THINKING DISPUTES: AN ESSAY ON THE ORIGINS OF THE DISPUTE INDUSTRY

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The paper identifies five presumptions of dispute theorizing: universality, ideological functionalism, settlement by courts, qualitative identity of the parties, and comparability. It is argued that these presumptions derive from or are related to the methodology of dispute theorizing, which is idealist either in the form of abstracted empiricism or logical deduction. Reasons for the sudden upsurge in dispute theorizing are discussed. Concluding, the authors evaluate attempts by dispute theorists to break away from the presumptions identified, and indicate some empirically limited but theoretically useful possibilities for futher work.

I. INTRODUCTION

Sociological concern with "disputes" has two main roots: anthropological studies of law and social control, and conflict theory. Other sources have more recently been identified (Kidder, 1981), but it is our contention that the study of disputes represents the merging of two distinct methodological traditions, and that an examination of these origins helps us to identify and explain the merits and the limitations of the sociological approach.

Certain defects, we argue here, are endemic to the approach; others are extrinsic, but commonly found. Our critique begins with an analysis of these defects. We then consider the methodology[1] employed by contemporary dispute

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[1] By methodology we mean the theory of method, *not* the technique of data collection employed.

analysts, and show how the relationship between this and the underlying presuppositions of the theory explains why liberal and radical scholars cannot quite break the conceptual fetters which encumber the notion of dispute. This brings us to the question of why dispute theorizing is a growth industry in the contemporary world, and finally to the more positive reappraisal for which the preceding conceptual analysis has cleared the way.

II. THE TWIN ORIGINS OF THE CONCEPT OF DISPUTE

According to Moore (1969: 230) the concept of dispute has been central in legal anthropology at least since 1963, when Gulliver published his seminal *Social Control in an African Society*. She cites this as the moment when scholars finally turned their attention to cases rather than institutions, building on the groundwork done by Llewellyn and Hoebel (1941), Hoebel (1954), and Gluckman (1955). More recently there has been another shift, as Nader's students (Nader and Todd, 1978) have repeatedly emphasized the importance of studying disputes in their context of origin, and not simply at one moment in the process of their development. The unit of observation is the network of observed people, not the case (Nader and Yngvesson, 1973: 886). Now, the centrality of disputes is more or less taken for granted, as Roberts (1979) and Gulliver (1979) demonstrate in their respective (and very different) attempts to draw together the strands of dispute theorizing within anthropology.

Concurrently with these developments, a concern with ways of resolving conflicts led European scholars such as Aubert (1963; 1967; 1969) and Eckhoff (1967) to elaborate distinctions between mediation and adjudication in particular, and to touch lightly upon negotiation and administrative decision making. These categories, added to but very little modified, have become part of the normal discourse of dispute theorists. Unlike the anthropological tradition, these analyses were not based on systematic fieldwork, but were derived from the tradition of speculative philosophy which in Europe has always been an equal partner with empirical work in the development of sociology. These latter analyses depended for their validity on their use values (degree of insight) and their logical coherence.

Dispute theorizing then, represents a marriage between two approaches to sociology. Over the last decade, however, the distinction between the two main strands has all but

disappeared, as each has adopted the terminology used and the questions posed by the other. One major reason for this has been an increasingly shared subject matter, as anthropologists have turned their attention to advanced industrial societies. What has made this new coherence possible, however, has been the fact that the two approaches share a number of basic assumptions. These assumptions, in our view, constitute a hidden ideology, which must be brought to light before further progress in the field can be made.

III. THE BASIC ASSUMPTIONS OF DISPUTE THEORY

Universality

Roberts sums up the assumption of universality thus: "Disputes, both within groups and between them, are found everywhere in human society" (1979: 45). Others are less explicit, but if a "dispute management process" (Nader and Todd, 1978: 3) or "alternative forms of dispute settlement" (Witty, 1980: 1) are universal, then disputes must be also.

