes—not to mention the commitment of juveniles to state facilities on the ground that they are beyond control (Baylor Law Review, 1969)—are all economic inefficiencies of no small significance. Companies are responsive to the dollars and cents consequences of this type of avoidance when they institute employee grievance programs; there is no reason why a society should neglect such costs.

More significantly still, there are evident psychological costs. "Avoidance" carries an emotionally neutral, "clean" connotation, but the transactions Felstiner describes may often more appropriately be described as "ruptures," and in varying degrees, they will be unavoidably traumatic. In discussing technologically simple societies, Felstiner indicates (1974: 68) that avoidance may impair the "emotional health" of the avoider and he notes (1974: 80) that even if avoidance is not practiced the causes of a dispute must be dispelled, lest "the repressed hostility felt toward the other disputant is likely to be shifted to someone or something else." Is it so clear that disputes culminating in rupture or even mere avoidance have less impact on the "emotional health" of the disputants in the United States than in technologically less complex societies? Even if that proposition were

clear, could one assuredly say that these costs are low in the United States? We think both questions must be answered in the negative.[1]

We think also that Felstiner (1974: 74) underestimates "the social stakes" associated with avoidance because, though he cites Hirschman (1970) he ignores Hirschman's central (and persuasive) thesis that avoidance often leaves sources of grievance uncorrected, so that others are likely to fall prey to them. Professor Hirschman (1970: 106-7) agrees that avoidance (or as he calls it "exit") "has been accorded an extraordinarily privileged position in American life" perhaps because we are a nation of those who have emigrated from elsewhere, perhaps in part because the frontier historically presenting us with [quoting Frederick Jackson Turner] "a gate of escape from the bondage of the past." But he is by no means as sanguine about this phenomenon as Professor Felstiner. In some circumstances, he note (1970: 26)

> The exit option is ineffective in alerting management to its failings . . . customer dissatisfaction would [be better] vented directly and perhaps to some effect in attempts at [improvement] . . . whereas under competition dissatisfaction takes the form of ineffective flitting back and forth of groups of consumers from one deteriorating firm to another without any firm getting a signal that something has gone awry.[2]

When some residents visit less or move away because of "unseemly yards" or "offensive pets" the annoyances recur for those who arrive in their stead and for those who remain behind. Even when companies or individuals detect the consequences of their alienating conduct, exit often leaves them uneducated as to the cause of the avoidance they suffer.

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1. This point becomes especially salient when we consider the psychological costs absorbed by the persons avoided—a perspective which Professor Felstiner largely ignores. Beyond that, we note that avoidance may often be anguished and unwilling. Rapes for example infrequently generate complaints, but here the avoidance is practiced largely because of fear of retribution or embarrasment. People who stay off the streets at night are practicing avoidance, but we doubt anyone would praise a society which was satisfied with this reaction to street crime because it was a cheap way of dealing with a difficult problem.
2. A French hotel manager recently made the same point in more matter-of-fact terms.
   > The [Americans] are . . . the most dangerous of all hotel guests. If something goes awry the French guest will put up a fuss, and teach you how to run your hotel. The British guest kicks and screams, politely of course, but he comes back. The American clients don't register a complaint; they just disappear, never returning to your hotel.
   >
   > (San Francisco Chronicle, Dec. 8, 1974.)

And what of those neighbors, children of employees who cannot move away, visit less, or quit their jobs? There is good reason to believe that American society offers fewer possibilities for avoidance than Professor Felstiner recognizes.[3] His discussion develops the point that geographic, occupational and social mobility is higher in this society than in technologically less developed societies, and from this the inference is drawn that avoidance is easy in this society. But such reasoning ignores the effect of technology on inhibiting the degree to which disputes can be outdistanced by mobility. The United States maintains massive and strikingly effective information flow industries. In less technologically developed societies gossip reduces the possibilities of avoidance: it keeps disputes visible and salient. (Colson, 1953; Gluckman, 1963). In the United States credit rating networks inhibit walking away from disputes (Yale Law Journal, 1971: 1036; Wheeler, 1969),[4] arrest records are yet more likely to survive if the question they raise is not resolved by adjudication,[5] (University of Chicago Law Review, 1971;) and "recommenda-

