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THE TRANSFORMATION OF DISPUTES BY LAWYERS: WHAT THE DISPUTE PARADIGM DOES AND DOES NOT TELL US*

CARRIE MENKEL-MEADOW**

I. INTRODUCTION

Unlike many law and social science papers which begin with observations that "there has been little exploration of . . ." or "there have been no empirical studies of . . .," this paper begins with the observation that there has been a great deal of thinking about and studying of disputes.¹ As a unit of analysis, the dispute has the potential of being one of the most promising avenues for the study of such law and society issues as the amount of conflict in our society,² the effectiveness of our institutions in "processing"³ such conflict,⁴ the capability of a variety of "alternative"⁵ institutions in processing disputes,⁶ the

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1. *Dispute Processing and Civil Litigation* 15 LAW & SOC'Y REV. 401 (1980-81); Cain & Kulcsur, *Thinking Disputes: An Essay on the Orgins of the Dispute Industry*, 16 LAW & SOC'Y REV. 375 (1981-82).

2. Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81).

3. I have placed in quotation marks several of the terms used by those who employ the dispute paradigm to place in relief the significance of these terms. "Processing" for example, demonstrates the emphasis placed on process or procedure rather than the substantive result or outcome of dispute resolution. Like "dispute resolution," the term dispute "processing" connotes the management and control over disputes rather than the full expression of disputing and the conflict that could be involved.

4. Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485 (1980-81); Trubek, *The Construction and Deconstruction of Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1980-81).

5. Many of the new forms of dispute processing are labeled "alternative" forms of dispute resolution, when in fact they may be in more common usage than court dispute resolution. The use of the term "alternative" tells the disputants they are pursuing a different form of dispute resolution than the "usual" way. Query whether

degree of participation in dispute processing by the parties and “intervenor,” including the “transformation” or changing of disputes by these parties,⁷ and the social structural aspects of dispute resolution in a variety of contexts and cultures.⁸

Recently, a variety of critiques of the dispute paradigm have complained that regardless of what may be illuminated by studying disputes, much remains hidden, if not obfuscated, by it. Kidder,⁹ Cain & Kulcsur,¹⁰ and Lempert,¹¹ to name a few, have criticized the dispute model as focusing too much on an individualistic, apolitical approach to disputing, which fails to account for the macro-social aspects of inequalities in conflict. Engel¹² has criticized the dispute paradigm for focusing law and society studies too much on a crystallized, and therefore, inaccurate conception of disputes as always occurring in courts, involving law, and concerning “trouble cases” of conflict, rather than concentrating on the more “typical” aspects of the normative and functioning systems in our society. Miller & Sarat¹³ and Felstiner, Abel & Sarat¹⁴ have criticized the conventional conception of disputing as being too static, by demonstrating how disputes are social constructs that change over time and

this is accurate and what effect such labeling has on the “alternative” dispute mechanisms. Cf. S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985).

6. FELSTINER & WILLIAMS, *COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS* (1980); Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* (R. Abel ed. 1982)[hereinafter cited as *POLITICS*]; Trubek, *Studying Courts in Context*, *supra* note 4, at 485; Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 *LAW & SOC'Y REV.* 199 (1978).

7. The use of the sociological term “intervenor” in considering the role of third parties in dispute resolution may obfuscate the differences to be found in different types of third party intervenors. Here the attempt to find a descriptively neutral term may make less clear the concepts sought to be defined. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC'Y REV.* 217, 244-45 (1973); Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 *LAW & SOC'Y REV.* 567, (1980-81); Felstiner & Sarat, *The Transformation of Disputes: The Divorce Lawyer* (study funded by National Science Foundation 1982-present).

8. *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (L. NADER & H. TODD EDS. 1978); Abel, *supra* note 7, at 287-303.

9. Kidder, *The End of the Road? Problems in the Analysis of Disputes*, 15 *LAW & SOC'Y REV.* 717 (1980-81).

10. Cain & Kulcsur, *supra* note 1.

11. Lempert, *Grievances and Legitimacy: The Beginnings and End of Dispute Settlement*, 15 *LAW & SOC'Y REV.* 707 (1981).

12. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 *AM. B. FOUND. RESEARCH J.* 425.

13. Miller & Sarat, *supra* note 2.

14. Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980-81).

have differential rates of recognition, action, and enforcement.

The crucial questions in any reassessment of a knowledge structure¹⁵ are what do we want to know and why do we want to know it. In short, we must be ever vigilant in examining the social roots of the theoretical constructs we create. The dispute paradigm does tell us a lot about disputes—how many there are, what types there are, which ones are acted on, and which ones are “lumped.”¹⁶ But, thus far, it has told us little about whether disputing is good or bad, whether the outcomes of particular disputes are good or bad, or whether the process of disputing may serve some functions independent of the outcomes. There is a hint in the critiques of the dispute paradigm that our research—particularly that of the Civil Litigation Research Project [hereinafter CLRJP]¹⁷—has been co-opted by its benefactor—the government—because the government seeks a functional analysis of how disputes can be most efficiently processed or managed. The critics, particularly Kidder, Abel, and Cain & Kulcsur seem to be suggesting we should move from a conservative, functional study of disputes,¹⁸ to a more comprehensive study of conflict and examine whether it is politically and socially useful to have more, rather than less, conflict in both our legal and social systems. This critique derives from a Marxist, critical point of view.

In this essay I will examine the dispute paradigm and its critique through the prism of one of the agents of dispute processing—the lawyer. This is not a simple task because in some studies of dispute processing, the dispute is the independent variable and the lawyer (the agent of dispute transformation) is the dependent variable. In other studies the reverse is true or the relationship is unclear. Are divorces made worse because of lawyers¹⁹ or do the dynamics of divorce disputes force lawyers to become particularly adversarial and antagonistic?²⁰ I choose this prism because the transformation of disputes conception²¹ not only illuminates a great deal about disputes, it is responsive to and

15. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1952).

16. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 *LAW & SOC'Y REV.* 695 (1975); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63 (1974); Miller & Sarat, *supra* note 2.