The presumption of universality is made possible by two strategies. The first is to define disputes in terms of the presumption—that is, to find a phenomenon which appears to be universal and then to define disputes in terms of the "highest common factor." Abel (1974: 225) is quite explicit that the merit of his definition is that it "can be applied more widely across disparate societies than any of the definitions of law already discussed." A further example of the HCF approach is offered by Rokumoto (1978). But if a concept is defined by this method, then the universality of its presence cannot legitimately be treated as a finding, as news, or even as a statement about society: universality here is a methodological fiat.[2]

Alternatively, and perhaps less legitimately, universality can be demonstrated empirically by the two processes of appropriation and conflation. Appropriation of real-world events to the concept of dispute takes place when the concept is deliberately expanded so as to subsume any activities in a society which a researcher may identify. Yngvesson's otherwise fascinating account (1978) of a Scandinavian fishing community is marred by this tendency. According to her evidence, high-status (insider) islanders denied the existence of disputes among themselves. Yngvesson deals with this by

[2] Abel himself avoids this trap, but his definition is widely cited. See, e.g., Blegvad (1982) and other contributors to the LEG volume.

viewing the denial as a method of dispute treatment. Similarly, normal methods of social control such as gossip and "unstructured talk" are discussed in the absence, which she notes, of a "settlement procedure."

Conflation occurs when an author starts off by discussing disputes, more or less closely defined, and then expands the discussion to cover also a range of other notions. Eckhoff (1967: 148) states explicitly that in his work "the expressions 'conflict' and 'dispute' will be used synonymously. . . ." Eckhoff follows this with a definition. Again, other authors may not draw the reader's attention to the conflation, but may nonetheless use as alternatives to the term dispute "trouble," "conflict," "debates," and "warfare" (e.g., Roberts, 1979: 48, 49, 52, 56, 117, 134). Both appropriation and conflation render disputes indubitably universal. The theoretical value of this obliteration of distinctions is, however, doubtful. The assumption of the universality of disputes must serve some other purpose.

Ideological Functionalism

The second underlying assumption of dispute theorizing is ideological functionalism. This may seem strange, given the conventional equation of functionalism with conservatism. The equation may, of course, be wrong, and certainly the best functionalists, from Durkheim on, have been sophisticated theorists. But more to our point is that modern dispute theorists can be classified as humanitarian reformers, concerned that members of the societies they describe should experience, when they wish to, a justice which they recognize (cf. Kurcewski and Frieske, 1978). Some, such as Tomasic in his admirable critique of the neighborhood justice movement in the United States (1980), as well as Abel (1979) and Kulcsar (1982), remind us that conflict may be functional for a society as a whole.[3] Most other theorists, however, move straight to a discussion of mechanisms of dispute treatment, as if the need for getting rid of disputes were obvious (Falke, 1978; Friedman, 1978; Gollop and Marquardt, 1981; Kawashima, 1973; Kritzer, 1981; Miller and Sarat, 1981; Nader and Todd, 1978; Sarat and Grossman, 1975; Starr, 1978; Todd, 1978; Witty, 1980), although Felstiner (1974) with his discussions of "avoidance" and "lumping it" is an obvious exception here. Others

[3] Abel suggests that disputing was functional for the pre-capitalist organization of the Turkish village investigated by Starr (1978). He explicitly recognizes that the conflicts engendered by the advance of capitalism are of a different order.

unequivocally adopt the standpoint of the individual, whose distress they are concerned to alleviate (Danzig, 1973; Danzig and Lowy, 1975; Felstiner, 1975; Felstiner and Williams, 1980; Merry, 1979; Sarat, 1976).

