TWO APPROACHES TO CONTEMPORARY DISPUTE BEHAVIOR AND CONSUMER PROBLEMS

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The two articles that follow contribute to the mapping of dispute behavior in contemporary society. Hannigan (1977) describes how a newpaper action line, or ombudsman, handles consumer disputes. Best and Andreasen (1977) report the findings of their survey of consumer experiences and what consumers did about the problems they encountered. These essays represent complementary approaches to the study of how people and institutions respond to common consumer disputes. I will begin by indicating where they fit into the evolving tradition of sociolegal research and how they add to our still redimentary understanding of dispute behavior.

What is known about contemporary dispute behavior? Perhaps the prior question must be, what portion of the social terrain has been the subject of this research tradition? Social control and the resolution or avoidance of conflict include a large part of political and social life. But scholarship in this tradition has in fact been limited to what happens to grievances, disputes, or trouble cases (e.g., Llewellyn and Hoebel, 1941). It has been primarily concerned with focused, visible conflict—the grievance of one identifiable party against another concerning a concrete dispute. Such a dispute may be only a part of, or a symbol for, some other underlying conflict, because the parties may be pursuing psychological, social, religious, or political goals not involved in the explicit dispute. This research tradition, however, has tended to isolate and concentrate on what is manifest. It has thus ignored larger, more complex clashes that explicitly concern social policy, conflicts among socioeconomic, ethnic, and political groups, and other polycentric conflict (Fuller, 1963, n.d.). This distinctive delineation of the dispute as a unit of analysis is parallel to, and has undoubtedly been influenced by, the fundamental Anglo-American common law model of what sort of conflict is appropriate for adjudication—concrete cases and controversies between present parties in interest.

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The traditional legal view has been that cases are resolved by litigation or through pretrial settlements negotiated by the lawyers before or after the cases are filed in court. Although we have always known that not all disputes are processed by lawyers and judges, the image of formal adjudication as the modal response to disputes has had amazing potency, and not only in academic legal circles. This primacy of the court is closely linked to a rule-centered conception of law and legal institutions, and has been accompanied by a scholarly preoccupation with courts and litigation. But the conception of legal rights in terms of the potential for court enforcement also raises implicit issues about dispute behavior outside the courts: which of the population of adjudicable disputes will actually be litigated, and what will become of non-litigated disputes (Weber, 1954:15-16).

This emphasis on the disjunction between rules and their enforcement is not simply a reiteration of the truism that the real world does not operate according to ideal legal rules, but is rather intended to suggest that there may be systematic social, cultural, and psychological factors that mediate between the rules of law and the outcomes of actual disputes and influence patterns of disputing and litigating. These problems have been conceptualized as the "mobilization" of law—"how the law is set into motion" (Black, 1973:127). Once we ask who mobilizes law to deal with disputes, the universe of legal institutions immediately expands to include the other official legal actors (police, prosecutors, lawyers, public defenders, etc.) as well as the disputing parties themselves. The persons or organizations with grievances come to be seen as central actors in the process of mobilization. Furthermore, as litigation and other forms of legal mobilization come to be viewed as problematic, we are forced to explore alternatives to legal mobilization, one of which, naturally, is to do nothing (Felstiner, 1974; Hirschman, 1970). But in order to address the question of alternatives we must first analyze the function that those alternatives perform. "Legality" has many faces, each of which offers a perspective from which to examine functional alternatives to the legal system (Galanter, 1977). One can distinguish the regulatory aspect of law (prospective, preventing conflict) from the legal response to particular conflicts (retrospective, dealing with concrete disputes). The latter function can be further separated into dispute settlement (compensating, vindicating) and law enforcement (retributive, exacting punishment, deterring, socializing or reinforcing norms, assuring rule compliance). Emphasis upon a particular aspect of law will define the conceptual frame of reference for analyzing legal and quasi-legal phenomena. The concept of mobilization, for example, is central if one is interested in re-

sponses to particular conflicts but would be less useful in understanding the socializing or educative effect of law. Similarly, concepts derived from law enforcement and deterrence would be less useful in analyzing mediation than those derived from dispute settlement.