17. The Civil Litigation Research Project has developed and analyzed one of the most comprehensive data sets on civil litigation with data on dispute processing from both federal and state courts and potential disputants nationwide. See *REPORT OF THE CIVIL LITIGATION RESEARCH PROJECT* (1984).

18. T. PARSONS, *THE SOCIAL SYSTEM* (1951).

19. See Felstiner & Sarat, *supra* note 7.

20. H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* (1963).

21. Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 *J. OF CONFLICT RESOLUTION* 26 (1963); Mather & Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 *LAW & SOC'Y REV.* 775 (1981).

cuts across most of the dispute paradigm critiques. The transformation of disputes helps us to analyze and understand the social process by which difficulties, problems,²² and troubles with the world become issues which the official or public arena²³ must recognize and deal with by "resolution," "domination," "legitimation," or some other strategy. Although the legal system is only one of the fora which could conceivably deal with disputes, in the United States it has become the "baseline" of dispute resolution against which other dispute mechanisms are invariably measured.²⁴ Because the lawyer is frequently the transformer of a social dispute into a "legal" dispute (and sometimes vice versa), looking at the dispute paradigm through the eyes of the principal transformation agent should tell us something about how useful the paradigm is.

I should begin by disclosing what it is that I hope to know by studying disputes as a focal point of socio-legal studies. My point of view is both critical and functionalist as well as humanistic. I want to know when, why, and how we dispute in order to consider when and how disputes should be resolved, recognizing that as human beings we make our disputes and conflict ourselves and then offer each other competing world views about their utility. It is both a social fact and a "real" fact that disputes exist; the more interesting question is what do we do with them. Thus, the lawyer as transformation agent is a critical actor, for the lawyer, in many ways, controls whether a bit of trouble or a problem will be converted into a social, legal, or political dispute. This channeling by lawyers may greatly affect, if not distort, our analysis of how useful disputes and conflicts are. In my view, lawyers both defuse and eliminate some disputes that might better be expressed as political conflicts, they exaggerate and exacerbate other disputes that could be better resolved in other ways, but they also productively and usefully structure and resolve disputes and other socio-legal relationships. Looking at the dispute paradigm through the prism of the lawyer reveals one important aspect of law and society studies—disputes are legal, social, political, and economic and any effort to clearly demarcate these categories is likely to fail. Our study of disputes by our multi- or trans- (if not inter-) disciplinary approach in their full contextual complexity promises greater explanatory purchase than if we look simply at lawsuits (a legal study of disputes) or problems (a social study of disputes).

II. THE DISPUTE PARADIGM

The dispute paradigm as a conceptual model or research program is not

22. The use of proper terms here is difficult. Many disputants and potential disputants do not like to characterize themselves as having trouble or problems which might ripen into disputes or require dispute handling. See MENKEL-MEADOW, *THE 59TH STREET CLINIC: EVALUATION OF THE EXPERIMENT* 40 (1979).

23. Gulliver, *Introduction to Case Studies of Law in Non-Western Societies* in *LAW IN CULTURE AND SOCIETY* (L. Nader ed. 1969).

24. See FELSTINER & WILLIAMS, *supra* note 6; Hofrichter, *supra* note 6.

without internal difficulties. Definitions of "dispute" as "controversies involving two (or more) parties, each making a special kind of claim: a *normative claim of entitlement*"²⁵ to "a resource which someone else may grant or deny"²⁶ have been criticized as focusing on the point where the dispute has already crystallized. Thus, Felstiner, Abel & Sarat suggest separating out unperceived injurious experiences (unPIE) from perceived injurious experiences (PIE) which become named as grievances when attribution of fault to another results in blaming and a demand for a remedy becomes a claim that when rejected ripens into a dispute.²⁷ Anthropologists see the dispute as a "case" with an extended history that precedes and follows any resolution of the dispute.²⁸ Still others see the need for a different nomenclature because of the potential of disputes underestimation by persons who are reluctant to describe themselves as having problems or troubles.²⁹ One further limitation of the definitional problem is that the term "dispute" is both overinclusive as well as underinclusive. Trubek³⁰ and others have noted that many "official" disputes do not contain real disputes at all. From the lawyer's perspective, the conception of a dispute as an unwelcome grievance fails to account for a number of transactions in which lawyers may be involved which include disputed issues in the context of non-disputed matters. Is the negotiation about a price term in a contract a dispute? Is an uncontested divorce a dispute?

The notion of dispute definition is important because if we can define and operationalize it we can measure it. This is some of the hard work in which the CLRP³¹ has been engaged. By measuring disputes we can learn what kinds of disputes exist³² and how they are dealt with. Thus, studies of dispute resolution seek to evaluate who processes disputes. These include courts,³³ arbitration, mediation,³⁴ neighborhood justice centers,³⁵ pre-trial settlement conferences,³⁶ administrative agencies,³⁷ and lawyers.³⁸ Additionally, these studies

25. Lempert, *supra* note 11, at 708.

26. Miller & Sarat, *supra* note 2 at 526.

27. Felstiner, Abel & Sarat, *supra* note 14 at 633.

28. *Id.* at 639.

29. MENKEL-MEADOW, *supra* note 22; Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 708-09 (1977).

30. Trubek, *supra* note 4, 737-40.

31. *See supra* note 17.

32. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY (1977); Miller & Sarat, *supra* note 2; Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 LAW & SOC'Y REV. 503 (1981).

33. M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1977).

34. FELSTINER & WILLIAMS, *supra* note 6.

35. Hofricther, *supra* note 6.

36. Walker & Thibaut, *An Experimental Examination of Pre-Trial Conference Techniques*, 55 MINN. L. REV. 1113 (1971).

37. Crowe, *Complainant Reactions to the Massachusetts Commission Against*

analyze how disputes are processed using cost, quality, and transformation measures.³⁹ Disputes have been characterized and classified in a number of ways—by number of participants (dyadic or triadic);⁴⁰ by location of dispute (a federal or state court, mediation, neighborhood justice center, arbitration); by manner of resolution (“settled”⁴¹ or adjudicated⁴²); and by type of dispute (civil, criminal, large stake, small stake, subject matter).⁴³ As social scientists, we hope to learn from these classifications or taxonomies that dispute processing varies depending on who does the disputing (socio-economic factors),⁴⁴ who does the processing (parties themselves, community intervenors, or expert intervenors such as lawyers, mediators, and judges), what type of dispute is involved, and what remedial scheme is available. Some of these things we have begun to learn; others await fuller data reports.

