DISPUTING IN LEGAL AND NONLEGAL CONTEXTS: SOME QUESTIONS FOR SOCIOLOGISTS OF LAW

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There has been a timely shift in the focus of the sociology of law from an emphasis upon the characteristics, operations, and impact of the distinctively legal institutions and agents in modern societies, to an exploration of a more complex set of interrelationships between those institutions and agents and other social phenomena. Kidder (1975: 385ff) outlined the significance of this shift in focus for students of litigation. The Civil Litigation Research Project is itself an embodiment of the change. The early products of the Project which are presented in this issue of the *Review* are a testimony to the importance of the change. Indeed, it is hard to imagine an empirical research project in the sociology of law which could be of more theoretical significance and at the same time offer so many practical policy implications. By the same token, the articles contained in the *Review* provide the opportunity for appreciating some of the difficulties of, and dilemmas in, producing theoretically integrated and methodologically satisfactory studies in the sociology of law with the new focus. This is not to direct criticism particularly at the Project or at the authors of the articles in this issue of the *Review*. Rather, it is to point to a more general set of difficulties and dilemmas facing many who are currently striving to produce an empirically based sociology of law which attempts to place law in its more general social context.

It is most timely to ask why the sociology of law should be focusing upon disputes, disputing, and disputing processes and institutions in the very comprehensive way undertaken by the Project. Llewellyn and Hoebel (1941) made the observation that it was one of the "law-jobs" to handle "trouble cases." One can scarcely argue with this, at least in the sense that the legal system does become embroiled in a great many "trouble cases." It is undoubtedly a legitimate task for the sociology of

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law to examine the way the law does handle "trouble cases." Some attention has been paid to those "trouble handling" processes which have occurred in the context of the legal institutions as conventionally defined. Moreover, an increasing amount of attention has been paid to the actual roles of the personnel in those institutions. In particular the recent emphasis upon the actual roles of judges and lawyers, and upon their impact on the dispute and the parties to it, has been most productive.

Recent attention, however, has been paid to aspects of disputing involving less distinctively "legal" processes and personnel. This has taken a number of forms. In the first place, the "pre-legal" stages of disputes have appeared to be increasingly important in explaining the legal stages of those disputes. More specifically, what happens in the very early stages of disputes can help explain why some disputes are taken to lawyers and courts while others are not (Felstiner *et al*., 1981). This focus upon the genesis of disputes has involved a marked shift from what is distinctively the sociology of law. The endeavor has been opened to the criticism that it is sociology of "life"—or akin to the search for quasars. A second trend in research upon disputing in modern societies has involved focus upon the role of nonlegal third parties or upon others not immediately involved in the dispute. This, too, has tended to divert attention away from the distinctively or obviously legal.

These various points are worth elaborating, and the articles contained in this issue of the *Review* provide many valuable insights into them. It is helpful to organize the discussion under six questions about disputes and then to consider three more theoretical questions about the study of disputing within the sociology of law.

I. QUESTIONS ABOUT DISPUTES

How Frequent are Different Kinds of Grievances and Disputes?

A number of authors have attempted to discover how frequently particular types of grievances and disputes are found in the general population. This research has concentrated especially upon the consumer area (e.g., King and McEvoy, 1976; Best and Andreasen, 1977; Ross and Littlefield, 1978) or upon those grievances or disputes which represent unmet legal needs (e.g., Curran, 1977).

Miller and Sarat (1981), in this volume, have made a notable contribution to this body of research by investigating *inter alia* the incidence of a broad range of grievances and disputes which might come under the aegis of the law. The necessity for a data base of this type can scarcely be denied. However, it is well to bear in mind the inherent limitations in this type of research, no matter how well it is designed and executed. One of these problems arises from the indistinct nature of the naming, blaming, and claiming stages (discussed below). Inevitably, many unperceived injurious experiences simply have no hope of being recorded. Moreover, one can expect that the normal methodological problems of obtaining accuracy and completeness of recall would be exacerbated in the case of parties who have "avoided" or "lumped" disputes, and when only terminated disputes and not ongoing ones are recorded, as was the case in the Miller and Sarat data. Furthermore, it can be extremely difficult to communicate equally well to all respondents the full and accurate scope of the sorts of disputes about which information is being sought.

It is also well to note, though the point is an obvious one, that the accuracy and usefulness of the data of the type presented by Miller and Sarat is limited by the operational definition of a grievance or dispute used in collecting the data. Because of the parameters of the Civil Litigation Research Project as a whole, Miller and Sarat restricted their interest to grievances and disputes which were not only terminated but which involved ". . . in excess of $1000 or a substantial nonmonetary issue . . ." (Kritzer, 1981b). These limitations are understandable, but they may have had considerable implications for the generalizability of Miller and Sarat's findings. First, it seems likely that the $1000 limitation will have been interpreted quite differently by different people, thus heightening the problems of the comparability of answers across respondents. Second, disputes involving more than $1000 are only a subset of all disputes when monetary value is disregarded. Thus their findings are likely to underestimate the actual incidence of grievances and disputes, particularly among people with lower status.

Despite Miller and Sarat's contribution to this area, and despite the difficulties involved, there is clearly a need for further research which transcends the limitations of their data. There are a number of questions to be answered. How frequent are disputes involving relatively small amounts of money? To what extent is the significance of a dispute for the

participants tied to its monetary value? How do disputes involving different monetary stakes differ in the way they are handled by disputants and by outsiders?

How Do Disputes Begin?

Much early research on disputing appears to have taken the existence of disputes for granted. The realization has grown, however, that the potential for disputes is infinite, that the possible sources of disputes are innumerable, and that disputes which do arise are only a tiny proportion of those which might develop. Given this perspective, the development of disputes in some contexts but not in others must be regarded as problematic. An important question therefore arises: how do disputes begin? And why do some potential disputes fail to develop?

Ladinsky *et al.* (1979) have raised these questions in the introduction to their work on secondary dispute brokers and dispute processing fora. They have sketched some preliminary ideas on the grievance defining process. A more systematic approach to the problematic nature of dispute development is taken by Felstiner *et al.* (1981) in this volume. Their three-stage model of the grievance defining process (naming, blaming, and claiming) is a helpful insight into the question of how disputes begin.

