GRIEVANCES AND LEGITIMACY: THE BEGINNINGS AND END OF DISPUTE SETTLEMENT

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The study of dispute settlement within the sociology of law has, for the most part, been organized around institutionalized processes of dispute settlement, which typically has meant around dispute settlement institutions. Although some researchers—notably in anthropology—have provided detailed natural histories of disputes, including information about denouements, most dispute settlement research has focused on the immediate inputs into the institutions of dispute settlement, on processes of dispute settlement, and on dispute resolutions both as outcomes of processes and outputs of institutions. Inputs of interest have included, on the one hand, parties and their representatives and, on the other, the disputes parties bring. Process has been broadly defined to include actions that occur within dispute settlement institutions and also organized patterns of behavior, such as Eskimo song duels, that may not be institution bound. Outcomes and outputs are typically confounded and operationalized as the decisions of institutions, although we know that in some settings these decisions do not necessarily determine party outcome.[1]

A striking feature of the current symposium is the number of articles in which dispute settlement institutions are a peripheral rather than central concern. Thus we follow individuals with grievances as their grievances are transformed into informal and then escalated disputes (Felstiner *et al.*, 1981; Miller and Sarat, 1981). We consider, from an economic perspective, the costs and rationality of avoiding disputes (Gollop and Marquardt, 1981), and we examine the implications of lawyer compensation schemes for the litigation of legal controversies (Johnson, 1981).

[1] Verdicts in small claims courts (Yngvesson and Hennessey, 1975) and orders to pay child support (Chambers, 1979) are well-known examples.

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Research on institutionalized processes of dispute settlement and on their embedding institutions is perhaps the most interesting body of work that the sociology of law has thus far produced, and it will no doubt continue to be a central concern of the discipline. However, if we are to understand the place of dispute settlement in society, understanding dispute settlement institutions is a starting rather than an ending point. While the essays in this volume are not the first efforts to take us beyond a narrow institution-bound perspective, they are important in that they help set the agenda for future research. In the brief comments that follow I would like to add two items to that agenda.

First, we must recognize, as both Felstiner and his colleagues and Miller and Sarat do, that dispute settlement is but one way of processing grievances. To understand how dispute settlement fits into the larger category of grievance processing, we must define the crucial terms: dispute and grievance. I believe it is fruitful to think of disputes as controversies involving two (or more) parties, each making a special kind of claim: *a normative claim of entitlement*. Where people asserting mutually exclusive interests in the same resource are not each asserting normative claims of entitlement, we do not have a dispute. If control over the resource is contested but none of the contestants makes a normative claim, we have a fight, though not necessarily a physical one. If one without normative justification tries to claim something another possesses by right, we have either a request for charity or theft or attempted theft, in a sociological if not a legal sense. Finally, where a person claims he is normatively entitled to something another possesses or controls, and the other has neither denied the claim nor asserted a normatively superior one, we have a grievance, pure and simple. Grievances may be private, since they are transformed into disputes by the actual denial of the grievant's normative claim and not by some likelihood that denial would occur if the grievance were known or compensation demanded. Thus, disputes must start as grievances; because until a normative claim is communicated, its validity cannot be contested.[2]

[2] These definitions differ somewhat, although I am not sure they differ in important ways, from other definitions offered in this volume. In particular, I believe communicating a grievance to an alleged wrongdoer (claiming) is an important stage or transformation in the *process* of dispute settlement, but I believe that one who has made a claim that has been neither disputed nor satisfied retains the original grievance. Claiming is part of grievance processing. Both the claims and the grievance turn on the same normative

Not all grievances are transformed into disputes. Some do not become disputes because they are never communicated to a person who might deny the claim's validity or give satisfaction (Felstiner, 1975). Other grievances do not become disputes, because although they are communicated, they are never controverted.