Looking at these elements of the dispute paradigm through the prism of lawyers as agents of dispute processing what do we know and what do we not know?

III. THE LAWYER’S ROLE IN TRANSFORMING DISPUTES: THE STAGES OF NARROWING AND EXPANDING DISPUTES

We know that many grievances, problems, or troubles never fully ripen into disputes⁴⁵ and even when they do many people do not seek the assistance of a lawyer.⁴⁶ Thus, when we study the lawyer’s role in dispute processing we are admittedly narrowing the field of possible disputes to be studied, even among those with a third party intervenor or supporter.⁴⁷ Still, the lawyer’s role in defining, channelling, and labeling a dispute is significant and may be the only source of contact with the legal system for many potential disputants. My text for looking at the lawyer’s role in dispute processing is, in part, the

Discrimination, 12 LAW & SOC’Y REV. 217 (1978).

38. D. ROSENTHAL, *supra* note 7; Johnson, *supra* note 7.

39. See, e.g., DISPUTE PROCESSING & CIVIL LITIGATION, *supra* note 1.

40. P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE (1979).

41. L. ROSS, SETTLED OUT OF COURT (1980); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

42. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. L. REV. 750 (1964); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

43. Miller & Sarat, *supra* note 2.

44. Cf. *id.* at 556.

45. *Id.* at 527.

46. B. CURRAN, *supra* note 32, Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients*, 11 LAW & SOC’Y REV. 207 (1976).

47. Mather & Yngvesson, *supra* note 21.

extant literature on lawyer transformation of disputes;⁴⁸ it is supplemented by the data supplied by materials used to teach lawyers how to be dispute resolvers⁴⁹ and empirical data (some of my data on legal services lawyers, and already reported data)⁵⁰ supplied in reports of how lawyers do define, resolve, and process disputes.⁵¹

The literature on lawyer transformation of disputes is rather accusatory. In general, if the *who* of dispute processing is a lawyer one may assume that the lawyer will make the dispute worse, much as medical treatment may make the illness worse.⁵² Lawyers are said to exacerbate disputes by increasing the demands and conflicts⁵³ and narrow disputes by translating into limited legal categories what might have been broader and more general.⁵⁴ For the purpose of illuminating the processes of lawyer dispute resolution and sparking greater empirical sophistication in studying the role of dispute managers, it may be useful to examine in greater detail the manner in which disputes are narrowed.

For Mather & Yngvesson, the principal transformation of disputes occurs in their *rephrasing*, that is, "some kind of reformulation into a public discourse."⁵⁵ Thus, the grievant tells a story of felt or perceived wrong to a third party (the lawyer) and the lawyer transforms the dispute by imposing "categories" on "events and relationships" which redefine the subject matter of dispute in ways "which make it amenable to conventional management procedures."⁵⁶ This process of "narrowing" disputes occurs at various stages in lawyer-client interactions and could be usefully studied empirically. First, the lawyer may begin to narrow the dispute in the initial client interview. By asking questions which derive from the lawyer's repertoire of what is likely to be

48. See, e.g., H. O'GORMAN, *supra* note 20.

49. It might be productive for law and society studies to make better use of the rapidly increasing literature on lawyering that has come out of the clinical legal education movement. Clinical educators have attempted to study what lawyers do so that law students can be taught. This literature should provide a rich source of information on what lawyers are taught to do and what they think they are doing. See, e.g., Lowenthal, *A Theory of Negotiation Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69 (1982); Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980).

50. See H. O'GORMAN, *supra* note 20; D. ROSENTHAL, *supra* note 7; L. ROSS *supra* note 41.

51. Specific findings are not reported here, but this paper is based in part on observations of legal services lawyers' conceptions of what it is they are doing and what they are actually doing. Menkel-Meadow & Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL. Q. 237 (1983).

52. I. ILLICH, *MEDICAL NEMESIS* 26 (1970).

53. H. O'GORMAN, *supra* note 20; Felstiner & Sarat, *supra* note 7.

54. Fitzgerald & Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 LAW & SOC'Y REV. 681, 700 (1980-81).

55. Mather & Yngvesson, *supra* note 21, at 777.

56. *Id.* at 778.

legally relevant, the lawyer defines the situation from the very beginning.⁵⁷ Rather than permitting the client to tell a story freely to define what the dispute consists of, the lawyer begins to categorize the case as a "tort," "contract," or "property" dispute so that questions may be asked for legal saliency. This may narrow the context of a dispute which has more complicated fact patterns and may involve some mix of legal and non-legal categories of dispute. A classic example of such a mixed dispute is a landlord-tenant case⁵⁸ in which relationship issues and political issues (such as in rent control areas) intermingle with strictly legal issues of rent obligation, maintenance obligation, and nuisance. Thus, during the initial contact the lawyer narrows what is "wrong" by trying to place the dispute in a legal context which the lawyer feels he can handle.

Even if the client is allowed to tell his lawyer a broader story, the lawyer will narrow or rephrase the story in his efforts to seek remediation. Beginning with an effort to negotiate with the other side, the lawyer will construct a story which is recognizable to the other lawyer so that he can demand a stock remedial solution. In recent social, psychological, and legal literature this process has been called the telling of "stock stories."⁵⁹ The "stock stories" can be likened to a legal cause of action with prescribed elements which must be pleaded in a particular way in the legal system to state a "claim for which relief can be granted." If pre-litigation negotiation fails and the lawyer begins to craft a lawsuit, the dispute will be further narrowed by the special language requirements of the substantive law, pleading rules, and rules of procedure. For example, until recently in most jurisdictions (and still today in some), relief could not be granted for a tort which caused the victim emotional distress but did not involve physical contact between the tortfeasor and the victim.

