

The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...

William L.F. Felstiner, Richard L. Abel and Austin Sarat
15 Law & Society Review 630 (1981)

I. INTRODUCTION

The sociology of law has been dominated by studies of officials and formal institutions and their work products. This agenda has shaped the way disputes are understood and portrayed. Institutions reify cases by reducing them to records; they embody disputes in a concrete form that can be studied retrospectively by attending to the words used by lay persons and officials and by examining the economic and legal context in which cases occur (Danzig, 1975). But disputes are not things: they are social constructs. Their shapes reflect whatever definition the observer gives to the concept. Moreover, a significant portion of any dispute exists only in the minds of the disputants.

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Assume a population living down-wind from a nuclear test site. Some portion of that population has developed cancer as a result of the exposure and some has not. Some of those stricken know that they are sick and some do not. In order for disputes to emerge and remedial action to be taken, an unperceived injurious experience (unPIE, for short) must be transformed into a perceived injurious experience (PIE). The uninformed cancer victims must learn that they are sick. The transformation perspective directs our attention to the differential transformation of unPIEs into PIEs. It urges us to examine, in this case, differences in class, education, work situation, social networks, etc. between those who become aware of their cancer and those who do not, as well as attend to the possible manipulation of information by those responsible for the radiation. * * *

This first transformation—saying to oneself that a particular experience has been injurious—we call *naming*. Though hard to study empirically, naming may be the critical transformation; the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision (cf. Cahn, 1949; Barton and Mendlovitz, 1960). For instance, asbestosis only became an acknowledged "disease" and the basis of a claim for compensation when shipyard workers stopped taking for granted that they would have trouble breathing after ten years of installing insulation and came to view their condition as a problem.

The next step is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another

individual or social entity. By including fault within the definition of grievance, we limit the concept to injuries viewed both as violations of norms and as remediable. The definition takes the grievant's perspective: the injured person must feel wronged and believe that something might be done in response to the injury, however politically or sociologically improbable such a response might be. A grievance must be distinguished from a complaint against no one in particular (about the weather, or perhaps inflation) and from a mere wish unaccompanied by a sense of injury for which another is held responsible (I might like to be more attractive). We call the transformation from perceived injurious experience to grievance *blaming*: our diseased shipyard worker makes this transformation when he holds his employer or the manufacturer of asbestos insulation responsible for his asbestosis.

The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy. We call this communication *claiming*. A claim is transformed into a dispute when it is rejected in whole or in part. Rejection need not be expressed by words. Delay that the claimant construes as resistance is just as much a rejection as is a compromise offer (partial rejection) or an outright refusal.

* * * We know that only a small fraction of injurious experiences ever mature into disputes (e.g., Best and Andreasen, 1977:708-711; Burman *et al.*, 1977:47). Furthermore, we know that most of the attrition occurs at the early stages: experiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible.

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The early stages of naming, blaming, and claiming are significant, not only because of the high attrition they reflect, but also because the range of behavior they encompass is greater than that involved in the later stages of disputes, where institutional patterns restrict the options open to disputants. Examination of this behavior will help us identify the social structure of disputing. Transformations reflect social structural variables, as well as personality traits. People do—or do not—perceive an experience as an injury, blame someone else, claim redress, or get their claims accepted because of their *social position* as well as their individual characteristics. The transformation perspective points as much to the study of social stratification as to the exploration of social psychology. *.*

PIEs, grievances, and disputes have the following characteristics: they are subjective, unstable, reactive, complicated, and incomplete. They are *subjective* in the sense that transformations need not be accompanied by any observable behavior. A disputant discusses his problem with a lawyer and consequently

reappraises the behavior of the opposing party. The disputant now believes that his opponent was not just mistaken but acted in bad faith. The content of the dispute has been transformed in the mind of the disputant, although neither the lawyer nor the opposing party necessarily knows about the shift.

Since transformations may be nothing more than changes in feelings, and feelings may change repeatedly, the process is *unstable*. This characteristic is notable only because it differs so markedly from the conventional understanding of legal controversies. In the conventional view of disputes, the sources of claims and rejections are objective events that happened in the past. It is accepted that it may be difficult to get the facts straight, but there is rarely an awareness that the events themselves may be transformed as they are processed. This view is psychologically naive: it is insensitive to the effect of feelings on the attribution of motive and to the consequences of such attributions for the subject's understanding of behavior (Loftus, 1978).