To say that grievances arise from a process of naming, blaming, and claiming only takes us so far, however. Further questions immediately suggest themselves. What causes naming? What leads from naming to blaming? When will blaming lead to claiming? In short, the framework offered by Felstiner *et al.* helps us to describe some important processes. The problems of explanation remain to be tackled. A further series of problems arises in operationalizing these concepts. In part, the notion of stages may be excessively tautological. Also, as Felstiner *et al.* acknowledge, the stages may be impossible to isolate clearly in many actual situations.

Because the emergence of a grievance is essentially subjective, depending upon changes in perception, Coates and Penrod (1981) have attempted to synthesize and apply the findings of several branches of social psychology to help explain the naming, blaming, and claiming processes. Their efforts have resulted in a stimulating argument about the emergence of disputes. It ought to be possible to subject many of their ideas and hypotheses to empirical investigation. To mention but two:

> It is possible that people are more inclined to take personal responsibility for expected or predictable events (Coates and Penrod, 1981).
>
> Someone who originally sees a [distressing event] . . . as the result of unstable causes is likely to view the offensive behavior as more consistent if the [events] . . . persist. This change in consistency judgments would probably also result in more stable attributions for the [events] . . . As the repeated [events] . . . become more disturbing, the afflicted individual will also be more inclined to conclude that the [offenders] . . . are being intentionally malicious (Coates and Penrod, 1981).

Some of these applications of social psychology will undoubtedly prove to be of more use than others in explaining the early stages of disputes. Some, for example, seem to be so self-evident and/or general as to offer little worth exploring further. For example:

> [R]ecent work . . . indicates that people will form attributions even under conditions of causal ambiguity. Relying on personal theories and selective evidence, people usually devise some kind of explanation for significant events in their lives (Coates and Penrod, 1981).

Despite such problems, however, the Coates and Penrod article offers considerable promise for real advances in our explanations of naming, blaming, and claiming. It is to be hoped that their work will be taken up in future empirical investigations of disputing.

It would be a mistake, however, to assume that the insights offered by social psychology are the only, or even the most important means of explaining naming, blaming, and claiming. It is possible to point to several other sets of factors which may be involved. For the most part they have received some recognition in the disputing literature but, like the social psychological factors identified by Coates and Penrod, are yet to be subjected to sustained empirical investigation.

Another useful concept—not without its own tautological problems—is that of a "trigger event." This notion emphasizes the importance of particular events in leading to the naming phenomenon (cf. MacIntyre and Oldman, 1977: 61). An event may or may not have occurred before. But if it is particularly salient, vivid, serious, disruptive, rapid, or continuous it may trigger a naming process (Mechanic, 1978: 277-280; Freidson, 1961: 142; FitzGerald *et al.* 1980: 4-5; Coates and Penrod, 1981). One author, Boyum (1980), has argued that the crucial aspects of a trigger event are the rate, magnitude, and scope of the change in circumstances which the event causes. In addition to influencing naming, the significance of the trigger event in terms of the foregoing characteristics, together with its duration, may also determine whether blaming and claiming occur (Coates and Penrod, 1981; Boyum, 1980: 9).

A second alternative influence in the naming, blaming, and claiming processes can be provided by third parties. The event may occur in the presence of or be recounted to one of a variety of types of third parties who can play an important role in causing the event to be defined as significant and worthy of a "fight," or insignificant (i.e. as injurious on the one hand or harmless on the other). The role of third parties is worth considering in some depth, as will be done later in this article.

A third influence upon the naming, blaming, claiming process is the particular cultural context in which the injurious experience occurs. This context may have considerable explanatory power itself. For example, events which would go unnoticed in one cultural context lead to the emergence of a grievance in another. Cultural change may also be involved in the process. As norms change, so new events become the source of perceived grievances. A good example here appears to be in the quite different responses of women to the "same treatment" by men in 1930 and 1980. Indeed it seems plausible to argue that naming, blaming, claiming are likely to be subject to fads and fashions. Moreover, under certain circumstances we would expect fashions to be communicated from group to group and also to "trickle down" the status ladder (FitzGerald *et al.*, 1980: 17-19; Fallers, 1954). While these ideas seem plausible enough in themselves, empirical research is needed to advance our knowledge of their overall significance and to develop our understanding of the specific types of contexts and changes which do and do not produce disputes.

Finally, it is also tempting to seek explanations for the emergence of disputes in the personality types of the parties, such as a "disputing personality" (cf. "litigious personality"). Such an all-embracing term may prove to be as elusive as the "authoritarian personality" type. It may well be more productive to think in terms of the importance of more specific aspects of personality such as tolerance, feelings of powerlessness, alienation, inferiority, and inadequacy, as well as the propensity to take risks (Ladinsky *et al.*, 1979: 7; Felstiner *et al.*, 1981; Komesar, 1979; Johnson, 1981; Boyum, 1980: 16).

What Happens in and to Disputes?

Naming, blaming, and claiming can have a variety of consequences, only some of which entail disputing. (Complete acquiescence by the other party, or complete rejection by the other party immediately accompanied by "lumping" or

avoidance by the first, are examples of nondisputing consequences.) Disputing may involve a variety of processes in a variety of contexts or arenas. Moreover, the importance of outsiders in many of these processes can be considerable. There can be a wide range of outcomes to disputes.

Arenas: Parties to a dispute or outsiders can take the dispute to a context or an arena which is different from that in which the parties normally interact. Such a movement is in itself likely to have some important influence upon the dispute—for example, by altering the respective disputants' sense of being in control or at least familiar and comfortable with the context. The notion of arena has geographic elements, but the social elements are predominant in the disputing contexts.

The importance of "setting" for determining the subsequent flow of events has been pointed out in general terms by writers such as Burke (1945) and in respect to disputing by writers such as Mather and Yngvesson (1981). The ways in which disputing arenas vary have received considerable attention in the literature at both a theoretical and conceptual level. Authors have argued that arenas may be distinguished from one another by formality, accessibility, the conception of what is relevant, decisional style, and the character of authority adhering to actors within the arena (e.g., Nader, 1969; Abel, 1973; Galanter, 1974; Starr and Yngvesson, 1975; Sarat and Grossman, 1975; Sarat, 1976; Mather and Yngvesson, 1981). Some of the insights of this theoretical and conceptual development have been applied to analysis of the disputing process in third-world societies (e.g., Nader, 1969; Mather and Yngvesson, 1981) and to research on arenas in western societies which might be regarded as officially established, relatively formal, specialized, and bureaucratic (such as courts and neighborhood justice centers). There have been few attempts to apply them to other semi-official or unofficial, less formal and specialized arenas in modern western societies (such as local government offices, media complaint solicitors, and gossip networks). In this regard the pioneering work of the Milwaukee Dispute Mapping Project (Ladinsky *et al.*, 1979), and of Merry (1979) and Buckle and Thomas-Buckle (1980) is in urgent need of replication and expansion.