Once negotiation commences the dispute is further narrowed,⁶⁰ the issues become stylized, and statements of what is disputed become ritualized because of the very process and constraints of litigation. In negotiation, lawyers begin to demand what they will ask the court to do if the case goes to trial. Lawyers are told to plan "minimum disposition," "target," and "reservation" points that are based on an analysis of what would happen if the case went to trial.⁶¹

57. D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING* (1977).

58. See Trubek, *An Afterword*, *supra* note 4, at 738.

59. W. BENNET & M. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* 5-6 (1981); R. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 32-41 (1980); R. SCHANK & R. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING* 51-61 (1977); Lopez, *The Internal Structure of Lawyering: Lay Lawyering*, 32 *UCLA L. REV.* 1, 3 (1984).

60. I have made this argument in greater detail elsewhere. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754 (1984); Menkel-Meadow, *Legal Negotiation; Strategies in Search of a Theory*, 1984 *AM. B. FOUND. RESEARCH J.* 905 (1984).

61. G. BELLOW & B. MOULTON, *LAWYERING PROCESS: NEGOTIATION* (1978);

Because a court resolution of the problem will result in a binary win/loss ruling, lawyers begin to conceive of the negotiation process as simply an earlier version of court adjudication. Thus, lawyers seek to persuade each other, using many of the same principles and normative entreaties that they will use in court,⁶² that they are right and ought to prevail now, before either party suffers further monetary or temporal loss. The remedies lawyers seek from each other may be sharply limited to what they think would be possible in a court case considering the court's remedial powers. Thus, most negotiations, like most lawsuits, are converted into linear, zero-sum games about money, where money serves as the proxy for a host of other needs and potential solutions such as apologies or substitute goods.⁶³ Negotiated solutions become compromises in which each side concedes something to the other to avoid the harshness of a binary solution. The compromise, which by definition forces each side to give up something, may be unnecessary and fail to meet the real needs of the parties. Consider two children disputing about a single piece of chocolate cake. The parental dispute resolver, like most lawyers, might seek the "obvious" compromise solution of cutting the cake in half, thereby eliminating a "better" solution if one child desires the cake, while the other prefers the icing.

Few empirical studies of actual legal negotiations exist,⁶⁴ but if my description is empirically accurate, disputes are narrowed in highly dysfunctional ways, both for the parties and for the larger dispute resolution mechanisms. "Real" needs of the parties in dispute are not exposed, explored, and resolved. Parties who seek apologies receive money, remain angry, and seek other ways to get their retribution. Thus, conflict may linger long after the dispute is officially "resolved."

In counseling clients lawyers may tell them what remedies are legally possible (money or an injunction) and thus preclude inquiry into alternatives which the client might prefer or which might be easier to obtain from the other party. As Engel has noted, some disputants prefer an acknowledgement that wrong has been done to them to receiving money.⁶⁵ Once lawyers are engaged and the legal system, even if only informally, has been mobilized, the adversarial structure of problem-solving forces polarization and routinization of demands and stifles a host of possible solutions. Although some have argued that courts do (comparative negligence) or should compromise⁶⁶ the limited

H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977); M. MELTSNER & P. SCHRAG, *PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL EDUCATION* (1974); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); L. ROSS, *supra* note 41.

62. Eisenberg, *supra* note 41, at 654-55.

63. Abel, *A Critique of American Tort Law*, 8 *BRIT. J. OF LAW & SOC'Y* 199 (1981); *Goods, Not Cash Settle Loss Claims*, *L. A. Times*, Feb. 19, 1983, at 1, col. 1.

64. *Cf.* G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

65. Engel, *supra* note 12, at 452.

66. Coons, *supra* note 42.

remedies of the courts, particularly when they also structure pre-court adjudicated outcomes, severely limit the quality of dispute resolution. This process, which I have called a "court model of negotiation,"⁶⁷ regresses all of the faults of court-resolved disputes, without many of the advantages of third party definitive and normative rulings. Thus, negotiated dispute resolution becomes "second best" dispute resolution; it has no appeal except that it is slightly faster and, perhaps cheaper.

The transformation of disputes paradigm is useful because by revealing what is wrong with narrowing, it illuminates what could be accomplished by an "expanding" transformative process. Mather & Yngvesson⁶⁸ and others⁶⁹ recognize that, on occasion, disputes can be expanded by lawyers. Thus, lawyers can "rephras[e] [a dispute] in terms of a framework not previously accepted by the third party. Expansion 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."⁷⁰ Lawyers engage in expansive dispute resolution when they create a new cause of action.⁷¹ Lawyers may also engage in transformative expansion of a legal dispute when they use the class action to increase the participation of disputants or to broaden legal disputes into political or social disputes. For example, early abortion cases sought to unite women and doctors in a common struggle over reducing state involvement in personal and medical decisions. The early abortion and birth control cases are also illustrative of individual disputes which were initially legally unsuccessful, but served an educative function, increasing both legal and societal recognition, and ultimately, acceptance of a controversial concept. Disputes do not necessarily become worse or magnified by "expansion"—in a sense they are merely recharacterized and placed in a different legal or social category.

Recent work on how lawyers might conceive of their dispute resolution functions more broadly makes implicit, if not explicit, use of the transformation model. Thus, critics of lawyer negotiation of disputes have argued for a broader view of legal disputes. Fisher & Ury⁷² and I⁷³ have argued that lawyers can "transform" the client's disputes back into what they were before the legal system narrowed them. Lawyers could consider the underlying needs of the parties, and facilitate solutions that achieve a greater number of the par-

67. Menkel-Meadow, *supra* note 60.

68. Mather & Yngvesson, *supra* note 21, at 802-07.

69. Fitzgerald & Dickins, *supra* note 54, at 697.

70. Mather & Yngvesson, *supra* note 21, at 778-79.

71. See *Goldberg v. Kelly*, 297 U.S. 254 (1970) (right to hearing in welfare termination); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel prohibits residency requirement for welfare benefits); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1977) (school financing).

72. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* (1981).