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Even in ordinary understanding, disputing is a *complicated* process involving ambiguous behavior, faulty recall, uncertain norms, conflicting objectives, inconsistent values, and complex institutions. It is complicated still further by attention to changes in disputant feelings and objectives over time. Take the stereotypical case of personal injury arising out of an automobile accident. A conventional analysis (e.g., the one often borrowed from economics) assumes that the goals of the defendant driver are to minimize his responsibility and limit the complainant's recovery. A transformation view, on the other hand, suggests that the defendant's objectives may be both less clear and less stable. Depending on his insurance position, his own experience, his empathy for, relationship to, and interaction with the injured person, and the tenor of discussions he may have with others about the accident and its aftermath, the defendant may at various times wish to maximize rather than minimize both his own fault and the complainant's recovery or to take some intermediate position.

Parties

Neither the identity nor the number of parties is fixed. New information about and redefinition of a conflict can lead a party to change his views about appropriate adversaries or desirable allies. Both may also be changed by officials of dispute processing agencies. The new parties, especially if they are groups like the NAACP, ACLU, or Sierra Club, may adopt a lawsuit as part of a campaign to use the courts as a mechanism of social change (see Casper, 1972: ch. 5; Weisbrod *et al.*, 1978; Tushnet, n.d.) or to mobilize political activity (Handler, 1978), although social and political movements may also lose momentum as a collective struggle is

translated into an individual lawsuit (e.g., school desegregation; see Wollenberg, 1977). Parties may be dropped as well as added. A grievance that was originally experienced collectively may be individualized in the process of becoming a dispute; tort claims as a response to harm caused by unsafe conditions and disciplinary hearings as a response to labor disputes are examples.

Obviously, the parties to a conflict are central agents, as well as objects, in the transformation process. Their behavior will be a function of personality as it interacts with prior experience and current pressures. Experience includes involvement in other conflicts; contact with reference groups, representatives, and officials; and familiarity with various forms of dispute processing and remedies. For instance, among the newly enrolled members of a prepaid legal services plan, those who have previously consulted a lawyer are more likely to use their membership privileges than are those who have not (Marks *et al.*, 1974: 63-64). Personality variables that may affect transformations include risk preferences, contentiousness, and feelings about personal efficacy, privacy, independence, and attachment to justice (rule- mindedness). Both experience and personality are in turn related to social structural variables: class, ethnicity, gender, age (see Curran, 1977; Griffiths, 1977; Best and Andreasen, 1977: Table 15). The relationship between the parties (cf. Black, 1973) also has significance for transformations: the sphere of social life that brings them together (work, residence, politics, recreation) - which may affect the cost of exit (see Felstiner, 1974: 79-80, 83-84) - their relative status (see Starr, 1978; R. Abel, 1979a: 245-246), and the history of prior conflict shape the way in which they will conduct their dispute. In addition, strategic interaction between the parties in the course of a conflict may have a major transformational role. An unusual example is the party who seeks proactively to elicit grievances against himself: the retail seller who asks purchasers about complaints (Ross and Littlefield, 1978: 202), the employer who provides an anonymous suggestion box, even the neurotic spouse or lover who invites recriminations. But more common are the new elements disputes take on, the rise and fall in animosity and effort that occurs in response to or in anticipation of the "moves" of the opposition.

Attributions

Attribution theory (see Kelley and Michela, 1980: 458) asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious. People who blame themselves for an experience are less likely to see it as injurious, or, having so perceived it, to voice a grievance about it; they are more likely to do both if blame can be placed

upon another, particularly when the responsible agent can be seen as intentionally causing or aggravating the problem (see Vidmar and Miller, 1980: 576-577; Coates and Penrod, 1981). But attributions themselves are not fixed. As moral coloration is modified by new information, logic, insight, or experience, attributions are changed, and they alter the participants' understanding of their experience. Adversary response may be an important factor in this transformation, as may the nature of the dispute process. Some processes, such as counseling, may drain the dispute of moral content and diffuse responsibility for problems; others, like direct confrontation or litigation, may intensify the disputant's moral judgment and focus blame. Thus the degree and quality of blame, an important subject of transformations, also produces further transformations.

Scope

The scope of conflict - the extent of relevant discourse about grievances and Claims - is affected both by the objectives and behavior of disputants and by the processual characteristics of dispute institutions. A hypothetical case frequently used in mediator training involves a man's wife and his lover. The wife has hit the lover with a rock, and the latter has complained to the police; at arraignment the Judge has referred the women to mediation. The discussion there focuses initially on the rock incident and then expands to include the battle for the man's affections. The scope of this dispute is thus complicated by the confrontation between the women during the rock incident, narrowed to that incident alone as the dispute is handled by police and court, and then broadened to re-embrace the original conflict plus the rock incident through interaction between the disputants and the mediator. Some types of dispute processing seek to narrow the disputes with which they deal in order to produce a construction of events that appears manageable. Others are alive to context and circumstance. They encourage a full rendering of events and exploration of the strands of interaction, no matter where they lead. The scope of conflict, in turn, affects the identity of the participants, the tactics used, and the outcomes that become feasible.