Any particular dispute may be taken to a variety of arenas or contexts in the course of its "life history." The possibility of

entry into other contexts may be an important element in the way the parties dispute in any particular arena, and may be essential to an understanding of what is occurring. There are also limits in the movement of disputes between certain contexts. For example, "trial by newspaper" certainly presents very grave problems for contemporaneous or even subsequent trial by jury. But we also know that in different jurisdictions quite different degrees of tolerance for such dual arena disputing are to be found. The scope, basis, and significance of such limits are a fitting subject for future research.

Processes: The actual processes of disputing are many and varied. They range across physical contests and economic warfare, to a variety of more social processes. The latter appear largely verbal. One suspects that were more attention paid to nonverbal forms of interaction, their importance for the disputing processes would not be inconsiderable. To date, apart from Merry (1979) and Baumgartner (1980a), there appears to have been relatively little research on the use of physical and economic processes of disputing in modern Western societies. One possible exception to this are the studies on the use of strikes in industrial disputes (for example see Hiller, 1928; Gouldner, 1954; Batstone *et al.*, 1978). There is a most urgent need to extend research so that we know more about the importance of such physical and economic processes for a more comprehensive range of disputes.

Considerable attention has been paid to some of the verbal processes involved in disputing. Images such as the negotiation (Strauss, 1978; Gulliver, 1979), transformation, and rephrasing (Mather and Yngvesson, 1981; Felstiner *et al.*, 1981) of the subject matter of the dispute have been proposed as important elements of the disputing process. Each of these images has its own power. The detailed analysis of the processes of negotiation which have been presented by both Strauss and Gulliver deserve serious study. In this comment, however, it is only practicable to focus upon the more limited, but important process of rephrasing.

The importance of rephrasing arises from the model of a dispute, not as:

> a static event which simply "happens," [but as something which is] . . . *changed or* . . . *transformed* 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 process of defining and shaping the object of dispute. Thus what a dispute is about, whether it is even a dispute or not, and whether it is properly a "legal" dispute, are often matters

which are negotiated, sometimes over a long period of time (Mather and Yngvesson, 1981:000).

"Rephrasing" refers to the process of modifying the statement of what is in contention while the dispute is in progress (Mather and Yngvesson, 1981: 776). The modification can take a variety of forms. It may simply involve the translation of the dispute into another "language" (e.g. into an official legal idiom) without really changing the substance or the object of the dispute. On the other hand, the modifications may be more radical. In this regard, one essential distinction which has been drawn is between "narrowing" and "expansion":

> *Narrowing* is the process through which established categories for classifying events and relationships are imposed on an event or series of events, defining the subject matter of a dispute in ways which make it amenable to conventional management procedures. . . . *Expansion*, in contrast . . . challenges established categories for classifying events and relationships by linking subjects or issues that are typically separated, thus "stretching" or changing accepted frameworks for organizing reality. Narrowing and expansion [therefore] . . . redefine the object of a dispute either in terms of an accepted normative framework or a new framework (Mather and Yngvesson, 1981: 777).

Some important examples of narrowing are given by Felstiner *et al.* (1981) in this volume.

The distinction between narrowing and expansion is undoubtedly most important, and it ought to be most useful in analyzing disputes taken to the legal system. It should be pointed out, however, that in the foregoing quotation, "narrowing" and "expansion" refer to the established frameworks for managing disputes, not necessarily to the scope of the particular dispute. It would be quite possible to broaden the substance of a particular dispute by redefining it within an alternative, but still acceptable, legitimate and normal framework in a way that involves no stretching of accepted frameworks at all, i.e. no expansion in the above sense. This would be so where, within this alternative framework, there were many more points of contention between the parties than there were under the initial framework. It may be useful to use words such as "broadening" and "confining" to refer to the implications of rephrasing for the scope of particular disputes. It is likely that expansion will inevitably entail "broadening," but not *vice versa*. The overall relationship between narrowing and "confining" may be less easy to postulate.

Outcomes: A variety of terms have been employed to refer to the situation prevailing at the end of a dispute, such as its "resolution," "termination," and "outcome." Of course, by no means all disputes have an "end"; some continue in unabated

vigor across generations. Others may be more cyclical, with periods of low-key, semi-suppressed hostility, or truces interspersed with more open disputation (Felstiner, 1974: 63n; also see Marcus, 1980). But for many disputes it makes sense to talk of an outcome which can range from a total victory for one of the parties to a mutually acceptable compromise. For other disputes the outcome can be characterized as "lumping it" or as avoidance on the part of one or more of the parties. There is a clear need for much more systematic attention to the range of possible outcomes and development of an adequate typology of outcomes. This need may be illustrated by Miller and Sarat's (1981) study in this issue. They categorized the outcomes of disputes in terms of "no agreement," "compromise," and "obtained whole claim." By measuring the outcome against what was claimed, they have taken account of only one of the many possible dimensions involved. While one can readily understand and sympathize with the methodological problems of attempting a more discerning typology of outcomes, one consequence of not being able to do so may have been inconclusive findings.

This comment will develop only a tentative and preliminary approach to the task of constructing a typology of outcomes.[1] There is a simplicity in utilizing the formal legal categories of outcome such as an amount of money damages, a cash settlement, or an injunction. However, the price of this simplicity may be that it ignores some distinctions which are likely to be important both in pointing to quite profound implications in various forms of disputing and dispute processes, and in allowing researchers to assess the overall significance of a dispute for the participants. So, for example, it may be necessary to consider the comparative impact of an amount of damages upon the disputant's overall finances rather than the mere fact that an award of damages has been made, or even the absolute value of the award. More difficult to operationalize, but of potential significance, are changes in the levels of the respective parties' prestige, status, and power. Again, attempting to assess the final or post-dispute relationship between the parties and exploring perceptions of improvement or deterioration and changed levels of hostility or harmony may be important. Of potential importance also are changes in outlook of the disputants. This may include changes in views about human nature, relationships, dispute

[1] We are indebted to David Hickman for suggesting the substance of the remainder of this paragraph.

handling institutions and their personnel, and, indeed, self-concepts. These discriminants of outcome tend to push us into studies which can only be done with great difficulty on a large scale, even when the researchers have generous levels of funding.