73. Menkel-Meadow, *supra* note 60.

ties' underlying needs than the solutions a court would craft if the case went to trial. Here a transformation and socio-legal study of dispute resolution could be girded to an important inquiry. Why do lawyers conceive their role and see their dispute resolution options so narrowly? Why do they persist in self-concepts of "advocates" or "hired guns" of an adversary system, rather than a more expansive, and presumably more interesting and creative conception of themselves as "problem-solvers?" Attempting to find non-routine solutions⁷⁴ to routine problems may be difficult and time consuming, but it could lead to more satisfactory results for the disputants and for what the lawyer-dominated dispute resolution processes offer. Indeed, much of the recent work on lawyer participation in new mediation models is also an effort to transform the lawyer's role from a simple conduit of court or legal system prescribed remedies to a facilitator of more individually crafted and creative solutions.⁷⁵ By expanding the repertoire of possible solutions or remedies from beyond those which a court would order, lawyers could expand their role in dispute resolution in useful ways.

Some lawyers have always viewed their roles in the dispute resolution machinery as being transformative. The civil rights and poverty movements produced a new generation of lawyers who describe themselves as explicitly seeking to translate individual cases into cases of larger numerical and social import.⁷⁶ Typical is this comment by a legal services lawyer: "I am trying to make things better, out of a sense of social and economic justice for all people."⁷⁷ Individual cases are transformed into class actions, legal disputes are transformed into political confrontations,⁷⁸ and individual dispute cases are transformed into opportunities to "resolve potential disputes" or change the rules for large numbers of people by explicitly seeking rule change, rather than "simple" dispute resolution between the parties.⁷⁹ Here, the lawyers serve an important transformative function of changing the nature of the lawsuit structure while the court continues to play its very traditional and conventional role of resolving disputes by enunciating the principles by which individ-

74. Bellow, *Turning Solutions Into Problems: The Legal Aid Experience* 34 BRIEFCASE 106 (1977).

75. Friedman, *Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice* in PEOPLE'S LAW REVIEW (R. Warner ed. 1981); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29 (1982).

76. J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978).

77. Interview with legal services lawyer (1981), Menkel-Meadow and Meadow, *The Origins of Political Commitment: Social Background Factors and Ideology Among Legal Services Attorneys*, paper presented to the 1982 Annual Meeting of the Law & Society Association, Toronto, Canada.

78. Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049 (1970).

79. J. KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* (1982); Menkel-Meadow, *The Professionalization and Politicization of Legal Services in the 1980's: Legal Aid in the United States*, 22 OSGOOD HALL L. J. 29 (1984).

ual disputes must be resolved in a complex legal and normative structure.⁸⁰ In this sense, we need more studies of how some lawyers come to define their roles as transformative in the expansionary sense while others persist in a more static and narrowly defined conception of their role in the legal system.

Whatever the potential for an expansionary transformative view of the lawyer in early stages of dispute resolution, given the limits of the formal dispute resolution machinery, once the dispute becomes a totally public event, the lawyer serves only a highly specialized and narrow function in dispute resolution. In a trial the lawyer's role as dispute resolver becomes simply to present the "stock story" that may be most persuasive to a particular fact-finder (judge or jury) and resolution of the dispute is transferred to that fact-finder. The lawyer continues to "process" that dispute, however, by the story that he or she tells. Once again, the voluminous literature which tells lawyers how to present their stories in court serves a highly narrowing, rather than expanding function.⁸¹ In judge-tried cases, lawyers may have more leeway with complex factual and legal presentations, but they are less likely to succeed with emotional, social, or political pleas.⁸² In jury trials, various forms of jury nullification may permit the lawyer to broaden the contextual aspects of the dispute and argue for emotional and political considerations (within the limits of the rules for "proper argument") but the "facts" must be kept simple. Trial manuals for lawyers tend to produce a conservative, narrow view of legal decisionmaking for which we have little empirical justification. For example, lawyers are told that attractive witnesses make more credible witnesses and are admonished to make their witnesses come to court dressed within certain conventional and conservative limits.⁸³ Should a lawyer seeking to deal with the dispute on its merits "expand" the dispute by explicitly dealing with this notion as an "issue" in the jury's factfinding process?

Finally, in "explaining" the results of official dispute resolution to their clients, lawyers may further transform the dispute by acting as legitimators or apologists for the system rather than engaging clients in a discussion of where the dispute resolution mechanisms have failed them. The lawyer's role in post-dispute resolution rationalization can serve to stabilize or "end" the dispute or to transform a client's feelings of justice or injustice in an individual dispute to a larger and more expanded view of what has happened to the dispute in the dispute processing machinery. The lawyer could facilitate the creation of an

80. M. SHAPIRO, *supra* note 33; Eisenberg, *supra* note 41.

81. P. BERGMAN, TRIAL ADVOCACY IN A NUTSHELL (1979); K. HEGLAND, TRIAL & PRACTICE SKILLS IN A NUTSHELL (1978); R. KEETON, TRIAL TACTICS AND METHODS (1973); T. MAJET, FUNDAMENTALS OF TRIAL TECHNIQUES (1981).

82. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 362-72 (1966).

83. The trial tactics books cited in note 81, *supra*, make explicit reference to such "facts" as the credibility of attractive witnesses (see BERGMAN *supra* note 81) without any empirical support for such statements. Many of the trial guides for lawyers rely on similar empirical statements without supporting data.

institutional competence or consciousness that can, but very often does not, expand a client's awareness of the transformation of his or her own dispute.

IV. WHAT THE TRANSFORMATION OF DISPUTES MODEL DOES TELL US

The dispute paradigm has enabled us to study and speculate on a number of important issues. If we take a certain amount of conflict in a social and legal system as a certainty, the dispute paradigm helps us look at whether lawyers serve to increase conflict or decrease it. As might be expected, the results of empirical studies are mixed and we must be cautious about specifying our conclusions and findings in their contextual complexity. Domestic relations lawyers may exacerbate the conflict between divorcing spouses.⁸⁴ Lawyers who seek to increase their own monetary gain may have an incentive to increase conflict to create more work.⁸⁵ Lawyers may increase conflict by narrowing disputes in such a way that the real issues of the dispute are hidden, masked, and solved in a manner which produces greater conflict later.⁸⁶ Yet at the same time, we learn that lawyers may actually decrease conflict by routinizing or homogenizing disputes in order to settle them quickly and predictably and within the constraints of "reasonable" and "common" remedies. Bellow has described a process of case routinization by legal services lawyers who settle cases within very predictable parameters to avoid the more difficult and complex strategies of pursuing conflict more vigorously and perhaps in a different, non-legal form.⁸⁷ Similarly, many criminal lawyers simplify the disputes of their clients by typing them and looking for the routine way out of the case, that is settling to minimize conflict and confrontation in the courtroom.⁸⁸