3. We also think that Technologically Simple Poor Societies offer many more possibilities for avoidance than Felstiner assumes. Although some observers attribute present options for exit in poorer societies to such relatively recent phenomena as labor migration, urbanization, and new sources of identity (Clinard and Abbott 1973: 108-131, Tessler, O'Barr and Spain 1973, especially chapters 7-11; but see, Salisbury and Salisbury 1972, for an example of these new options reinforcing established relationships) other authors have found long standing patterns of individual and group avoidance (Woodburne 1968, Friedl 1962, Gluckman 1972). In fact, a noted historian of Africa has suggested that fissioning due to lineage system strains was important to the peopling of the continent (Davidson 1974). In addition to avoidance thru geographic movement, the literature on community life in Technologically Simple Poor Societies demonstrates the remarkable ability of people who live in close physical proximity to ignore one another (Roberts and Gregor 1971).

4. Credit rating networks inhibit walking away from personal as well as commercial disputes. One student of the field recently reported that there were ninety million credit reports on file in the United States. These apparently report arrests, law suits, divorces, neighbors' opinions, drinking habits and other "personal" matter as much as financial histories, because credit decisions are often viewed a judgment of character as well as capital and capacity to pay. (Yale Law Journal, 1971: 1036.) If anything, this tendency towards extensive information retention seems likely to increase as this society grows more technologically sophisticated and as creditors find their repossession remedies increasingly hemmed in by state and federal law. (National Commission on Consumer Finance, 1972: 212.)

5. The President's Commission on Law Enforcement and Administration of Justice found that 75% of the employment agencies sampled in a new York City study would not refer an applicant with an arrest record. See, The Challenge of Crime in a Free Society, 75 (1967a). Recent case law is slowly encouraging the practice of expungement. See, e.g., *Davidson v. Dill*, 503 P.2d 157 (Colorado, 1972), but several million Americans still carry their arrest records with them wherever they go. See Karabian, 1972, Wolfgang, *et al.*, 1972: 58-60; President's Crime Commission, 1967a: 75: "The fact that the majority of slum males (estimates vary from 50 to 90 per cent) have some sort of arrest record indicates the magnitude of this problem."

tions" are so often a prerequisite to a next job that it may be even truer now than it was in Shakespeare's age that "reputation is past all surgery," it is "the immortal part of myself." (Shakespeare, 1602, Act II, Sc. iii 11. 260-264).

One's sense of the difficulties of avoidance may be enhanced by the suggestive observation that the United States may be viewed as a bundle of "status communities" (Stub: 1972), often based upon occupational specialties [jazzmen (Keil: 1966); tramps (Spradley:1970); longshoremen (Pilcher:1972); and cocktail waitresses, (Spradley and Mann: 1975)]. Avoidance within such status communities may be almost impossible when individuals live in the same town or city. When greater distance is established, automobiles, telephones, trade journals and other devices of communication and transportation inhibit avoidance.

The hierarchical ordering of some status communities compounds the difficulties of a would-be avoider. Though a university professor or a small town police chief can move to any of hundreds of other universities or cities, the actual range of his options will be inhibited both by his reputation and by his desire to move at least laterally in terms of status. Reich describes this phenomenon well (although his attention is mainly devoted to governmental largesse) when he emphasizes (1964) the importance of a "new property" in American life: the property of position. "New Property", it may be suggested, is often not portable, whether at lower or higher status levels. A factory worker and a fireman will be inhibited from movement by the organizational boundaries of their seniority rights and often—even in the face of recent federal legislation—of their pension arrangements. Doctors, lawyers, salesmen and businessmen will be tied into social and economic networks which are their most valuable property asset—their clientele.