Dispute Trajectories: The concept of "dispute trajectory" may be the most useful way of describing what happens in and to disputes. The notion of various illness "trajectories" was developed by medical sociologists, notably Glaser and Strauss (1965; 1968), to throw light upon the interaction which can be observed over time between the ways particular illnesses can develop and the range of different responses to particular patients by the "caring" professions. It seems timely to introduce the notion of trajectory into the disputing literature for an analogous purpose. By a dispute trajectory we simply mean the progress of a particular dispute over time through particular combinations of disputing arenas, processes, and outsiders towards particular outcomes. It may be possible eventually to specify a finite number of regularly occurring dispute trajectories in any particular society, at least for particular types of disputes.

What Factors Influence the Trajectory or Course of Disputes?

It is at once helpful and problematic (at least for the coherence of a sociology of law) to explore factors which prevent a dispute developing, and factors which may explain the quite different courses disputes take. Attempts have been made to use several levels of explanation for various dispute trajectories (including "still-born" disputes). To date, particular interest has focused upon trajectories which involve entry into the formal legal system and those which do not.

Authors such as Komesar (1979) have utilized economic theory and cost-benefit analysis in explaining dispute trajectories. This work has been taken a step further by Gollop and Marquardt (1981) in this issue of the *Review*. They apply themselves to the task of specifying the economic forces which might prevent dispute trajectories being established at all. Stated simply, they argue that the level of resources invested in dispute prevention by a household (and presumably other units as well) depends on the household's estimate of the probability that it will be involved in a dispute, and upon other demands on its resources. This hypothesis is expressed in a series of mathematical formulae. This general approach would

also be applicable to the study of determinants of actual trajectories (as distinct from still-born ones).

We need to question how useful an econometric approach like Gollop and Marquardt's will be, as opposed to a less technical and more inexact (but possibly more true-to-life) means of acknowledging the importance of cost-benefit considerations. There is undoubtedly some economic thinking on the part of some disputants and potential disputants. It is also clearly the case that the economic costs of some forms of disputing, such as litigation, do deter and discourage a substantial amount of that form of disputing. But many of the factors which determine the choice of dispute handling techniques are simply not quantifiable in money terms. Pride and principle are inevitably part of grievance situations. They cannot be sensibly quantified. Even if they could be, there is little reason to believe that one would find weightings given to them which were sufficiently patterned to make any of the economics-of-disputing formulae actually work.

A quite different set of explanatory factors for dispute trajectories have been explored by Miller and Sarat (1981). They have attempted to test three hypotheses. The first of these is that people with certain backgrounds (in terms of status, education, sex, and ethnicity) are more likely than others to perceive an experience as injurious and to formulate a grievance, and are more competent to deal with the grievance once it arises. This idea was not supported by the data. Second, they hypothesize that people with previous experience of handling grievances and disputes handle a new grievance or dispute differently from those without such experience (see also Felstiner *et al.*, 1981). Again they found that this idea was not supported. Third, they hypothesized that the way a grievance or dispute is handled is influenced by the nature of the problem—i.e., subject matter, size of stakes, and nature of opponent. This hypothesis was supported. To help explain this finding, Miller and Sarat have speculated about the importance of (a) particular cultural norms about disputing and (b) the relationship between disputants.

Miller and Sarat's evidence on the first two hypotheses appears to run contrary to the findings of at least some previous research. For example, Hunting and Neuwirth (1962: 71-85), Best and Andreasen (1977), Hannigan (1977), and Ross and Littlefield (1978) all argued that an individual's status, education, and experience influenced the way they managed disputes. At this stage we can only puzzle at the difference in

findings. One reason may be that Miller and Sarat only studied disputes which involved $1000 or more. They were effectively controlling for the stakes. However, it has been argued that the stakes are a crucial variable in determining how people handle a grievance or dispute (Starr and Yngvesson, 1975: 561; Komesar, 1979: 4-8). This has also been demonstrated by Best and Andreasen (1977). Would a different picture have emerged if Miller and Sarat's study had included "smaller" disputes, which would have meant that a broader range of cost-benefit ratios were involved? Another reason for the apparent lack of importance of some factors such as class and ethnicity may be that Miller and Sarat's methodology appears to have taken no direct account of disputing trajectories such as inaction or "lumping it," avoidance, self-help, or direct action and harassment of the other side.

Still another set of possible explanations for the differences in dispute trajectories may be found in a more psychological or social-psychological approach. Coates and Penrod's paper offers us some helpful suggestions in this direction. Our own preliminary analysis of data gathered in 110 in-depth interviews with neighbor disputants in Melbourne, Australia, has suggested the potential importance of the following list of factors, which at this stage should be treated as a checklist requiring much elaboration, investigation, and pruning:[2]

(a) the parties' perceptions of type of relationship involved;
(b) the parties' ideal for type of relationship involved;
(c) the parties' perceptions of quality of relationship prior to dispute and likely quality of relationship in future;
(d) estimates of the competence and power of the parties, which will be likely to influence what are considered to be feasible strategies;
(e) the extent to which the particular behavior in dispute is seen as typical/atypical for actors, and/or for people in general. (This is considered relevant because it is hypothesized that people will react differently to what they see as an idiosyncratic action than to what they perceive as a likely recurring pattern. See also Coates and Penrod, 1981);
(f) the extent to which actors are seen as "representing" a larger group or cause;
(g) whether the problem is seen as specific to the individuals in this dispute or an example of a universal problem;
(h) whether the problem is perceived in terms of "interests," "attitudes," "values," "status," or various other possibilities;
(i) the extent to which what is at stake is regarded as crucial, vital, personal;

[2] The research, funded by the Australian Research Grants Committee and the School of Social Sciences at La Trobe University, is being conducted by the two authors in conjunction with David Hickman. The checklist which follows in the text is an adaption of one developed by Hickman in a preliminary draft of an as yet unpublished paper on the subject.