We know very little about communicated grievances that are not processed as disputes. With a few notable exceptions, there has been virtually no work on untransformed grievances. What little there is deals largely with situations where potential disputants (i.e., those who might legitimately assert a normative justification for their actions) decide not to assert their position and instead give the grievant some measure of satisfaction. Thus, businesses may accede to highly questionable claims in order to preserve valued relationships (Macaulay, 1963), or an appliance store may adopt a "customer is always right" policy, feeling that in the long run this will be good for business (Ross and Littlefield, 1978). Similarly, the threat of a lawsuit may have nuisance value, since satisfying a grievance may be cheaper than disputing it and ultimately prevailing (Ross, 1970).[3]

Almost nothing is known about the situation in which grievances are asserted, not disputed, yet never satisfied. Such situations may be quite common: a letter is written but never answered; the legitimacy of a complaint is acknowledged, but a bureaucrat's hands are somehow tied; phone calls are not returned; sympathy is readily available, but the person who can rectify the situation cannot be identified; the complaint is referred up some bureaucratic hierarchy (or so one is told), but a solution never comes down. I daresay that virtually every reader of this article has had some such experience.

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perceptions. A dispute is a further stage in processing grievances which may in fact transform them. In a dispute the existence or integrity of the grievance is questioned because the essence of a dispute is that the opponent questions the normative basis of the grievance in whole or in part. Without a normative basis, a grievance collapses into a mere injury. If on the other hand the grievant prevails in the dispute and the claim is satisfied, the grievance again disappears. Of course, the fact that a grievance matures into a dispute does not mean the dispute will be satisfactorily settled. Therefore, while we may for some purposes wish to conceive of a dispute as a transformation of a grievance, this transformation does not mean that the grievance ceases to exist. It always makes sense to ask of the moving party in a dispute, "what is your grievance?" It also makes sense to ask at that stage "what is your dispute?" But that is a different and not a mutually exclusive question.

[3] Note that when plaintiff's cause of action has no substance the assertion of a claim for its nuisance value is not a grievance; it is an attempt at theft.

Just as we must be concerned with how grievances come to be transformed into disputes, so we should be concerned with the fate of grievances that never mature into disputes. Simple counts would be revealing. How many serious (however that may be defined) grievances does the typical person have which are never communicated? How many are communicated and satisfied? How many are communicated, not disputed, yet never satisfied? What proportion of communicated grievances are contested on normative grounds? The sociological literature provides few clues. Although it is likely that recorded disputes are only the tip of the iceberg, we have little idea of the berg's dimension or shape. Miller and Sarat's article in this volume is important because it recognizes the importance of what has previously been submerged and provides an initial description.[4]

We also know little about the processes by which grievances get sorted. Are some grievances of a kind that are rarely communicated? What apart from lack of seriousness characterizes such claims? When grievances are communicated, what determines whether they are disputed? Among those grievances that are not disputed, what determines whether they are settled? The answers to these and similar questions will, no doubt, turn on characteristics of the grievances, those who hold them, and those they are directed against. Miller and Sarat's multivariate analysis suggests the difficulties we can expect to encounter in sorting out causal relationships. They also indicate that quantitative investigations will not be enough. Qualitative approaches are also necessary if we are to understand the nuances of grievance processing.

We may find that actors who are legally competent and tend to prevail in disputes are also "pre-legally" competent and know how to get their undisputed grievances satisfied or, on the other hand, are experienced in fobbing off claims they cannot dispute. Yet this is not necessarily the case. A simple personality trait like aggressiveness may be more important to

[4] My perspective implies disagreement with Miller and Sarat's operationalized definition of dispute. If I understand their paper correctly, all communicated grievances (claims) that did not result in an agreement being reached with little or no difficulty are considered disputes. I believe that the quality of the response to the claim, whether or not it is normatively based, and not the incidence or ease of grievant satisfaction, determines whether there is a dispute. If, for example, Miller and Sarat were to question organizations that were subjects of interviewee complaints, they might find that organizational officials in a position to deal with the grievances would often not report involvement in a dispute and, on occasion, would even be unaware of complaints.

successful grievance processing than substantial wealth or the experience that characterizes repeat players. Conversely, an organization that receives many grievances it cannot contest may institute ways to satisfy them, while an organization subject to only occasional undeniable claims may through inadvertence or design succeed in giving claimants the runaround. More likely we will find, as our empirical base builds, that the mere volume of uncontested complaints does not determine outcomes but instead interacts with other characteristics of both claimants and respondents.