Again there are exceptions. But it is submitted that, as Kidder (1981) has also suggested, most dispute theorists and analysts operate implicitly from the standpoint of societal or individual functionalism, however radical their intent. The explanation here lies in the coercive power of the concepts used, embedded as they are in functional anthropology and in pluralist conflict theory. However much it is argued (Abel, 1974; Felstiner, 1974; Gulliver, 1979) that disputes have outcomes rather than settlements, the notion of the need for resolution is integral to the concept, as it is integral to the concept of conflict. Society is by definition ordered; a dispute is a moment of disorder; it is therefore unthinkable as a permanent condition. Relevant questions for research and analysis then become whether the outcome is functional or dysfunctional for society as a whole or for the various individuals concerned; and how the outcome is arrived at. These are the questions posed by the two antecedent traditions, combined and answered by dispute theory.

Courts Should Settle Disputes

The third presumption is that courts should settle disputes, with the corrollary that if they do not, then alternative institutions should be established to do so. An opening sentence of the original project outline of the Civil Litigation Research Project (CLRP) stated, for example, that "dispute resolution is a principal function of our civil courts."[4] While it is plain that this presumption is closely linked with the latent functionalism of dispute theory outlined above, it also has a second source in lawyers' ideology that courts, or at least civil courts, adjudicate disputes, as opposed to creating them or dealing with other matters altogether. Again, not every theorist shares this presumption: Trubek (1980-81) has explicitly denied it on behalf of the participants in CLRP notwithstanding the aforementioned earlier statement. But it is sufficiently widespread to warrant its inclusion, as evidenced by its frequent appearance in the *Access to Justice* volumes (Bender, 1979: 437; Bierbrauer *et al.*, 1978) and in recent American literature (Danzig, 1973; Kritzer, 1981; Merry, 1979;

[4] The document referred to is a two-page summary available from the Dispute Processing Research Project, University of Wisconsin-Madison.

Sarat, 1976; Sarat and Grossman, 1975; Wanner, 1974). Few people now argue that this is the sole function or task of civil courts, but it is commonly claimed that dispute settlement is one task among many. Thus when alternatives to courts are being discussed (e.g., Danzig, 1973; Merry, 1979; Witty, 1980) it is alternative institutions for the settlement of disputes that the writers have in mind.

Qualitative Identity of the Parties

The fourth presumption of dispute theory is that of the qualitative identity of the parties. This assumption derives directly from pluralist conflict theory, according to which participants may differ in power or in strategic skill, for example, but only along a single dimension (see, e.g., Galanter, 1974). The differences in power are capable of being equalized: more money, more knowledge, more organization, even more experience, may be given to the weaker party, and then the difference would disappear. In other words, the differences between the parties according to pluralist conflict theory are *quantitative* and therefore one-dimensional; *qualitatively* the parties are identical. This again reflects legal ideology in which organizations are treated as "persons" for adjudicative purposes. Sociologists have been all too well aware of the effects of this practice, but even so have not theorized the difference between individuals and organizations (Kulcsar, 1980). Thus their recommendations entail the opposite of the legal practice: they recommend making individuals as much like organizations as possible in terms of the resources at their disposal. We are in favor of this practice as well (see Cain, 1982), but argue that if qualitative differences between the parties were adequately theorized and identified, even more effective action might be taken.

It follows from this fourth presumption that dispute theorists in contemporary societies may pay insufficient attention to political or ideological levels of analysis. The unidimensionality of the differences between the parties involves a contrast between the rich and the poor in terms of the resources deemed necessary for success. This may be linked with a theory of the wider society by means of a simple correlation between riches and poverty in monetary terms and richness and poverty in terms of court-relevant resources. Thus knowledge (ideology) and organization (politics), when reduced to quantitative dimensions which are, furthermore, independent of each other, become facets of an equally

quantitative dimension called money (economy). The complex interplay of the qualitative differences actually involved cannot be analyzed in these terms. Ironically, the most moderate of reformers whose analyses are based on dispute theory end up with a more economic-determinist interpretation than any contemporary Marxist scholar would adopt.