Professor Felstiner makes much of the fact that relationships in technologically simpler societies tend to be multiplex (multifaceted), while those in a technologically complex, richer society are more often simplex. But the distinction between simplex and multiplex relationships becomes less important if we conceive of society in terms of socio-economic networks rather than bounded groups. Important advantages are gained from such networks and we are inclined to think that abandonment or avoidance of one's network may have many of the adverse socio-economic and psychological consequences which Felstiner posits for multiplex relationships within the context of a society cen-

tered around corporate kin groups.[6] In sum, though it may be fair to say that this is the most mobile society in history, though it may even be fair to deduce from this that avoidance may be unusually achievable for some Americans often, and for many Americans occasionally, still avoidance may be the minor mode of dealing with disputes in this society. One ought not to confuse changes at the margins of societal organization with fundamental changes in society.

II. ON THE PRESENT DEMAND FOR AND SUPPLY OF MEDIATION

If Professor Felstiner exaggerates the ease and underestimates the costs of avoidance, he similarly, in our view, underestimates the present demand for mediation.

It is easy to do so, because evidence of the demand for mediation is drawn from various contexts and is often disguised by the fact that the mediator has other and more obvious roles. Mediational services are often for sale. People hire lawyers to help them settle claims, counsellors to guide them in resolving family tensions, and therapists to work through the effects of disputes. When they come together in groups such as labor unions, business corporations, athletic leagues or universities, they hire mediators, counsellors, deans, personnel officers and the like. Though all of those hired perform other functions, dispute resolution through mediation bulks large in their work. Moreover, studies as diverse as MacCallum's (1967: 291-99) of a shopping center and Macaulay's (1966: 151-58) of relations between automobile franchisors and franchisees describe the processes by which individuals and agencies come to play a mediative role even when charged with apparently predominant adversarial or adjudicative functions. For example, the Wisconsin Department of Motor Vehicles, a mediative forum described by Macaulay, has no official role in franchisor-franchisee relations except to hold hearings on whether to revoke a franchisor's license in Wisconsin because of his wrongful termination of a franchisee. But,

> The Department does not now view its major function as holding formal hearings and suspending or revoking licenses. Rather it is proud of its informal mediating activities . . . frequently co-

6. Indeed we suspect that Professor Felstiner exaggerates the necessity of inter-relationships between the facets of multiplex relationships in technologically simple societies. We think there is substantial evidence that mediation, arbitration and adjudication will often produce curtailment of a single strand or interest in an otherwise continuing multiplex relationship. See, Starr and Yngvesson, (1975) and, Van Velsen (1969).

> munication between manufacturer and dealer is reestablished because these arguments take place before representatives of the Department who can and do ask searching questions which must be answered. The combatants are forced to deal with each other's arguments; the Department officials can deflate untenable stands; and they can force both sides to make concessions. After an hour or two usually the parties will ask for a recess, leave the meeting room, and work out settlement. (Macaulay, 1966: 154).

The tendency to employ mediators or to have people who are in theory employed for other purposes assume a mediative role seems so strong that in many situations there is no apparent need for any further provision of mediative services. But the provision of these services is presently markedly skewed. By and large they are available in business life where the stakes are high, and in everyday relational contexts when an aggrieved party is well-to-do. But even more than with most other goods they are in scarce supply for the poor. We provide the poor with adjudicative mechanisms on the matter-of-fact assumption that adjudication must be a public good but—by and large—we turn our backs on couples who cannot afford marriage counselling,[7] low-income tenants who quarrel with their landlords, low-expenditure consumers who quarrel with their suppliers, and teachers and students, tenement dwellers and teenagers who quarrel with each other. In dealing with their disputes these people strive to engage outsiders as aides no less—indeed perhaps more—vigorously than their wealthier counterparts. But finding no service tailored to their demands they bring their disputes to agencies and individuals who are both unmotivated and ill-equipped to mediate.