Finally, we will have to attend to the potential for escalation into the legal arena, a point in which the respondent who does not transform a grievance into a dispute will be forced to satisfy it. Clearly the threat of suit is an important ingredient in many out-of-court settlements, but it is likely that most such settlements involve actual disputes rather than uncontested grievances. While the threat of legal action may play a role in inducing parties to satisfy uncontested grievances, I would be surprised if such threats are crucial to most satisfied grievances.

The study of grievance processing is important both in its own right and as part of a larger effort to understand dispute settlement. What happens to grievances determines the inputs into the dispute settlement process. Grievances that are not communicated and those which are settled upon communication will obviously not be inputs into the dispute settlement process. Less obvious is how some parties succeed in keeping grievances from becoming disputes without either satisfying them or questioning their legitimacy. Grievances are the grist for the dispute processing mill. We cannot fully understand what goes on in that mill unless we understand why only a portion of that grist is processed there. We cannot understand the sociological implications of what the mill produces unless we know what happens to the grist that never reaches it. In short, the full understanding of dispute settlement requires that it be seen in context, as a mode of grievance processing. And, even if it did not, the untransformed grievance would be an interesting and important subject of research.

The second item I would like to see on the dispute settlement research agenda concerns outputs. Here I am not thinking in terms of decisions of tribunals (which are the subjects of a growing body of research) nor even of ultimate outcomes to parties. Rather I am thinking of the sociological

implications of effective or ineffective and biased or unbiased systems of dispute settlement.

One of the most interesting developments in the contemporary sociology of law is the emergence of the so-called critical school of criminology (Taylor *et al.*, 1973) and related neo-Marxist interpretations of law and legal development (Thompson, 1975; Balbus, 1973). An important, if not the core, insight of the latter group is that legal form may serve both to maintain the legitimacy of a system of domination and to restrain those with power from acting in their unbridled self-interest (Thompson, 1975; Balbus, 1977; Trubek, 1977). Indeed, law can operate to strengthen the position of the leading class while (and to some extent by) thwarting the private interests of members of that class (Hay, 1975; Balbus, 1977).

The key element in this analysis seems to be the relationship between legal action and legitimacy. Except when the ideological underpinnings of a system are under attack—as they are, for example, when the very institution of private property is questioned—proceeding through law has a *prima facie* neutrality about it. All are, in theory, governed by similar strictures, eligible for similar punishments, and able to achieve similar rewards. Of course, the empirical distribution of rewards and punishments among classes reflects anything but equal eligibility. Nevertheless, a semblance of equality is maintained by the publicity given the sanctions visited on the rich when they run afoul of the law, by the successes of the poor in avoiding the full rigors of the law, and by the fact that those in power face obvious restraints in achieving desired goals (Hay, 1975).

Formal legal equality and the appearance of a just legal system are arguably crucial in inducing people to extend legitimacy to a government. Where legitimacy is extended for these reasons, we have legal domination, a form of rule which is: (1) stable, since allegiance is owed to an evolving system of rules rather than to dated tradition or vulnerable individuals; (2) flexible, since the rules can be changed, even dramatically if the situation appears to require this; and (3) cheap, in the sense that large bodies of people can be ruled with relatively small expenditures on force. The state's rules in a system of legal domination carry a strong presumption of validity; and even if the validity of the rules is questioned, the legitimacy of punishing violators often is not.[5]

[5] This is a crucial point, for law in a system of legal domination is like law in any other system of domination in that if it is to remain viable its rules

Implicit in this analysis is the premise that people attend to the quality of justice delivered by legal systems. Formal justice is fundamental in that if people see formal equals treated differently on the basis of special characteristics, such as class, legitimacy is likely to be threatened.[6] Substantive justice, while not as fundamental, may still be important; and the experience of substantive injustice may also threaten the continued legitimacy of a legal system. Where this happens, the first step of those who dominate the status quo may be an attempt to define what is occurring in formal terms. However, if this fails to restore legitimacy, substantive concessions are often given.