The presumption of the qualitative identity of the parties betrays these characteristics most obviously when advanced industrial societies are under consideration and class relationships between the parties are ignored. It is in the study of these societies that "conflict theory" has had more influence. In spite of the convergence of positions previously discussed, and in spite of their long tradition of classifying societies in economic terms only (hunters, pastoralists, etc.) as opposed to more complex mode of production terms (Hindess and Hirst, 1975), anthropologists nonetheless are aware that economic factors rarely operate in an unmediated way. This has affected and added richness to their analyses of the uses of courts, and of disputes generally. (For recent examples see the papers in the collections by Koch [1979], and Nader and Todd [1978]. See also Mather and Yngvesson [1979] and Witty [1980]).

Comparability

The fifth and final presumption underlying dispute theorizing is that of comparability. This relates to the presumed universality of disputes. For some, such as Abel (1974), the need for comparability between different cultures necessitates a minimal definition which is capable of being universalized. However, for others who use less explicit means in support of their presumption that disputes are universal phenomena, comparability is not a reason for but instead a function of universality. If disputes are everywhere in society, at all times and places—if this phenomenon is a constant, a cultural universal—then it becomes possible (and for other reasons, desirable) to compare the ways in which this phenomenon is dealt with, and to explain any differences that occur.

This emphasis on comparison has roots in each of the intellectual traditions which gave rise to dispute theory. Theoretical anthropology has used the comparative method as routinely as empirical anthropology has used various styles of observation. Within anthropology of law there have been important debates about techniques of comparison, the best known being that between Gluckman (1955; 1962) and

Bohannan (1957). Nader too (1965) has dealt extensively with the problem, and the ways in which the search for analytic universals has underpinned many now classic texts in anthropology.

Conflict theory too has been concerned from very early days with comparison, for example Jackson's attempt (1952) to apply the lessons of industrial relations to the international sphere. Comparative work in this tradition has tended to be more concerned with policy and less concerned with methodology than anthropological studies. Both approaches can be identified in contemporary studies of disputes.

Major debates have been elaborated as a result of the presumption of comparability. Most important have been discussions in the United States about the possibility of applying to another society methods of dispute settlement which have been identified as working satisfactorily in one society. Among those arguing in favor of transferability have been Cappelletti and Weisner (1978), Danzig (1973), Danzig and Lowy (1975), Koch (1979), Merry (1979), Nader and Yngvesson (1973: 916), Sarat and Grossman (1975), and Witty (1980). Those taking the opposite view, that of the particularity or nontransferability of institutions, or those arguing at least for extreme caution in drawing inferences about transferability have been Abel (1974), Felstiner (1974), and Tomasic (1980). By 1980 Felstiner had modified his view to the point at which he could argue that there might be some advantages in mediation schemes for minor criminal cases, although his research results supported his earlier skepticism (Felstiner and Williams, 1980). Finally Moore (1978), while not addressing directly the issue of transferability, nonetheless argued for the temporal specificity of institutions.

Thus while the possibility of comparison has been accepted sufficiently widely to be classified as a common presumption among dispute theorists, there has been strenuous debate about the political implications of the comparisons when drawn.

The transferability debate has been further elaborated into a discussion about the potential benignity of state intervention. In most cases the application of imported alternatives to domestic disputes has necessitated and resulted from state activity. While formal state courts may be out of touch with popular ideas of fair play, exponents of the new initiatives (e.g., Danzig, 1973) felt that a change of procedure, a deformalization of these institutions, might set matters right. Advocates of

transferability have tended, therefore, to assume that fundamentally the state is benign, and that the unpleasant facets of state activity can be ameliorated or destroyed, giving the benign facets of state activity more opportunity to appear. However, in Europe in particular this view has been strongly attacked. Both Mathiesen (1980) and de Sousa Santos (1980) have argued that deformalization may be a new, more insidious form of state control. More recently Abel (1981) has raised similar questions about the United States.