(j) the extent to which the problem is isolated or has ramifications for the life style, resources, and self-concept of the actors concerned (see also Boyum, 1980: 2);
(k) the extent to which the actions of parties to the dispute are seen as "voluntaristic," i.e., subject to decisions of actors so that the actors could be appealed to for continuation or change of behavior;
(l) the extent to which actors are seen as directing actions towards other parties or affecting them only coincidentally;
(m) the estimates of "intentionality" of actions of parties to the dispute (see also Coates and Penrod, 1981).

Finally, possibly the most significant explanation for different dispute trajectories may prove to be the various roles outsiders such as third-party intervenors and audiences actually play. This matter deserves a question of its own!

Of What Significance Are Outsiders?

A great deal has been written about some particular outsiders to disputes, and their importance for the disputing process and the trajectories of disputes. At least as far as studies of disputing in modern western societies have been concerned, the focus has been largely upon the roles of judges, mediators, and lawyers (Eckhoff, 1966; Aubert, 1967; Blumberg, 1967a; Fuller, 1971; 1978a; McGillis and Mullen, 1977; Santos, 1977; Ryan and Alfini, 1979; Galanter *et al.*, 1979; Felstiner and Williams, 1980; Cavanagh and Sarat, 1980). Some time has now passed since Felstiner (1975: 704-705) observed that:

> To my knowledge, no anthropologist has studied the dispute processing behavior of any non-ethnic American community with the thoroughness and comprehensive perspective that characterize many studies of Mexican towns, African tribes and Indian villages. As a result we have only sporadic and unrelated information about the dispute processing functions of lawyers, clergy, medical personnel, marriage counsellors, psychotherapists, family members, friends, social workers, local notables or gossip in general.

Since Felstiner wrote, the lack of research on lawyers has to some extent been redressed. Further, a number of recently reported or commenced projects have provided or can be expected to provide at least some important insights into the roles of other, less formally involved outsiders, such as police, local government officials, community leaders, clergymen, friends, and relatives (Ladinsky *et al.*, 1979; Black 1980: 109-192; Buckle and Thomas-Buckle, 1980; Merry, 1979; Baumgartner, 1980). Nevertheless, there remains a clear need for more research in this area.

In analyzing the influence of outsiders upon the emergence and trajectories of disputes, at least two important distinctions should be made. The first involves distinguishing between different kinds of outsider roles. The other differentiates

between the roles of outsiders on the one hand and their actual effects on dispute trajectories on the other.

It seems worthwhile to distinguish between at least four outsider roles: audience, supporter, agent, and intervenor. These roles can be placed on a continuum from passive to active. An audience plays the most passive role, while others can be placed at varying points towards the "active" end of the continuum. It is necessary to consider a few general points about each of these outsider categories.

Audiences: Merry (1979) and Mather and Yngvesson (1981) have illustrated the important role which audiences may play in a dispute. An audience is an individual or group of people who witness, directly or indirectly, some phase of the disputing process and whose attitude, demeanor, or actions—actual or assumed, directly or indirectly observed—influence the development or management of the dispute by those directly involved. At the very earliest stage of the disputing process, the existence of an audience may influence whether an actor comes to perceive an experience as injurious or not. This is to say that in the absence of an audience, some "shows" will be less likely to "go on." An illustration of this situation appears to be provided by police-citizen encounters (Kirkham, 1974). In contrast, the presence of an audience in other situations will itself act to quash a potential dispute. An example of this situation can be observed in many primary group relationships where the parties go to great extremes to avoid "washing dirty linen" in public. In addition to the mere presence or absence of an audience, a similar importance may be attributed to its size, physical and social locations, and, in particular, its level of interest in any given dispute or any stage of the dispute process (including any likely temporal limits upon such interest). Important too are the disputants' evaluations of the audience; it will matter whether disputants are kindly disposed towards it or not and how they perceive the attitude of the audience towards themselves.

Supporters: The term supporter refers to people who form a supportive network around a disputant at some stage of the disputing process, without actually becoming involved in the dispute themselves. Supporters may have professional expertise in handling disputes (e.g., a lawyer who advises a person without actually acting for him) or in the substantive area of the dispute (e.g., a mechanic in a dispute over a car); they also may have neither (e.g., friends and family).

Supporters may fulfill a number of functions. They may provide encouragement by persuading the disputant that it is worth fighting (and even that it would be wrong not to fight); that it is possible (or likely) that the outcome will be positive; and that the disputant need not feel isolated or alone. This can involve reinforcing negative images of the potential "other side" and pointing to examples of others who have fought similar battles and won (or of the unfortunate fate of others who have shirked the battle). Supporters may also give advice (solicited or unsolicited) on how best to handle the dispute. They may suggest that the aggrieved individual should "lump" the situation, "avoid" the conflict, or postpone it by emphasizing the difficulties facing the potential party in any of the possible dispute handling mechanisms likely to be brought into play. There have been a number of studies of the propensity of the legal profession to so act (Sudnow, 1965; Skolnick, 1967; Rosenthal, 1974). Supporters may succeed in preventing a dispute by convincing a potential disputant that "on the broad scale of things" a dispute would be counter-productive (for example, by costing more than it would yield, or by destroying or impairing valued relationships). Again, supporters may point to the existence of, or actually provide resources for waging the campaign. These include solidarity, money, and the technical skills required to negotiate the possible dispute handling mechanisms which may be brought into play. When such support is lacking the aggrieved individual may simply put up with the injury or eschew particular forms of dispute management, such as direct confrontation (Baumgartner, 1980: 29).

One of the most important roles played by supporters appears to be that of referral. A number of studies have shown that some disputants may only reach professional dispute advisers or managers after being referred or "passed on" by what Ladinsky (1976: 218-219), drawing on Freidson (1961), calls a "lay referral system," and what Lochner (1975: 223-242) refers to as "intermediaries." These models of "referral" and of "intermediaries" have been useful in explaining, for example, why only a limited number of poor persons with legal complaints actually obtain available no-cost or low-cost legal assistance (Lochner, 1975). (See also Hunting and Neuwirth, 1962: 66; Buckle and Thomas-Buckle, 1980: 26; and Ladinsky *et al.*, 1979: 6-10.) Of course, professional dispute advisers or managers may also refer disputants to other professionals, for a variety of reasons (Ladinsky *et al.*, 1979: 20).