We are beginning to learn the particulars of how lawyers process disputes⁸⁹ in studies such as those by Felstiner & Sarat,⁹⁰ Williams,⁹¹ Fitzgerald,⁹² and Cain.⁹³ Thus, it seems safe to conclude that in some circumstances lawyers will serve as "gladiators," representatives, or fighters, but in other circumstances lawyers will smooth over disputes and effect predictable compro-

84. H. O'GORMAN, *supra* note 20; Felstiner & Sarat, *supra* note 7.

85. Johnson, *supra* note 7.

86. Menkel-Meadow, *supra* note 60.

87. Bellow, *supra* note 74.

88. P. UTZ, *SETTLING THE FACTS* (1978); Forst & Brossi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. OF LEGAL STUD. 177 (1977); A. BLUMBERG, *CRIMINAL JUSTICE* (1967).

89. Similarly, we have learned how insurance adjustors and the police settle disputes. See, e.g., L. ROSS, *supra* note 41.

90. See *supra* note 7.

91. See *supra* note 64.

92. Fitzgerald, *The Contract Buyers League and the Courts: A Case Study of Poverty Litigation*, 9 LAW & SOC'Y REV. 165 (1975).

93. Cain, *The General Practice Lawyer and the Client; Towards A Radical Conception*, 7 INT'L J. OF SOC. OF LAW 331 (1979).

mise agreements midway between the two opening demands.⁹⁴ As Fitzgerald & Dickens have put it, we are still left with the question of whether lawyers are "pot stirrers or peacemakers"⁹⁵ though we are beginning to make some advances in specifying the circumstances under which they may be one or the other. We need more studies with contextual sophistication to specify the circumstances under which lawyers may be one or the other.

From the data and speculative work we have done so far, some commentators have used the transformation of dispute model to interpret and analyze what role lawyers have played to offer suggestions for additional work. Bellow's and others' work on the routinizing and homogenizing of cases by lawyers has suggested that lawyers depoliticize disputes (as do many of the alternative, informal dispute resolution mechanisms)⁹⁶ and reduce conflict or disputes that might be meaningfully expressed in less routine fashion. Similarly, lawyers who see their roles as transforming problems into legal problems miss important opportunities to assist in retaining the social and political dimensions of problems that may have limited legal aspects.⁹⁷

The dispute paradigm has sharpened our consideration of how lawyers and clients negotiate the problems and disputes that will be processed,⁹⁸ though clearly much more is needed. We have learned that clients who seek particular remedies are frequently "cooled out" by their lawyers who transform their aspirations into ones more easily met. As I have argued, one of the principal roles lawyers serve in transforming disputes is to convert demands or pleas for non-monetary items into currency the lawyers can convert into simple compromises.⁹⁹

Similarly, focus on the dispute as a unit of analysis has enabled us to see how lawyers come to individualize disputes by focusing on the individual remedy or individual lawsuit. As Bellow¹⁰⁰ has suggested, lawyers need not use exclusively the class action device to collectivize disputes; lawyers can find other ways to aggregate claims against common enemies by organizing economic boycotts (in consumer and civil rights cases) or rent strikes (in landlord

94. H. RAIFFA, *supra* note 61, at 66-77; T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

95. Fitzgerald & Dickens, *supra* note 54, at 700.

96. Abel, *The Contradictions of Informal Justice in POLITICS*, *supra* note 6; Cain & Kulcsur, *supra* note 1.

97. Wexler, *supra* note 78.

98. D. ROSENTHAL, *supra* note 7; Kritzer, *supra* note 32; Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession* 128 U. PA. L. REV. 41 (1979).

99. See E. Abel, *Collective Protest and the Meritocracy: Faculty Women and Sex Discrimination Lawsuits*, *FEMINIST STUDIES* (1981). Abel reports that those seeking vindication and job reinstatement in employment discrimination suits frequently concede by settling for money, which in many cases is not the principally desired solution.

100. Bellow, *supra*, note 74.

tenant disputes). Such common strategies of dispute resolution in earlier social movements seem on the decline today.¹⁰¹

The dispute paradigm has illuminated a great deal and could do more. For example, we could study how lawyers decide to collectivize a dispute by raising class action possibilities.¹⁰² We could study lawyer transformation of disputes by examining *by observation* lawyer-client and lawyer-lawyer interactions that are not in the public eye.¹⁰³ We are beginning to study whether particular variables (type of case or type of client) affect the degree to which disputes are transformed.¹⁰⁴ These are only some of the questions we could examine productively. Others can be found in the Law & Society Review Special Issue on Dispute Processing.¹⁰⁵ For all of these interesting and useful questions, there are many other questions about the role lawyers play in the bridge between law and society that may not be answered under the dispute processing rubric.

V. WHAT THE DISPUTE PARADIGM DOESN'T TELL US

The dispute processing model suggests questions and provides answers that are important, but partial. There are other aspects of disputing in the intersection between law and society that are not explored within the current statements of the paradigm.

First, the dispute processing model has thus far focused on *process*, not outcome. Although we talk about the narrowing and expanding of disputes to limit or increase the issues of the dispute, there has been little discussion of the quality or utility of the outcomes of dispute mechanisms. There has been a tendency to measure dispute institutions with process measures (cost and efficiency) which are most often requested by governmental and evaluative bodies. There has, however, been some beginning in seeking measures of client satisfaction with some of the alternative dispute mechanisms. As lawyers narrow disputes by seeking only those remedies in a negotiation that a court would be able to provide, there may be a narrowing of options available to the disputants. If lawyers can accomplish in negotiation only compromised versions of what would happen if the case were tried, why go to a lawyer at all?

101. R. CLOWARD & F. PIVEN, *POOR PEOPLE'S MOVEMENTS* 34-36 (1977).

102. Although some researchers (see note 103, *infra*) report difficulties studying lawyer-client interactions, it would be useful to study how lawyers convert "individual" cases into class actions and what negotiation, if any, occurs with clients to inform or persuade them to aggregate their claims. Of course, some of this could be studied retrospectively, even within the limits of such an approach. See Garth & Nagel, *The Sociology of Class Actions* (research funded by the National Science Foundation, 1983-present).