The police are the agency most often selected to perform this function. A policeman may be called to render physical aid, to initiate the adjudicative process, to protect someone who is trying to "avoid" someone else. But often, also, he is called to mediate. A 1968 opinion survey of 1,369 randomly selected New York City policemen revealed a widespread sense that the public was making "unrealistic demands" on the agency. When asked to explicate the nature of these demands, the most often cited item—noted by 45% of the officers—was settling disputes between family members and friends. Moreover, thirty-seven per cent of the officers cited the "unrealistic demand" of their being called upon to settle disputes between customers and store managers, cab drivers and passengers. (Opinion Research Corporation, 1968: 6-9). A contemporaneous incident study of a New York City police precinct sustained this impression when it

7. But see Foster (1966).

showed that after sick calls and miscellaneous categories, more total police time was spent dealing with disputes than on any other type of incident. (National Institute of Law Enforcement and Criminal Justice, 1971: 15; see also Cummings, Cummings and Edell, 1965).

The police have traditionally been very poor at the dispute resolution aspect of their job. In recent years some departments have attempted to improve this aspect of their work, by creating special landlord tenant dispute units (Moody, 1972), by providing family crisis intervention training (Bard, n.d.; Bard, 1969; Leibman and Schwartz, 1973) and the like. However, viewed as dispute processing efforts these programs confront at least a half-dozen very substantial difficulties. First, police offer high resistance to doing mediative work. Skolnick (1968: 17) reports a characteristic comment by a line officer, "If I had wanted to be a social worker, I would have gone to social work school." Second, the time pressures associated with police work leave the patrolman little freedom to devote more than an average of a half an hour to a dispute call (National Institute of Law Enforcement, 1971: 15). Third, the rewards within a police department are based on criteria (primarily arrests) which create no incentive for an officer to perform mediative functions (Rubinstein: 1973). Fourth, on top of these difficulties a patrolman's efforts at mediation may often be stymied by the alien, authoritarian characterizations that his uniform, weaponry, and coercive power evoke in citizens. Fifth, the experiential and value affinities which Professor Felstiner thinks very important to the success of mediation often do not exist between a policeman and the people he polices.

> [A] police officer whose background is likely to be middle or lower middle class in nature cannot rely on his common sense or his past experiences within the middle-class segments of the community when he attempts to gain voluntary compliance from those whose common sense is predicated on values and norms at variance with his own. (McNamara, 1967: 168).

Finally, and perhaps most seriously, police work does not usually permit follow-through, or the handling of repeated cases by the same personnel. Given the almost universal absence of accessible referral agencies, disputes once "cooled" by a policeman tend to fester and then break out again. Tension from the non-resolution of these differences often results in civil cases (which officials will not seriously attend to) escalating into criminal ones (which officials will address).

Often, Professor Felstiner may be right, neighbors ignore one another after a quarrel, and couples let by-gones be by-gones

or get a divorce. But often, also, tension, far from being dissipated through avoidance escalates into self-help—a category which Professor Felstiner's trichotomy of avoidance, mediation and adjudication ignores. Self-help in this context often takes the form of assault and sometimes murder. Several studies of urban courts in the United States have shown that about a third of the criminal cases heard there involve neighbors, friends and kin (Katz, 1968; Goldman, 1973; Leaa, 1975; City of Cincinnati, 1975). This observation is especially striking if one keeps in mind that the police are biased *against* filing criminal complaints about kinsmen or well-known others. (Black, 1970). A perhaps more reliable indicator of the effect of festering disputes is the fact that in wilful murder cases, where obviously the police cannot avoid opening a file, over half of those recorded as murdered turn out to be previously linked by bonds of some intimacy to their murderers. (Wolfgang, 1958; President's Crime Commission, 1967 b.)

The police experience of being impressed to meet the demand for mediative services while being poorly positioned to provide them is replicated in lesser degree by many other agencies and individuals who have contact with the poorer segments of our society. Social workers, school teachers, ward politicians, local ministers and low-level city bureaucrats all view their primary mandates in other terms,[8] yet all feel the hydraulic force of demands for assistance in dispute processing. (Goldsmith, 1975).