Choice of Mechanisms

The grievant's choice of an audience to whom to voice a complaint and the disputant's choice of an institution to which to take a controversy are primarily functions of the person's objectives and will change as objectives change. Mechanisms may also be determined by exogenous factors such as the whims of court clerks (see Felstiner and Williams, 1980: 19; cf. R. Abel, 1969: Table III and accompanying text; 1979d: 188) and lawyers who prefer not to try cases (see Rosenthal, 1974: 110, 115) or who cool out consumers in order to maintain good

relations with retailers (Macaulay, 1979: 137). Once a mechanism - court, administrative agency, mediator, arbitrator, or psychotherapist - is set in motion, it determines the rules of relevance, cast of actors, costs, delays, norms, and remedies.

Objectives Sought

A party may change his objectives in two ways: what he seeks or is willing to concede and how much. Stakes go up or down as new information becomes available, a party's needs change, rules are adjusted, and costs are incurred. Delay, frustration, and despair may produce a change in objectives: victims of job discrimination frequently want the job (or promotion) or nothing at the outset but later become willing to settle for money (*see* E. Abel, 1981; Crowe, 1978). As Aubert (1963: 33) noted, the relationship between objectives and mechanisms is reciprocal: not only do objectives influence the choice of mechanisms, but mechanisms chosen may alter objectives. Because courts, for instance, often proceed by using a limited number of norms to evaluate an even more circumscribed universe of relevant facts, "the needs of the parties, their wishes for the future, cease to be relevant to the solution" (Aubert, 1963: 33). Even where a legal remedy is anticipatory - alimony, worker's compensation, or tort damages for future loss - the legal system frequently prefers to award a lump sum rather than order periodic payments. Finally, the experience of disputing may stimulate a participant to take steps to avoid similar disputes in the future, or to structure his behavior so as to place him in a stronger position should a dispute occur (e.g., Macaulay, 1966: 167, 204).

Ideology

The individual's sense of entitlement to enjoy certain experiences and be free from others is a function of the prevailing ideology, of which law is simply a component. The consumer's dissatisfaction with a product or service may have been influenced by the campaigns of activists, like Ralph Nader, who assert that consumers have a right to expect high quality. Legal change may sometimes be a highly effective way of transforming ideology to create a sense of entitlement. This is the sense in which, contrary to conventional wisdom, you *can* legislate morality. Although it would be foolish to maintain that after *Brown v. Board of Education* every minority child had a sense of entitlement to integrated education, made a claim against segregation, and engaged in a dispute when that claim was rejected, surely this has happened more often *since* than before 1954. Following a recent television program in Chicago in which a woman subjected to a strip search during a routine traffic citation described her successful damage claim against the

police department, *hundreds* of women telephoned the station with similar stories. In this instance, a legal victory transformed shame into outrage, encouraging the voicing of grievances, many of which may have become disputes. When the original victim chose a legal mechanism for her complaint, a collective grievance against police practices was individualized and depoliticized. When she broadcast her legal victory on television, the legal dispute was collectivized and repoliticized. Ideology—and law—can also instill a sense of disenfranchisement. The enactment of worker's compensation as the "solution" to the problem of industrial accidents early in this century may have helped convince workers to rely on employer paternalism to ensure their safety and relinquish claims to control the workplace (Weinstein, 1967).

Reference Groups

Disputes may be transformed through interaction with audiences or sponsors. A tenant's dispute with a landlord may be the cause around which a tenants' association is formed; a worker's grievance against a foreman may become the stimulus to a union organizing drive or a rank-and-file movement within an existing union. This transformation may not only make an individual dispute into a collective one: it also may lead to economic or political struggle displacing legal procedures. This is especially important in the remedy-seeking behavior of disadvantaged groups. The movement from law to politics, and the accompanying expansion of the scope of disputing, are prompted and guided by the reaction of a wide social network to individual instances of injustice. Absent the support of such a network, no such movement *is* likely to occur (Scheingold, 1974: ch. 12). Whether that support is provided depends on a number of independent variables: the subculture of the audience - which will define the experience as injurious or harmless, encourage or discourage the expression of the grievance, and prefer certain dispute processing strategies; and the social composition of the audience - whether it is made up of peers or superiors. These variables, in turn, are influenced by social structural factors - for instance, whether the network in which the individual is situated is open or closed (Bott, 1955). In an open network, where ego is related (separately) to the members but they are not related to each other, the audience is likely to respond individually, often seeking to resolve the dispute through the exercise of superordinate influence. In a closed network, where everybody is related to everybody, the likelihood of a collective response is much greater.

Representatives and Officials

Lawyers, psychotherapists, union officials, social workers, government functionaries, and other agents and public officials help people understand their grievances and what they can do about them. In rendering this service, they almost always produce a transformation: the essence of professional jobs is to define the needs of the consumer of professional services (Johnson, 1972: 45). Generally, this leads to a definition that calls for the professional to provide such services (Larson, 1977: xvii; R. Abel, 1979b: 86-88; Illich, 1977; 1980).