Agents: Agents are people who go beyond the encouragement, advice, and referral provided by supporters, and actively represent or act on behalf of a disputant. They may have professional dispute handling expertise (e.g., lawyers) or they may not (e.g., a fellow officer in court-martial proceedings in past centuries).

If an agent has special expertise, access to a restricted arena, or contacts, and can therefore operate in circumstances under which the disputant himself cannot, the agent may fulfill the function of a "broker." For example, a city councillor may represent his constituents in council meetings, or a lawyer may act on behalf of his client in plea bargaining sessions. These are both situations from which the disputants themselves would normally be excluded (Buckle and Thomas-Buckle, 1980: 28; Felstiner *et al.*, 1981; Mather and Yngvesson, 1981: 812; Lochner, 1975: 434-442).

In other circumstances an agent may fulfill the function of an "organizer" or "provocateur" by taking over the management of the dispute from the disputant and encouraging its development or extension. This may take the form of persuading other people to join in the dispute because they are in a similar set of circumstances as the original disputant (Lipsky, 1970; FitzGerald, 1972). The fact that an individual dispute is turned into a collective dispute can give the original disputant greater power (e.g., Buckle and Thomas-Buckle, 1980: 28; Boyum, 1980: 8).

Intervenors: The role of intervenor has received considerable attention in both the theoretical and the empirical literature (e.g., Abel, 1973). In some ways the "intervenor" label as it is used in this literature is an unsatisfactory one: all outsiders may be regarded as intervenors in a dispute if all that is meant is that they play an active role in influencing or causing a change in the dispute trajectory. However, in the absence of a suitable alternative, and following past usage, "intervenor" is used here to specifically describe those outsiders who, after listening to the history of the dispute as recounted by at least one (but usually both) disputants, or after ascertaining it for themselves, attempt to formulate or help the disputants to formulate an end or resolution to the dispute, based on an application of a relevant set of rules or norms, or on what the intervenors themselves regard as fair, or on what the disputants want. An intervenor may or may not have professional expertise. In addition an intervenor may or

may not be the incumbent of an institutionalized intervenor position.

Having discussed some aspects of these four outsider roles, it is important to note that a specific individual may play different roles at different times in a dispute. For example, a lawyer may play the role of a supporter at one stage of a dispute before taking on the mantle of an agent at another stage (Ladinsky *et al.*, 1979: 19-22). Indeed, an individual may slip rather easily back and forth between one outsider role and another (Mather and Yngvesson, 1981: 783). However, there are limits to this, and these limits are worthy of future research.

The Importance of Outsiders in Defining the Dispute: Outsiders can play crucial parts in the creation and maintenance of the initial definition of a dispute: they may initiate or perform the "naming" task (Felstiner *et al.*, 1981). For example, an outsider can draw attention to the previously unnoticed effects of an individual's experience, thereby manufacturing a "trigger event," and also provide a framework in which that event may be interpreted. This will often involve specifying the nature and extent of the injury caused by the trigger event. It may also involve the articulation of resources, values, and principles which are at stake (Ladinsky *et al.*, 1979: 6). It is hypothesized that persons who have had prior positive relationships with a potential disputant are in a particularly strong position to act as "namers" inasmuch as a high degree of trust and confidence are usually necessary to "sell" a new definition of the situation or to convince a person that an unpopular or threatening definition of the situation is indeed correct and ought to be accepted or retained. Research into the Chicago Contract Buyers' League provides a particularly dramatic example of the problems faced by a group of white outsiders ("armed" as they were with quite impressive evidence) in convincing black home buyers on the west side of Chicago that they had been the victims of a "real estate swindle." It was not until one of the buyers herself articulated the situation as one of "swindle" (and hence grievance) that the other buyers began to accept a changed definition of the situation (FitzGerald, 1972).

Once naming has occurred, outsiders may act as reality testers. In this role, the outsider is sounded out for confirmation that the trigger event has actually occurred, that the sense of having been wronged or "taken" is not unwarranted or misconceived, or that there is some hope of

obtaining redress (Ladinsky *et al.*, 1979; Buckle and Thomas-Buckle, 1980: 26). The reality tester may be expected to listen passively and make some balanced pronouncement after considering carefully, or he may be expected to take on a devil's advocate role and to really probe, challenge, and attempt to shake the disputant's definition of the situation. While acting as reality testers, outsiders may play an important part in reducing the apparent significance of key events by, for example, pointing to further facts and alternative interpretations. Thus they can influence the analysis of an experience by emphasizing frameworks for interpretation in which conflict is inappropriate, unfair, or unjustified. For example, they may place emphasis on the "personal" problems or excessive sensitivity of the disputant as an alternative to a framework in which some other party is to blame. Or they may reinforce a set of values according to which the disputant would be in the wrong to act, for example, by "not respecting a contract" (FitzGerald, 1972). Reality testing is especially important during the naming and blaming stages but may occur at any stage of the dispute process. By no means all disputants resort to reality testers. It can be hypothesized that their use is to be found predominantly among the socially sophisticated classes.

Outsiders may play a crucial role in maintaining a particular definition of the dispute situation once it has been created. This is especially so when the issues involved in the dispute are novel in themselves, or are novel to one party or where the disputant feels vulnerable or powerless (either generally or in the context of the particular relationship which underlies the dispute). This is essentially a specific application of a more general line of research in the psychology of perception. That research has demonstrated how the agreement of others is necessary in sustaining a particular perception of phenomena in the face of other competing perceptions (e.g. Sherif and Sherif, 1948: 245-267). A similar pattern has been found in jury research.

At a more general level, much of what has been discussed in the preceding few paragraphs has exemplified some of the ways in which outsiders contribute to the transformation of disputes through rephrasing, or help resist certain kinds of transformations. The general importance of lawyers in the phrasing and rephrasing of disputes has been long known (Cardozo, 1924), and this is an area which has recently received particular attention in research. But lawyers have no

monopoly over rephrasing, and research is sorely needed to examine the ways in which other types of outsiders actually contribute to the rephrasing of disputes in modern Western societies.

Pot Stirrers or Peacemakers? It is undeniable that outsiders can have a wide range of impacts upon a dispute trajectory, ranging from "escalation" to "defusing." It should not be assumed that any particular form of outsider participation is inherently escalating or defusing. A further necessary complication in adequately characterizing the participation of outsiders stems from the fact that particular outsiders can play a variety of roles, use a variety of techniques and strategies, and have different impacts on different disputes and even on the one dispute at different points of time.