III. THE POTENTIAL FOR MEDIATION IN THE UNITED STATES

Our proposition is simple. All concede that the procedures in municipal, state and federal courts are ossified to the point, priced to the level, and slow to the degree where they cannot flexibly assist disputants in resolving their everyday disputes. The roles played in other societies by kinsmen and local community in supplementing their equally ineffective regular government court systems are only partially, very imperfectly, and often unwillingly filled here by policemen, social workers, ward politicians and others. To fill this gap we recommend experimentation with "community moots."[9]

8. "In discussing the generation of role expectations in street-level bureaucracies, the relative unimportance of non-voluntary clients should be noted. The non-voluntary clients of these bureaucracies are not primary (nor even secondary) in creating role expectations for these jobs" (Lipsky n.d.:13). Elsewhere (1971) the same author has argued that decentralization of street level bureaucracies (police, teachers, welfare personnel) may overcome these difficulties.
9. Though we speak of experimentation, we do not mean to imply that

The method of operation of a moot could vary with each neighborhood.[10] Typically, however, it might draw referrals from social agencies, schools, the police, the existing court system, and from voluntary submissions by individuals who wished the services of the body. A mediator accepting such requests for a moot might then arrange sessions at a time and place suitable to the participants, the complainant, the persons about whom he had complained, and those invited by these parties or the mediator. If a necessary party refused to attend, a mediator would simply refer the other parties to the municipal justice system. This possibility should often secure the cooperation of those who in the court system would be defendants.[11] A significant attraction to complainants is that the moot holds promise of being more conveniently located, more considerate, faster, and more comprehensive in addressing conflicts than the municipal system. Moreover, there is evidence that a number of would-be complainants do not proceed through the regular police and court system because they do not want the offender to be "harmed" or because they think that the incident is a private, not a criminal matter.[12] For such people, the informal, private, noncoercive style

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there are no precedents for this enterprise. We have refrained from presenting a review of citizen mediation programs since a Law Enforcement Assistance Administration funded research report has just been completed on the subject and should be made public shortly. Agencies concerned with mediation of some interpersonal disputes among adults—some of which, in fact, report that their efforts were prompted by Danzig (1973)—are now operating in, for example, Columbus (LEAA 1975) and Cincinnati (City of Cincinnati (1975) Ohio; Chester (Warhaftig:1973) and Philadelphia, Pennsylvania; Newark, New Jersey; New York City (Freinberg and Weisbrod 1975) New York; and Tuscon, Arizona (Graecen 1975). These programs vary in case screening, location, restrictions on attendance, choice of mediator, types of cases handled, amount of follow-up work, and how "free" the litigants are made to feel about using this kind of dispute management. For example, the mediation efforts in Chester, Pennsylvania are handled by well known community residents who mediate domestic disputes and other criminal complaints. The project has its own office located in the community and attendance is flexible. The Columbus Ohio program handles a wider range of cases which are mediated by law students. Attendance is more restrictive and the hearings take place in a municipal building (Warhaftig and Lowy 1974).

10. The following four paragraphs are largely drawn from Danzig, 1973: 46-48.

11. In Columbus Ohio, from September 1972 to September 1973, 3,626 complaints were diverted from the court for mediation. 37% (1,341) of these cases were not heard because one or both parties failed to appear- yet no complaints were filed in court. An additional 2% (84) of the cases resulted in a complaint being filed at court. Unfortunately the information available does not tell us how many of these 84 cases were a result of no-show by the defendant or a lack of agreement after mediational effort. The largest group of cases 61% (2,201) were mediated and no complaints were subsequently filed (information on the lasting effect of the mediated outcome is not available), (see, LEAA 1975).