Of all of the agents of dispute transformation lawyers are probably the most important. This is, in part, the result of the lawyer's central role as gatekeeper to legal institutions and facilitator of a wide range of personal and economic transactions in American society (Parsons, 1962). It is obvious that lawyers play a central role in dispute decisions. Yet relatively few studies of lawyer behavior have been informed, even implicitly, by a transformation perspective (but see Blumberg, 1967; Macaulay, 1979; Cain, 1979; Rosenthal, 1974). We know more about the structure of the bar (see, e.g., Laumann and Heinz, 1977) and about particular ethical problems in the practice of law (see Carlin, 1966; Freedman, 1977) than we do about how lawyers interact with clients and what difference it makes.

Critics of professionals argue that they "create" at least some of the needs they satisfy (see, e.g., Illich, 1977). Lawyers exercise considerable power over their clients. They maintain control over the course of litigation (Rosenthal, 1974: 112-113) and discourage clients from seeking a second opinion or taking their business elsewhere (Steele and Nimmer, 1976: 956-962). There is evidence that lawyers often shape disputes to fit their own interests rather than those of their clients. Sometimes they systematically "cool out" clients with legitimate grievances. In consumer cases lawyers may be reluctant to press claims for fear of offending potential business clients (Macaulay, 1979). In defending the accused criminal, lawyers may prefer negotiating a plea bargain to trying the case (see Blumberg, 1967: 110-115; see generally Law & Society Review, 1979). In tort litigation they prefer to settle, and may offer package deals to claims adjusters (see Rosenthal, 1974: 103; Ross, 1970: 82; Schwartz and Mitchell, 1970: 1133). In other cases they may amplify grievances: some divorce lawyers recommend litigation for which a substantial fee can be charged, rather than engage in difficult, problematic, and unprofitable negotiations about reconciliation (see O'Gorman, 1963: 146).

Lawyers may affect transformations in another way—by rejecting requests for assistance or providing only minimal help and thereby arresting the further development of a dispute, at least through legal channels. Limited data suggest

that lawyers respond differently to different categories of clients. This differential lawyer response contributes to variation in dispute behavior between poor and middle class, corporate entities and individuals, normal and deviant, members of ethnic majorities and minorities, and young and old (Maddi and Merrill, 1971: 17-19; Handler et al., 1978: ch. 5; Lochner, 1975: 449-453; Curran, 1977: 149-152).

Of course, lawyers also produce transformations about which we may be more enthusiastic. They furnish information about choices and consequences unknown to clients; offer a forum for testing the reality of the client's perspective; help clients identify, explore, organize, and negotiate their problems; and give emotional and social support to clients who are unsure of themselves or their objectives. * * * Courts may transform disputes by individualizing remedies. Some of the victims of a defective product may want to force the manufacturer to alter the production process. But because courts award only money damages for unintentional torts, even those victims' concept of an acceptable outcome is transformed from a collective good (safety) into individual enrichment, a transformation greatly encouraged by the lawyer's interest in creating a fund out of which his fee can be paid.

Because of the monopoly exercised by lawyers, the esoteric nature of court processes and discourse, and the burdens of pretrial procedure, the attitude of disputants may be altered by their minimal role in the courtroom and the way they are treated there (Simon, 1978: 98, 115). In effect, their "property" interest in the dispute is expropriated by lawyers and the state (Christie, 1977). The rediscovery of the victim in the criminal prosecution is one recognition of this. Furthermore, delays caused by court overload or foot-dragging by an adversary may transform what disputants would otherwise consider a useful procedure into pointless frustration.

The nature and potential transformational effects of courts can be seen best if we contrast litigation with another technique for handling conflict - psychotherapy. Like law, therapy individualizes conflicts and remedies. In most other ways, however, it sharply contrasts with courts and lawyers. Disputants are encouraged to describe the conflict and express their feelings about it in whatever terms they find comfortable. Since mental health professionals are trained to use anger to reduce hostility, disputants will not need to deny their feelings. The nonjudgmental posture and reflective responses of the therapist should provide emotional support for disputants, who are urged to examine the pattern of their own responses to the behavior of others. They may find, for instance, that progress toward a solution may be obstructed not by the dilatory tactics or opposition of an adversary but rather by their own reluctance to act. One objective of the process is to increase the disputant's understanding of the motives, feelings,

and behavior of others. Thus, where the outcome of successful litigation is usually an order directed to an adversary, the outcome of a successful psychotherapeutic intervention may be a change in the client. In between courts and psychotherapy there are many other dispute institutions— arbitration, mediation, administrative hearings, and investigations - that use ingredients of each process in different combinations but always effect a transformation.