Recent research on the work of lawyers can usefully illustrate the foregoing. We know that lawyers can and do undertake a range of outsider roles in disputes—as audience, supporter, agent, and even as intervenor. Moreover, they can perform a variety of functions in these various roles—acting as reality creators and testers, spokesmen or mouthpieces, "gladiators" (FitzGerald, 1975), and the like. While some of these are more likely than others to lead to escalation or defusing, the recent work of Mather and Yngvesson (1981) and Cain (1979) has shown how problematic is the direction of the impact of one of these forms of lawyer participation—the rephrasing of the dispute in the framework of the black letter of the law. This may involve confining the issues seen to be at stake. But it may also involve a considerable broadening of them—with new issues in contention including legal technicalities, evidentiary matters, and a host of possible legal exceptions and loopholes. Moreover, neither confining nor broadening of the issues can necessarily be equated with either escalating or defusing a particular dispute.

What is needed is research which endeavors to specify the circumstances under which particular types of people (e.g., lawyer, family, friend) (a) take on particular outsider roles, (b) perform particular functions, and (c) affect the narrowing or expansion, and defusing or escalation of the dispute. It is crucial, however, that this research should take into account the ". . . goals, aims, strategies, and stakes . . ." of the outsiders, as well as the disputants, as Starr and Yngvesson (1975: 562) have pointed out.

Johnson's (1981) article on lawyers in this issue makes a significant contribution to this endeavor, emphasizing how the

professional and economic aims of the lawyer, as they interact with the economic and other intentions of the client, can have a profound effect on the trajectory of disputes. Some of his insights seem to be equally applicable to other professional outsiders, such as doctors, psychiatrists, police, social workers, and private detectives. Other contributors in this area are Blumberg (1970), Sudnow (1965), and Skolnick (1967).

Does Anything Unique Happen to a Dispute when it Enters the Legal System?

To answer this question, it is necessary to consider the various processes within the structure of the legal system which may affect a dispute. Lempert (1978: 99-100) has suggested the following list of ways in which a court may intervene in a dispute:

> (1) courts define norms that influence or control the private settlement of disputes; (2) courts ratify private settlements, providing guarantees of compliance without which one or both parties might have been unwilling to reach a private settlement; (3) courts enable parties to legitimately escalate the costs of disputing, thereby increasing the likelihood of private dispute settlement; (4) courts provide devices that enable parties to learn about each other's cases, thus increasing the likelihood of private dispute settlement by decreasing mutual uncertainty; (5) court personnel act as mediators to encourage the consensual settlement of disputes; (6) courts resolve certain issues in the case, leading the parties to agree on the others; and (7) courts authoritatively resolve disputes where parties cannot agree on a settlement.

Rather than attempt to expound on each of the foregoing processes and assess whether any or all of them are unique to the courts (or the legal system), it is more manageable, and probably as helpful, to consider one process (or sub-process) which has previously been considered: "rephrasing" by outsiders who are participants in the legal system.

Rephrasing itself is certainly not unique to legal functionaries; many types of outsiders are likely to attempt it. But is the type of rephrasing effected by legal functionaries unique, either in itself or in its consequences? The transformations made by lawyers—for whatever aims, motives, and stakes—involve the use of legal terminology to describe the substance of the dispute. Lawyers may also add to the dispute a considerable component of the rhetoric of legality and legitimacy. Having thus rephrased a dispute, lawyers and judges can then proceed to handle it through a variety of apparently distinctive legal processes. One such process involves a legal functionary acting as authoritative pronouncer and applier of rules. Another involves the lawyer acting in a bargaining style in which appeal is made to the legal rules (but

in which considerable flexibility and ambiguity is evident in the meaning attached to the rules), in which the rules can sometimes be changed mid-process, and in which appeals are made to other reference points such as past history (or custom)—between the parties as well as between other parties—and equity or justice (Cardozo, 1924).

While lawyers and judges may be singularly proficient at legalistic rephrasing of disputes and apparently technical legal processes, it is by no means the case that they have a monopoly on either the use of legal or rule-related terminology, or on the ability to appeal to legal and other rules (see, for example, Santos, 1977). Moreover, it is also the case that many people other than lawyers have the ability to appeal to the appearance of legality and the mantle of legitimacy (Galanter, 1974: 126-134). A variety of studies have provided examples of nonlawyers adopting tactics similar to those associated with lawyers and with the legal process (Strauss *et al.*, 1964: 312-315). It would therefore seem worth the effort to compare the actual use made of the "legal tools" in the disputing process, and their efficacy or impact where "professionals" are involved in their use and where they are not. (It should be remembered that lawyers and judges themselves can vary substantially in the ways in which they use these tools.)

The foregoing approach ought to help answer the question of whether there is anything particularly distinctive about disputing within the processes of the law. But does anything depend on the answer to this question? This really returns us to the more general point, made earlier, concerning the legitimate scope for a sociology of law.

II. DISPUTING AND THE SOCIOLOGY OF LAW

Is the Context Overwhelming the Law?

In the introduction to this comment, attention was drawn to a significant shift in the focus of the sociology of law which is clearly manifest in the articles in this issue of the *Review*. Three more general and theoretical concerns suggest themselves. The first deals with the scope of the "context" which it is legitimate or sensible to include within the ambit of the sociology of law. For example, should we admit as part of the sociological study of law those studies which focus upon the pre-legal stages of disputes which eventually do get taken to court? It is quite likely that we can gain a much greater insight into what happens in court and in the other parts of the

legal system by knowing what has preceded a dispute's entry to them. As such, the study of the pre-legal stages seems to be a necessary part of the sociology of law. But, as can be seen from the scope of the articles in this issue, the disputing literature has gone much farther than this and has taken a more comparative perspective and examined alternatives to the legal processes of disputing. Researchers and commentators now ask such questions as: what disputes do not get to court, and why, and with what consequences? This, too, entails paying attention to the genesis and very early stages of disputes in order to isolate, if possible, the factors which determine why only some disputes are set upon a trajectory which leads to formal legal process. Moreover, to have anything like an adequate appreciation of the significance of the outcomes of legal processing of disputes, comparable data is needed on the outcomes of disputes which are not so handled.