Differentiation of the various frames of reference is not only necessary for theoretical understanding but also has implications for policy. Let us look, for instance, at the recent interest in consumer protection—the "consumer movement"—which forms part of the intellectual background and motivation for both of the articles under discussion. A principal issue in this area has been whether reform efforts ought to focus on the functions of regulation, criminal law enforcement, or dispute settlement. The conceptual frame of reference one adopts profoundly influences the reforms that will be advocated. An emphasis on regulatory or preventive law may lead one to perceive the problem as originating in widespread business practices and to advocate rule-making and administrative supervision (e.g., National Highway Traffic Safety Commission, National Product Safety Commission, Truth-In-Lending Act and regulations). An emphasis on law enforcement may lead one to perceive the problem as deviance and to advocate prosecution of criminal and enforcement of civil laws against fraud, deceptive advertising, and unfair business practices. An emphasis on dispute settlement would lead one to perceive the problem as lack of bargaining power and lack of access to legal forums and to advocate improvements in the delivery of lawyers' services, paralegal personnel, community advocates and advisers, the creation of forums for arbitration and mediation, and the reform of small claims courts (Eovaldi and Gestrin, 1971; Jones and Boyer, 1972; National Institute of Consumer Justice, 1972; Small Claims Court Study Group, 1972; Steele, 1975; Steele and Nimmer, 1976).

One major branch of recent sociolegal literature has adopted the dispute-settlement frame of reference for the analysis of legal phenomena, and the "dispute" as the unit of analysis (Abel, 1973). This frame of reference suggests questions both about institutions and about individuals. Each of the articles that follow emphasizes one of these approaches.

I. THE INSTITUTIONAL APPROACH TO THE STUDY OF DISPUTES

This approach asks such questions as: what institutions process disputes, how do they operate, who are their clients, what are the outcomes, how do they interrelate? Studies adopting the in-

stitutional approach have generally examined one type of institution at a time, often a single organization. Comparative analysis, although implicit in the notion of alternative responses to a dispute, has only infrequently been attempted (e.g., Abel, 1973; Galanter, 1974; Sarat, 1976). Recent studies of dispute behavior at the institutional level have analyzed trial courts (e.g., Friedman and Percival, 1976; Galanter, 1975; Sarat, 1976; Wanner, 1974, 1975; Yngvesson and Hennessey, 1975), state regulatory agencies (e.g., Mayhew, 1968; Nonet, 1969; Selznick, 1969; Steele, 1975; Steele and Nimmer, 1976; Whitford and Kimball, 1974), the ombudsman (e.g., Gellhorn, 1966; Anderson, 1969), and nongovernmental institutions such as insurance companies (Ross, 1970, 1975), commercial arbitration (Bonn, 1972a, 1972b; Mentschikoff, 1952, 1961), and community and ecclesiastical courts (Doo, 1973; Kirsh, 1971; MacCallum, 1967; Yaffe, 1972). Hannigan's study of a newspaper ombudsman, or action line, falls within this tradition.

The institutional perspective has been significantly influenced by legal anthropology (see, e.g., Nader, 1965, 1969a; Abel, 1973; Felstiner, 1974). The examination of disputing in other societies vastly different from our own has been useful in suggesting what behavior should be studied and also in constructing ideal types that can help us to understand disputes in our own society. Although much of the literature posits two dichotomous ideal types, it may be more fruitful to analyze dispute institutions in terms of continous variables (Abel, 1973: 240-44). These variables tend to be extrapolations from the characteristics of official courts, often the common law court as it has been idealized in the Anglo-American tradition. Some of the principal dimensions that have been suggested are : public/private, formal/informal, adjudication/mediation, coercive/voluntary, legalistic/therapeutic, value dissensus/conflict of interest, zero-sum/compromise, decision-oriented/agreement-oriented, rule-oriented/person-oriented (Aubert, 1963; Eckhoff, 1966; Galanter, 1974; Nader, 1969b; Sarat and Grossman, 1975; Steele, 1975). Some have concentrated on formulating typologies of third-party dispute institutions and understanding interrelationships between types (Abel, 1973; Eckhoff, 1966; Sarat and Grossman, 1975; Nader, 1969b). Others have attempted to understand two-party negotiation (Eisenberg, 1976; Gulliver, 1973; Simmel, 1950) and the relationships between two-party and three-party institutions (Aubert, 1963; Galanter, 1974; Steele, 1975).

This brief reference to the models that have been developed to analyze the dispute institutions of contemporary society provides sufficient background for the discussion of newspaper action lines

as dispute institutions. The media ombudsman is a nonpublic, nonformal, noncoercive, nonadjudicatory, nonrule-oriented institution, and thus occupies a place on the continuum of institutions quite far from the official courts. On the other hand, it is clearly a *third*-party resource or remedy agent standing outside the dyadic relationships in which disputes arise and thus is distinguished from direct, nonmediated negotiation, Hannigan concludes that the principal function of the newspaper ombudsman is to assist the complainant who has been unable to obtain a response from the other party, a situation in which the issue has not yet been joined, rather than to intervene where the response is evasive or hostile. Newspaper ombudsmen can effectively facilitate communication but cannot mediate and certainly cannot adjudicate and impose solutions coercively.