12. A National Opinion Research Center Survey of 10,000 households in 1965 revealed that only about 50% of all crimes were reported to law

of the moot may be very appealing. Because the moot has no power of compulsion and does not preempt regular court action, a complainant has nothing to lose by turning first to it. Refusal to give the mediator power to compel attendance is not likely, therefore, to leave a moot without cases.

A moot might be public or private, held in a home and in a community meeting hall, or at a mediator's office. Typically, moots might function by the mediator asking the complainant to state his grievances and his requested remedies, by having the person complained about respond, and then by allowing general discussion and questioning between all those present.[13] It would be hoped that through such open discussion a range of grievances running in both directions would be aired and better understood;[14] that the mediator might be able to suggest future conduct by both parties to reduce tensions; and that both friends and relatives invited by the participants might serve as "witnesses" and participants in the consensual solutions evolved. It is also possible that litigants might recognize that their disputes have roots outside their interpersonal relations and work together to change the conflict generating situation, or to improve each other's positions.[15]

It will be seen from this brief description that in some cases it is hoped that the moot will have effects beyond the judicial and even the correctional function. The moot as recommended

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enforcement authorities. Thirty-four percent of those who did not report an incident explained that they did not want the matter treated as a criminal affair or the offender harmed. Ennis, *Crime, Victims and the Police*, in MODERN CRIMINALS 87, 94 (J. Short ed. 1970).

13. Not every type of community will have a cultural milieu conducive to the expression of such grievances, nor could we expect every potential participant in any given community moot to be open to this approach. See the comments on cultural barriers to the expression of feelings, in J. Spiegel, *Some Cultural Aspects of Transference and Countertransference*, in INDIVIDUAL AND FAMILY DYNAMICS 160, 171-75 (J. Masserman ed. 1959).

14. "In the moot the parties . . . are allowed to hurl recriminations that, in the courtroom might bright a few hours in jail as punishment for the equivalent of contempt of court." Gibbs, *supra* note 121, at 286.

15. "A young man stole a color television set. At the diversion hearing he found that his victim was an invalid old woman, to whom the television set was life's central attraction. He was able to grasp the full consequences of his act—he had not just ripped off a TV, he had materially hurt the quality of the old woman's life. In the end, he agreed to paint her house, mow her lawn, and drive her to the doctor for her weekly checkup (in addition to returning the television set) . . . . In another case the victim ultimately provided the offender with a $10,000 scholarship to attend medical school" (Graecen 1975: 53).

The decentralization of the management of interspousal disputes may be a countervailing force to the increasing control by medical and legal specialists of responsibility assignment in our society. (This argument is developed in Lowy 1974).

would be unique in prompting *community discussion* about situations in which community relations are on the verge of breaking down. When the juvenile who loiters around a shop now receives a police record and warning, antagonisms between him and his peers and the shopkeeper and police are increased rather than relieved. If the complaint were replaced by mediation to which the teenager brought his friends, the shopkeeper his associates (including family, other shopkeepers, his employees), and (in some instances) the police their officers charged with working with juveniles, there would be a fair chance for the kind of interchange which is valuable when staged as a one-event "retreat" in other communities. Depending, no doubt, on the passions and personalities involved, the interests of the litigant's supporters, the skill of the mediator and the root causes of tension, there is reason to hope that such sessions would be useful.

No legislation would be necessary to initiate a moot; the cooperation of individuals associated with the existing court system would be the only prerequisite. Insofar as the moot might prove ineffective in some cases or areas, complainants could be expected to reinitiate their cases in the municipal courts.

Professor Felstiner raises two objections to this scheme, one tangential and the other basic. Almost as an aside he remarks that a mediator working in an American neighborhood may not have the authority to effect a resolution of the dispute before him. At much greater length, and with a more full blown analysis he suggests that a mediator is "unlikely to be functional unless he shares significant intimate experience with the disputants. If such a criterion is ignored or cannot be met in counsellor selection [foreign experiences with moots] may be impossible to duplicate." (1974: 87).