The logic of these claims as important parts of the context of law is impeccable. But do such inquiries lead us so far from the law, do they make the task so complicated, that the endeavor can scarcely be regarded as the development of the sociology of law? Is it more a sociology of disputing or even of life and, as such, so broad as to be unmanageable? (For a somewhat analogous comment see Feeley, 1976: 520-521.)

What Categories Should We Use?

A second set of problems arising out of the new emphasis upon the context of legal disputes and one which is related to the first, concerns the categories and concepts which sociologists of law should use in their studies of disputes. As long as attention is focused firmly upon the formal legal process, it can make very good sense to use some of the concepts and categories lawyers employ. But these concepts and categories may well prove to be quite inadequate for a more broadly based endeavor: being either too broad and thus concealing vital distinctions, or too narrow and thus concealing essential similarities. This is readily exemplified in the disputing literature by the use of legal categories such as "civil litigation," "tenancy," "property related," "debt," "matrimonial," and "consumer." These have been especially attractive to researchers for several reasons. In the first place, they do convey a relatively well-known set of distinctions as to the possible substantive content of disputes. Moreover, in studies which compare disputes that do get to court with those

that do not, some such legally related categorization is desirable, at least from a policy perspective.

The major problem in using such legal categories as a basis for typologies of disputes is, however, that unless the categories do point to some important differences in disputing and dispute processing, they lead nowhere. Worse, they may conceal important differences which "cross" the categories. As Buckle and Thomas-Buckle (1980: 24) observed, in Johnson Square disputants choose dispute handling techniques ". . . more by general preference than by the specific type of dispute . . . ." In the long term, we can be fairly confident that empirical studies such as those by Miller and Sarat (1981) will reveal whether or not it makes any sense to use particular legal categories of dispute. This is to say that inconclusive, nonsignificant findings are useful in prompting us to examine our conceptual apparatus. To some extent, such a process of empirically "trying out" the usefulness of a conceptual framework is an inevitable and important part of any scientific endeavor (Kuhn, 1962). However, economies of time and resources make it highly desirable to use as effective and discerning a theoretical framework as is possible from the beginning.

Could a more adequate dispute typology be devised than that based on legal categories derived from substantive areas of law? There are a number of reasons for believing that it ought to be. In the first place, Felstiner *et al.* (1981) and Mather and Yngvesson (1981) have argued convincingly that disputes are not concrete entities which exist apart from the people involved in them. So, unless the perspectives, perceptions, feelings, and intentions of the disputants themselves are understood, it is unlikely that much else about disputes and disputing will be understood either. Moreover, the substantive content of the dispute, as perceived by the disputing parties, may change over time. Which description should be used? Further, a party's description at any point of time may or may not correspond to the legal categorization of the situation. (It may be broader or narrower, and it may be quite different.) In particular, a categorization based on legal categories is likely to overlook such important aspects of the dispute as the nature of the relationships between the disputing parties, and the nature of actual and potential other parties and audiences.

It is to be hoped that some of the key elements which help explain the various trajectories of disputes will provide the basis for a more satisfactory typology of disputes. To delve into

even a few of the elements outlined in the discussion above for purposes of developing a typology of disputes is to complicate, and doubtlessly confuse, the structure of research upon the disputing process. To incorporate all of them in a typology of disputes is certainly out of the question. What the disputing field needs is inspiration as to which few key elements among the long litany of possible ones form the most adequate basis for a typology of disputes.

It is, of course, possible that at particular times and in particular circumstances, various combinations of the possible discriminants of disputes may be associated with particular types of substantive legal categories. This appears to be the case in Miller and Sarat's (1981) findings relating to the distinctiveness of the way disputes over discrimination are handled. However, the potential time and region boundedness of this apparent configuration of factors should be kept in mind.

Macro-Sociological Theory and Disputing

An altogether higher-level problem now evident in the disputing literature concerns the relationship of disputing to the overall state of society. It is probably fair to characterize much of the more traditional sociology of law, at least in the United States, as being based firmly on the assumption that social conflict and friction are necessarily destructive. Further, it assumes or asserts that legal processes, at least when they are working well, play an important part in managing conflict and friction and must therefore contribute to the overall level of social cohesion and integration in society. More recently, the legal anthropological literature of disputing in non-Western societies has augmented this line of thought. This has led to proposals for alternative dispute handling mechanisms such as Neighborhood Justice Centers, which may be more efficacious than the courts in reducing certain types of potentially disruptive conflict (e.g., Danzig and Lowy, 1975).

There has actually been very little empirical work testing assumptions that courts (or their alternatives, for that matter) are actually effective in reducing the overall level of social friction or in inducing social cohesion or solidarity. There have, however, been some theoretical challenges to the foregoing assumptions and claims. Critical legal studies proponents have pointed to the capacity of courts and other legal institutions to stimulate and engender conflict and friction; they have raised the question of which sections of society pay the costs of any short-term pacification of long-term, class-based conflict.

Others, such as Felstiner *et al.* (1981) and Miller and Sarat (1981), ask whether conflict and friction are bad *per se*, and whether intervention processes which reduce them are necessarily a good thing . . . at least in the short term.

The time is ripe for these matters to be tackled directly. Conceivably, the most productive way for this to happen will be the comprehensive reception into the sociology of law of the insights of theorists such as Simmel (1955), and Coser (1956), or at least for an attempt to be made to place studies of disputing firmly in the macro-theoretical framework of the conflict theorists. A useful step in theory development has been taken by Miller and Sarat (1981) in their attempt to link disputes with the general level of contentiousness in society, and by Mather and Yngvesson (1981) in demonstrating how the ongoing definition and transformation of disputes by disputants, third parties, supporters, and audiences acting in varying dispute arenas serve to confirm or change legal and social structures.

III. CONCLUSION

The work undertaken within the Civil Litigation Research Project has already considerably augmented our insights into disputing and its significance. It is to be hoped that the future products of the Project and of those involved in related work will continue to be as helpful. We can expect them to provide much necessary empirical data on disputing. The work will be even more useful if it continues to draw attention to, and help solve, the types of difficulties and dilemmas inherent in producing theoretically integrated and methodologically satisfactory studies of disputing. The sociology of law will be enriched when the study of disputing is satisfactorily incorporated into it.

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