103. Cf. Danet, Hoffman & Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 *LAW & SOC'Y REV.* 905 (1980).

104. Menkel-Meadow, *supra* note 60; Miller & Sarat, *supra* note 2.

105. See *supra* note 1.

We need to speculate and inquire about whether the dispute mechanisms we use provide the type of solutions the disputants desire and whether the solutions provided are useful to an audience beyond the participants in the disputes. Are there better ways to resolve custody disputes that include the interests of the children, the school system, the family, and the social structure? Are the solutions "better" if imposed by a third party who makes a definitive and authoritative ruling that will govern the parties' behavior or as is suggested in the mediation literature, does participant participation in the dispute processing improve the quality of the dispute? We could speculate, for example, that courts which resolve past disputes may not provide "good" solutions for parties who will engage in repeat actions that may not be governed by the ruling about a past dispute. This is not mere speculation; in the support enforcement area we already have evidence that single dispute court adjudication of long-term issues is not providing satisfactory or lasting solutions.¹⁰⁶ Lawyers may behave in similar ways when they plan litigation strategies around conceptualizations of past activity, although the "past" may present continuing problems in the present and future. This is seen in the need to litigate medical expenses before they have all been incurred, however, this practice is changing with the use of structured settlements.¹⁰⁷

Measuring or evaluating the quality of the resolution of a dispute, of course, includes an assumption that we know what we are trying to do when we process or resolve a dispute. This is one of the things the dispute paradigm has not addressed and here I am in agreement with some of the recent critics. Should disputes be resolved at all? Does the "processing" of disputes "cool out" some disputes that are best left hot? We need to step back and consider the social utility or function of disputing in our society. Is the proper role of the legal system to "solve" all disputes in the courts or should some be left for political, legislative, or collective action? Should some disputes be returned entirely to the parties, with no state intervention at all? Is the lawyer's role to encourage the molding of a dispute so it will "fit" into the legal structure and get resolved, or should the lawyer encourage the client to feel the political and moral indignation that accompanies a broader, and therefore, less manageable conception of the dispute. From these questions one could ask if there are good disputes and bad disputes, some disputes that should be resolved, diverted, avoided, or eliminated and others that should be provoked, encouraged, and made more public. It seems to me that these are questions central to a study of law and society. Does law transform disputes in ways that serve certain functions for our society and not serve others? Which functions are productive and which are not? Answers to these questions implicate political questions. Some disputing may be functionally useful in system maintenance terms and

106. D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979).

107. Granelli, *Structuring the Settlement: Piecemeal Payments Gain in Popularity*, NAT'L L. J. Feb. 16, 1981, at 1, col. 4.

some may be required for needed innovation, but how often do we need disputes that call for a rethinking of the whole system?

Related to the issue of the role of disputes in our legal and social systems is the slightly larger question of the role conflict *should* play in these systems. Have lawyers who “play the game” within the “old boy network” [sic] reduced the conflict in the legal system; by conspiring to settle cases have they eliminated any real “adversary” system that produces truth by conflict? Or, as others have argued, do we have too much conflict in the legal system—an unnecessary amount of adversarial posturing and conflict that prevents us from finding more creative solutions by speaking to each other in real terms, not those “stylized” by court rhetoric.¹⁰⁸ We are constantly accused of being an overly litigious society, but do we have any true idea of what too much litigation means?¹⁰⁹

What is the relationship between disputes and conflict? If disputes remain individualized through the work of lawyers and others in the dispute processing system, do we prevent some useful conflicts from emerging by failing to aggregate claims that produce group conflict? The development of such community groups as Mothers Against Drunk Drivers (MADD) represents an effort to collectivize action where individualistic treatment in the legal system appears to be inadequate to a particular interest group. Is there any way we can speculate about what disputes should or will expand into broader, socially productive conflict? Can or should such disputes be narrowed, individualized, or submerged or is it productive to have such conflicts ripen into social warfare? Are some disputes made unnecessarily conflictive by the way they are characterized? Does the adversary system and the structure of third party payments make more adversarial than necessary the settlement of an automobile accident, particularly in cases where no one is “at fault” or the one “at fault” already accepts moral responsibility? There are a number of questions which we do answer by looking at disputes as discrete events or happenings, but such studies necessarily are intertwined with a number of normative and political issues that we should not ignore. Only after we have considered what is meant by productive or unproductive disputes and conflict can we decide whether there is too much disputing or whether lawyers make disputes better or worse. Description of the disputing process only takes us so far, we also need to know why we are studying it.

My final comment on what the disputing paradigm does not tell us is a far more fundamental criticism which derives from my work on lawyers, although others have make the point from other perspectives.¹¹⁰ By studying disputes do we focus too intensively on only the tip of the law and society

108. Menkel-Meadow, *supra* note 60.

109. Abel, *supra* note 96; Galanter, *Reading the Landscape of Disputes: What We Know & Don't Know & Think We Know About Our Allegedly Contentious & Litigious Society*, 31 UCLA L. REV. 3 (1983).

110. Engel, *supra* note 12.

iceberg? That is, have we engaged in a study of deviance only? A focus on disputes is a focus on the pathology of the legal and social system; it tells us about the case that went wrong. Should not we be focusing as intently, some might argue more intently, on the role law serves in facilitating social life in affirmative, normative systems? Many, if not most, lawyers devote more of their time to facilitating transactions and relationships, and bringing parties together, than they do in dealing with disputes. Among those who deal with dispute resolution, some, if not enough, see their role as facilitating solutions and agreements, rather than merely "processing" those disputes. Some lawyers spend their time trying to prevent disputes. Thus, at least through the prism of the lawyer, the dispute paradigm does not help to describe fully the role of the lawyer either in the legal system or in the larger social system. This critique is not dissimilar from those who argue that the dispute paradigm does not accurately account for all that courts do.¹¹¹ To have a more complete picture of what the lawyer does we would have to develop a new paradigm which might include a transformation dimension in that sphere—perhaps a transactional paradigm.