In advancing the first of these points we think Professor Felstiner overlooks the ease with which position confers authority on those who may otherwise lack it in everyday life. Other cultures may have "internalized a particularly strong respect for authority," but the experimental data, day-to-day information, and intuitive evidence runs counter to any assertion that American psyches are different in this respect. (Cf. Milgram, 1974).[16] Moreover, a mediator may derive substantial authority from the prior agreement of the disputants to accept his assistance—an

16. It is however, possible that those who tend to be engaged in disputes of the sort that would come to a moot, would be less prone to compliance than the more general population observed by Milgram. As with other possibilities, more insight on this must await empirical evidence.

agreement which may be encouraged by their desire to avoid formal court proceedings.[17]

We believe that Professor Felstiner errs more seriously in adopting what we call a "third party perspective" for assessing the quality and value of mediation. Implicit in his discussion is a view that to be "efficient" a counsellor must have substantial prior information about the disputants, a keenly developed intuition as to a dispute's outcome, and a high degree of authority enabling him to force that outcome. Theorizing that an American mediator such as we describe will have paltry resources in each of these respects, he thinks such mediation unlikely to succeed. But for us the value of mediation is likely to be determined not so much by the third party's production function as by the conduct of the disputants, and "success" is to be assessed not so much by the outcome of a mediation as by the process by which the outcome was generated. This difference in perspective may account for much of the difference between Professor Felstiner's pessimism and our more optimistic view of the possibilities for dispute resolution through mediation in the United States.

Some descriptions of the efficacy of mediators (Barton: 1919) do stress their respected position and the implied threat of social, physical, or supernatural force which they can mobilize if displeased. However, descriptions of moots in Africa, including Gibbs' description of the Kpelle (1963), contrary to Felstiner's interpretation, give greater weight to the therapeutic atmosphere produced by the aggregation of a body of kinsmen, neighbors, friends and concerned people, than to the effect of the mediator him or herself. According to Gulliver (1971), Ndenduelli mediators are structurally neutral and well respected individuals, but the litigants develop their own outcomes, using the assembly's response as a clue to right and proper behavior, and as a guide to what is likely to be socially acceptable by the interested community outside the moot.

Insofar as the mediator does play a critical role, we think it is as an advocate for the process of discussion and bargaining rather than for a particular settlement. We saw this contribution to process in Macaulay's description, quoted above, of the Wisconsin automobile franchise mediation. The mediator asked "searching questions," the parties were forced to "deal with each

17. For example, the Columbus Ohio program reports that respondents in only 100 of 2,201 cases needed a re-hearing because of non-compliance with the mediated outcome. (Unfortunately, the length of time involved is not reported).

other's arguments," and then "the parties" retired to negotiate a settlement.

The most carefully developed existing efforts at neighborhood dispute processing in the United States have grasped the importance of moving away from a factory-like emphasis on producing results (variously termed "decisions," "decrees," or simply "justice") and toward an emphasis on having each disputant develop his own view of events, while recognizing his opponent's perspective. Put another way, while the typical American courtroom is devoted to educating the judge (a third party) about disputes so that he can make the "right" decision,[18] the efforts which we endorse reject an objectification of the disputants as though all we were concerned with (in Professor Felstiner's terms) was the "efficiency" of "processing" a dispute. Instead the emphasis is on the disputants' educating each other. Statsky (1974: 17, 31) offers the following description of the Neighborhood Youth Forum in the Tremont District of the Bronx, New York City, which has community residents (who have been given thirty hours of training) mediating disputes involving juveniles.

> The mediator helps the parties reach a resolution on their own. Unlike an arbiter who is invited by the parties to decide an issue for them, the mediator positions the parties so that they are able to focus on the issues and identify the arenas of compromise. The parties may have come to the Forum thinking that the Forum Judges will "make a decision" for them. In fact, the entire proceeding is geared to the development and announcement of a commitment by the parties to make their own decision and to formulate a plan of action based on that commitment.
>
> . . . The most difficult obstacle for the Forum Judges to overcome when they approach the heart of the mediation process toward the end of the hearing is to persevere in the goal of getting the parties to reach their own resolution.