Hannigan's data also tell us about the relationship between the newspaper ombudsman and other dispute institutions. Over 90 percent of those who approached the ombudsman had first voiced their complaints to the other party, and over 60 percent had engaged in two-party negotiation about the dispute. It is more surprising that almost 30 percent of the ombudsman's clients had previously contacted at least one other third-party remedy agent about the same dispute, indicating that such variables as the formality, official status, or coerciveness of a dispute institution are not related in any simple way to the sequence in which remedy agents are mobilized. It does seem clear that the invocation of third-party intervention typically follows the failure of two-party negotiation and serves, in this respect, as an "appeal" from the dyadic outcome (compare Steele, 1975:1144-46). Although the function of facilitating communication may seem to some to be unduly passive and relatively unimportant, especially in the context of what are often highly polarized consumer disputes, Hannigan reports that almost 50 percent of his respondents stated that their problems were at least partially resolved by the intervention of the ombudsman.

Many unanswered questions remain, of course, about how the media ombudsman achieves these results. Perhaps its persuasiveness rests on its implicit power to publicize and thus to sanction, or on its function as an aggregative mechanism, coordinating the many small complaints it receives into larger issues to be investigated and possibly reported in the press (Galanter, 1977; Mayhew, 1975), or on its greater "competence" in disputing (Carlin *et al.*, 1967), as Hannigan suggests.

Hannigan also relates the role of the newspaper ombudsman to the characteristics of the society in which it is found. He argues

that it serves to bridge gaps in communication peculiar to our increasingly urbanized, large-scale society in which systems of informal social control have lost much of their effectiveness. Thus Hannigan's description of the newspaper ombudsman ought also to help us test some of our theories concerning the relationship between dispute institutions and the structure of a society (e.g., Abel, 1973; Felstiner, 1974; Galanter, 1974).

II. THE INDIVIDUAL APPROACH TO THE STUDY OF DISPUTE BEHAVIOR

The other main empirical approach to the study of disputes has focused on the general population rather than on institutions. It investigates the incidence and distribution of problems in that population and the styles and strategies employed to deal with them. Such studies have included surveys of the general public (Curran, 1977; King and McEvoy, 1976; Mayhew, 1975; Mayhew and Reiss, 1969), surveys of the poor (Caplovitz, 1963, 1974; Levine and Preston, 1970), and explorations of the practices of business organizations (Macaulay, 1963, 1966; Whitford, 1968). The study by Best and Andreasen is in this research tradition of asking members of the public about their consumer problems and responses.

These studies, as well as recent surveys of criminal victimization, indicate that people experience many problems which they neither act upon nor take to third parties. It is not only the mobilization of *law* that is problematic in a dispute, but also the mobilization of *any* dispute institution and even the voicing of the complaint to the other party. Thus we begin to see that the array of dispute institutions has a pyramidal structure similar to that of the criminal justice system—a large mass of perceived problems, a small proportion of which are resolved between complainant and adversary, and a far smaller percentage of those that are not resolved which are appealed to third-party remedy agents. This pyramidal structure offers a very different picture of the prevalence, distribution, and "case flow" of consumer disputes from the view yielded by studying the intake of any particular dispute institution.

It is somewhat surprising to find, as do Best and Andreasen, that over half of the respondents who perceived problems and voiced them to the seller were satisfied with the result, as were approximately one-third of those who voiced their complaints to third-party remedy agents. Although it is impossible to evaluate the absolute distributive justice signified by these percentages, they convey an overall impression that consumers are competent

and effective in dealing with their problems, and that remedy agents are not as ineffective as others have suggested. Data such as these suggest that a large proportion of consumer grievances ought to be characterized as disagreements and misunderstandings rather than as fraudulent, dishonest, or predatory conduct, and that many can therefore be resolved with a moderate expenditure of resources. The dispute-settlement frame of reference thus appears to be a useful way to analyze the situation of the consumer and to conceptualize reform strategies.