A transactional paradigm would address how lawyers and other actors in the legal system put things together. What are the social patterns or networks for identifying those who are interested in working together? Do lawyers ever facilitate a "cross class dialogue or conversation" by bringing together participants to a transaction that might not otherwise encounter each other? How are social relationships converted to legal relationships and what is gained and what is lost in such transformations? In a sense, some of these studies have been undertaken: Macaulay's work¹¹² on businessmen; popular books on the "dealmakers;"¹¹³ efforts to understand how the legal form of marriage affects the relationship between the parties;¹¹⁴ and the role of lawyers in community organizing.¹¹⁵ We could certainly use more studies, however, that tell us something about the role of the making of transactions or about administering social and legal relations to supplement what we already know about when they fall apart. From the lawyer's perspective, by focusing on more of the things that lawyers do we might be able to answer such questions as whether lawyers and the legal system are more likely to enhance or diminish social good and wealth.

111. *Id.*; Schwartz, *The Other Things That Courts Do*, 28 UCLA L. REV. 438 (1981).

112. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 29 AM. SOC. REV. 55 (1963).

113. See, e.g., P. HOFFMAN, *LIONS IN THE STREET* (1973).

114. M. GLENDON, *MARRIAGE, FAMILY AND THE STATE* (1979); Prager, *Sharing Principles in Marital Property Law*, 25 UCLA L. REV. 1 (1977); Schultz, *The Contractual Ordering of Marriage*, 70 CAL. L. REV. 2 (1982).

115. R. CLOWARD & F. PIVEN, *supra* note 101; J. HANDLER, *SOCIAL MOVEMENTS & THE LEGAL SYSTEM* (1978); Wexler, *supra* note 78.

VI. IMPLICATIONS FOR STUDIES OF DISPUTE PROCESSING

I end this essay as most law and social science papers end, with a call for more research, but not just any research, on disputing. The implications of the observations in this essay suggest a number of concrete directions in which our research and thinking about disputes should proceed.

First, we should continue to explore the role that lawyers, along with other intervenors and supporters, play in the transformation of disputes. How does a "lay story" become converted to a "law story?" How is a lay story different from a law story? Do disputants (clients) have different expectations of what they hope to achieve in disputing than what lawyers, mediators, or judges give them? Such inquiries are important because present research has explored dispute resolution on an institutional level, perhaps too much to the exclusion of the individual, human level. The lawyers who narrow or expand disputes are individuals with social backgrounds, political ideologies, and social networks, which are conventional, but important categories in social analysis. The question of how lawyers come to narrow some disputes and broaden others should be pursued on many different levels and in many different ways. Lawyer and client interactions must be observed and lawyers and clients interviewed separately. In addition, we might take a critical look at the materials produced by lawyers for lawyers which purport to teach them their trade and inform them how to resolve disputes because this is the "legal culture" from which lawyers learn their dispute transformation processes.

Second, we need to learn more from survey research why and when disputants dispute and why and when they do not. Have they given up on a system of dispute resolution they think is no longer workable (if it ever was for those who have trouble affording it or playing in it)?¹¹⁶ Why do they avoid seeking redress?¹¹⁷ Is disputing of more concern to lawyers and social scientists than it is to the parties or are there ways that will permit those who want to proceed to seek redress of grievances? We must be careful of our definitions—there may be whole classes of grievances or claims in the world that we are unaware of because of our own narrowing of the concept by its definition.

Third, we should begin to confront the sociology of knowledge questions in this research agenda. Why do we want to know about disputes? What political uses can be made of this work? Already an important body of work has criticized the diversion of some disputes, particularly those involving the powerless, from mainstream dispute resolution institutions.¹¹⁸ Legal representation in dispute processing has played an important role in the access to justice movement and in seeking support for government-funded legal services programs. But, are we clear (can we be?) about whether more law and more

116. See Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

117. Felstiner, *supra* note 16.

118. Abel, *supra* note 96.

disputing is required? I think the answers to these questions are complex. Dispute and conflict is essential for social change and thus, those of us who are critics of a static system functionalism seem to be arguing for the function of conflict in our legal and political systems.¹¹⁹ Yet some conflict and dispute is clearly unnecessary, unhealthily, and unproductively exacerbated by our system of dispute resolution. Is there any systematic way to explore which disputes are socially useful and which are not? This is a question posed by those who ask us to consider our theories of society while we are busily collecting data on the dispute process.¹²⁰

Fourth, some evaluation research might be in order. Are disputants satisfied with the solutions the dispute resolution mechanisms provide? Are there ways we can think about and explore the outcomes of dispute resolution mechanisms? Some have argued that it is difficult, if not impossible to compare court outcomes and processes with non-court outcomes,¹²¹ but we need some outcome measures to determine whether dispute resolution or management in various contexts is doing what it purports to be doing. Do "solutions" endure differentially? Are court orders enforced more easily than mediation or arbitration awards? Do "solutions" in which the parties participate have greater legitimacy than those which do not involve the parties? These are all questions which can be explored empirically.

Finally, we should continue our dispute research and thinking, but we also need to broaden our focus to look at everyday transactions in the legal and social system. The dispute paradigm owes some of its history to the anthropological study of cases, but the anthropological experience also includes the negotiation of transactions as well as disputes.¹²² The transactional process, which may turn out to be more creative and less narrowing, may give us cause to be less pessimistic about the role of law in society.

In my study of lawyers, the dispute paradigm has been very useful as a unit and method of analysis. The lawyer's role in transforming disputes by both narrowing them and expanding them is one of the most critical roles that lawyers play in the legal system. This role has great implications for what disputes in society are resolved or processed and which are not. Yet the dispute paradigm does not tell us all we need to know, either about lawyers or about the role that disputes and conflict play in our larger social system. The dispute paradigm should continue to inform our research, but we also need to think about what else we need to know and why we are seeking the knowledge we are pursuing.

119. Cain & Kulcsur, *supra* note 1; Kidder, *supra* note 96.

120. Cain & Kulcsur, *supra* note 1.

121. Engel, *supra* note 12.

122. See, e.g., P. GULLIVER, *supra* note 40.