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18. This emphasis on results as perceived by a third party leads Professor Felstiner to wonder why courts which are so inefficient in producing results nonetheless survive and prosper. He muses (1974:85) that the answer may in large part be that:

> The actual function of dispute processing institutions may not be what they do for disputants, but what they do for the third parties by way, for instance, of reinforcing their prestige or political authority.

The disputants perspective leads us to suggest a further explanation. Use of a court often has meanings for litigants which are quite independent of the particular result which the legal system generates. A decision to go to the law can stand as a symbol to an opponent and one's associates. One of these meanings may be that a litigant does not intend to resolve a dispute at all (Kidder 1974). What a third party may view as a loss may appear to be a victory to a litigant if he has accomplished his aim of stalling a dispute. Going to court can also signal that a plaintiff is prepared to settle a dispute at another forum (Singer 1974, Lowy 1971, Figdor 1973). It may in other words be merely a visible official step explicable only in the context of an officially invisible sequence of overlapping dispute strategies. To understand the use litigants make of courts and other agencies of dispute management we must frequently enquire into their motives (Figdor 1973:101; Lowy 1975:29-31).

This perspective leads us to a concern somewhat different from Professor Felstiner's. The problem in regard to a mediator's capability will revolve, we think, not around his authority or his experience in regard to a particular dispute or pair of disputants, so much as around teaching laymen the techniques which underlie the mediative process. On this count neither we nor anyone can speak with great confidence. However, reports of the performance over the last decade of mental health paraprofessionals who have been given only brief training give us cause for considerable optimism. (Grosser, Henry and Kelly, 2969; Pearl and Reisman, 1965). Moreover, preliminary returns on efforts at creating community moots in the United States are encouraging.[19]

IV. CONCLUSION

It seems to us that Professor Felstiner both prescriptively and descriptively overrates the social equilibrium which is maintained in the United States at present. Prescriptively, he seems to tell us (1974: 89) that Americans successfully cope with their disputes and that those who seek change ought, consequently, to channel their energies in other directions or to limit their efforts to effecting changes at the margins of existing operations. "Since the need for . . . court reform has been apparent for decades, the utility of avoidance must be viewed as a blessing. In a world that is too infrequently symmetrical, our inability to process many disputes by adjudication or mediation may generally be balanced by a lesser need to do so." Descriptively, Professor Felstiner (1974: 63) seems to think that the "linkage between social organization and dispute processing" is so tight as to severely constrict the range of options for effective dispute processing mechanisms within this society.

We think that Professor Felstiner overlooks the extraordinary costs that the members of our society are now paying because of the paucity of interpersonal dispute resolution mechanisms in America. Moreover, we think he exaggerates the difficulties associated with reducing these costs by setting up mechanisms of mediation. We think society is more plastic than he thinks it is, that as he himself puts it (1974: 63): "Man is an ingenious social animal."

We think it will be valuable to experiment with forums of mediation for everyday disputes in this country. If a mediator can serve as a third party who is neither coercive nor threaten-

19. See note 9.

ing, litigants may be encouraged to themselves think about the root causes of their disputes, and beyond this about the role social organization plays in causing, defining, and resolving much matters.[20] The process of disputing might become an educational process. Decentralized citizen mediation then, might lead to alterations in the conventional meanings of bringing a dispute to the police, courts, or local political leaders.

To the extent—and we would hope it would be a very substantial extent—that Professor Felstiner's article is read as clarifying some of the difficulties advocates of change confront, we are indebted to him, and think his article a valuable contribution. If his article is read—and we hope it will not be—as an argument against the kind of social change we have here and elsewhere advocated (Danzig, 1973; Lowy, 1973), we fear that it will be counterproductive.

20. See Griffiths (1970:363).

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