Best and Andreasen, as well as Hannigan, also tend to confirm the hypotheses and findings of others that socioeconomic status and educational level correlate with perceiving problems, voicing those problems, and using third-party remedy agents. This seems congruent with the argument that the socially advantaged have more social and legal competence in coping with problems (see, e.g., Carlin *et al.,* 1967; Galanter, 1974) and that they constitute a disproportionately large fraction of the users of the total array of institutions, unofficial as well as official. However, where Best and Andreasen find that all users are equally benefited by third-party remedy agents, Hannigan concludes that the socially advantaged are *less* benefited than the disadvantaged by the newspaper ombudsman.

The problem of access to dispute institutions, and to legal institutions in general, is a recurrent theme in the sociolegal literature. Access has traditionally been analyzed in terms of costs and benefits, with an emphasis on the high entry and transaction costs of most dispute institutions, especially those that require representation by lawyers. But Best and Andreasen's data suggest that the concept of access is more complex.

First, it is common for an individual to be aware of a particular deficiency in a good or service but yet not to view it as a problem justifying a complaint or requiring redress. We therefore need to know why people define situations differently, and in particular why some individuals feel aggrieved by occurrences that others (or the same individuals at other times) accept as the inevitable disappointments and frictions of organized society. It might be instructive, for example, to know whether socioeconomic status, political attitude, or interest in consumer issues (on all of which Best and Andreasen have some data) are associated with the tendency to perceive an imperfection as a grievance to be redressed rather than as a drawback in a product that is, on the whole, satisfactory.

One of the difficulties in addressing this issue is the absence of data about defects in the purchased goods and services from a

source other than the consumer whose perceptions are the subject of inquiry. Despite this difficulty, Best and Andreasen did ask their respondents about (a) the nature of any problem that made a particular consumer purchase unsatisfactory, and (b) "what could have been better" about each purchase that was viewed as satisfactory (1977:739, 2.c, 2.d), and they did categorize reported problems and product imperfections according to the nature of the deficiency (1977:710, Table 4). An attempt to correlate the kinds of deficiencies perceived as grievances with background characteristics of the consumer might serve as a starting point for the analysis I have urged.

A further indication of the complexity of the concept of access is the finding that the survey respondents disproportionately saw themselves both as having fewer consumer problems than other people and as complaining less about their problems than other people. Consumers appear to be reluctant to *view* themselves as having problems or complaining about them, which may make them reluctant to perceive or assert grievances. This attitude may have many causes. Consumers may be reluctant to perceive most situations that they encounter as problems because they view their problems as relatively insignificant when compared to the dramatic cases publicized by the consumer movement and the mass media. If this does occur, the consumer movement may, ironically, be suppressing the assertion of grievances by the very strategies intended to raise consumer consciousness of problems and willingness to assert grievances (Best and Andreasen, 1977:728-29). In addition, this effect would contradict the hypothesis that most consumer problems go unredressed because consumers lack the social or legal competence to assert them effectively.

The apparent reluctance of consumers to perceive problems or assert grievances may also be linked to self-esteem. In our competitive market economy, self-esteem is derived, in part, from a feeling of competence in dealing with the marketplace. Being outbargained, conned, "ripped off," sold a lemon by a high pressure pitch, or otherwise bested in an adversary consumer transaction may lead to a lowering of self-esteem or a loss of face. Similarly, perceiving oneself as having a consumer problem, and complaining about that problem (to the other party or to a third party), may be inconsistent with the self-image of competence in consumer purchasing. To recognize the existence of a grievance may be to admit that one has "lost" in a consumer transaction. Such a psychological process would tend to inhibit both the perception of problems and complaints about them.

On the other hand, to the extent that consumers view their problems as caused by the irresponsible or dishonest conduct of

sellers, one might expect greater willingness to perceive and assert grievances. Perceiving oneself as the victim of fraud and dishonesty may mitigate the consumer's sense of inadequacy as a purchaser, and thus allow a response uninhibited by any threat to self-esteem. But scholars, prosecutors, and consumer advocates seem more prone to characterize the consumer as the innocent victim of predatory business practices than does the consumer himself when faced with a concrete problem. This reluctance of consumers to perceive problems and assert grievances despite the extensive publicity given to consumer fraud may simply be a special case of the more general observation that Americans are in fact a relatively noncontentious people despite all their talk of asserting and defending their rights (cf. Galanter, 1975). Perhaps the vehement claims of rights and the highly visible investigation and prosecution of some of the more egregious cases of consumer fraud are the means by which we sublimate our unexpressed dissatisfactions and unredressed grievances. At any rate, Best and Andreasen's data and those from other studies indicate complex relationships between social, psychological, and cultural variables, and dispute behavior, including the definition of the situation (problem perception), the action taken to change it, and the choice of strategies, resources, and institutions to be used.

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