Research informed by the idea that the quality of delivered justice may be crucial to the legitimacy of legal systems usually focuses on situations where the relative power of classes is at issue. The struggle may be partially disguised by the legal form, as when the state through the criminal law acts as a surrogate for the interest of the dominant classes (e.g., Thompson, 1975); or it may be more open, as is the case with labor law (Klare, 1978). No one, to my knowledge, has studied the implications of normal processes of dispute settlement for the legitimacy of legal orders. Yet private disputes may be the most common occasions on which ordinary citizens are forced to confront or are able to use legal rules and procedures.

It is in the nature of disputes that in many instances at least one party will be dissatisfied with the results. When a disputant learns that the law is on the other side or is told by a

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must, however rare the occasions, ultimately be backed by force. If force may be consistently and legitimately used, it may successfully coerce behavior which will come to be seen as legitimate (Ball *et al.*, 1962). An example of the basic point is found in the attitudes which many take toward those who violate patently unjust laws to protest them or arguably just laws in an effort to ameliorate injustice. Such behavior is often approved of only if the violator is willing to accept the legally prescribed punishment. Thus during the Viet Nam war some resisters and many who shared their goals felt that protesters were morally obligated to violate laws openly and accept—except insofar as there was a legal defense—criminal punishment. Such a doctrine is, in effect, a prescription for removing from the fray those who might most effectively oppose governmental action. So long as the state proceeds through law, potential followers may accept as legitimate the removal of likely leaders from their midst.

[6] What is legitimate depends to some extent on the legal system, since a law has a presumption of legitimacy if it is *duly* promulgated. However, what can be duly promulgated (legitimacy) ultimately depends on prevailing ideology. Thus, benefit of clergy which treated people who committed similar sins in decidedly unequal ways did not violate formal equality so long as the Church had the ideological resources to convince the populace that clerics were fundamentally different from laypeople who committed the same acts. Legal domination is complete when the prevailing ideology is that whatever is duly promulgated is legitimate, and the legal system's rules of recognition (Hart, 1961) provide the only test of due promulgation (Weber, 1954).

court that it is, what determines whether the disputant regards the result as merely painful or actually illegitimate? Do people come to regard legal systems and states as more or less legitimate depending on how their disputes are resolved? While the civil law may be as important to the class structure of modern society as the criminal law (cf., Horwitz, 1977) it may be that the actual resolution of most disputes has little implication for the stability of class relations. Many civil disputes may have only attenuated impacts on more powerful parties because of insurance and other cost-spreading devices. In other disputes, such as divorces, the resolution may simply allocate resources among members of the same social class. It may be that a system which can deliver what is perceived as high-quality justice to those involved in systemically inconsequential disputes obtains some leeway for bias or even oppression in areas of greater structural importance. It may also be that a failure to deliver justice between individuals (for example, because of corruption) renders a regime precarious whatever its other claims to legitimacy.

At the same time the civil law is instrumental in establishing the fundamental relations of property and contract that determine the allocation of wealth and labor in modern society. What determines whether these rules are regarded as legitimate? Is this affected by the ways in which disputes arising under these rules are resolved and rationalized? Do disputes and their resolution affect these rules? In a common law system a reciprocal relationship is not only possible; it is expected. Form also plays a role. The form of the jury trial and the pretext that only factual differences need be resolved may infuse substance in the law which negates class legislation but also serves to enhance the legitimacy of the system. The jury's treatment of workers' injuries in the 19th century (Friedman and Ladinsky, 1967) and of the doctrine of contributory negligence in the twentieth are examples. Ultimately patterns of dispute settlement, as with these examples, may encourage legislation that appears to, and may in fact, reallocate resources between classes.

Questions and concerns such as these are not reflected in the articles prepared for this symposium. They have simply not been attended to by students of dispute settlement. Yet the end of dispute settlement in society is not the decisional output of a court, arbitrator or moot. Ideologically it is justice and sociologically it *might be* legitimacy or a contribution to it. It is only by viewing dispute settlement in terms of its ultimate

social implications that we can come to understand the place of dispute settlement and dispute settlement institutions in society. It may be that it is only with this understanding that we can appreciate why dispute settlement institutions function as they do. Core concerns again require an appreciation of the periphery.

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