IV. METHODOLOGICAL QUESTIONS

We argue that the methodology employed by dispute theorists makes these presumptions tenable, and also in part explains the way in which they relate to each other, forming a logically consistent whole. But our main quarrel with these presumptions is also located in the methodology which gave rise to them, which we consider to be idealist on a number of grounds.

First it should be noted, as Kurcewski (1982) has argued, that dispute theorizing has much in common with legal ideology. Crucially, dispute theorizing starts with the dispute, as legal theory starts with the law. Questions are posed about disputes in society, or in their social context. Thus the primary task of the theorist is to understand the dispute.

For a sociologist or a political economist, however, the primary concern is to understand the society or the social formation under investigation. In order to do this the sociologist develops a theory of the society or the social formation. Such a theory may have to be elaborated in a number of ways to take account of existing and newly developing circumstances. The theory itself, and the material changes, will indicate areas where research and theoretical elaboration are necessary. Sub-specialisms—in law, say, or education—should thus be *elaborations of a general sociology, which facilitate the understanding of society as a whole*. If such sub-specialisms are not elaborations of a pre-existing general theory, they can add nothing to the understanding of the total social order. They will deal with areas which are conceived as separate from it. They can be related to aspects of the total social order only by such devices as correlations, which imply and require separateness in order to be valid. Law, education, etc., conceived in this way can never be *integrally* related with knowledge of the total social order.

In addition, if such sub-specialisms are not elaborations of a pre-existing general theory of the social order, achieved by a dialectic between theory and research (Cain and Finch, 1981), the understanding of the objects constituted in the discourse of those sub-specialisms themselves is also impossible. The status of the objects themselves is unknown, no matter how sophisticated subsequent theorizations and explanations of these objects may be.

A very commonplace example will make these points clear. The status of crime in, say, Durkheim's theory is absolutely clear, because in accordance with his general theory he defines crime sociologically as all those behaviors which are sanctioned. Crime as a theoretical object is located in his theory (Durkheim, 1964). Empiricist (or "positivist") criminology, as has been well known for two decades, tried to build a theory on empirical rather than theoretical definitions of crime. Like the theorists of disputes and law whom we are currently discussing, they tried to start with an empirical object, crime, and then to explain "it" in terms of society. Little was added to the understanding of society as a whole by these efforts, and the status of the object, crime, was itself ambiguous since the discourse in which crime was constituted also claimed that crime was external to itself.

Indeed, it is the major task of theoretical elaboration to construct an object for further inquiry—that is, a theoretical object (concept of) law, education, or whatever. The new object of investigation will in this way *in its inception be integrally related to a theory* or to knowledge of the society, social formation, or social order. In this way a main criterion of scholarship will be met: the status of the object of investigation will be *public*. The theory which gave rise to it will be known, as will the logic and the research from which it was constituted. The new concept (theoretical object) will thus be *open to criticism*—i.e., it will meet the scholarly criterion of publicity. Concepts and objects which do not meet this criterion we regard as ideological, since the implications of their use cannot be assessed, because their sources cannot be identified.[5]

As suggested in the example from criminology above, one such ideological approach involves defining an object of analysis separately and first, and then, perhaps, putting it

[5] This discussion of methodology is perforce condensed. Many of the arguments on which it is based can be found in Cain and Finch (1981). This source is acknowledged here for the last time, although it is relevant throughout this section.

"into" society. This involves an inevitable theoretical mismatch, for there is no reason why the way in which the object has been independently defined should make it capable of being a concept in or integrally related to any other theory. Another such approach—the best and most logically coherent recent example of which is the work of Black (1976)—involves once again defining one's object independently (in Black's case the object is law) and then elaborating a theory "of" that object. But such an elaborated theory, while sophisticated in itself, must also be separate from a general theory of the society or the social formation. Again there is the broken circuit and a leap connection to an assumed structure of society. Again and inevitably ideological or untheorized categories are used, since theorizing the society has not formed part of the enterprise. A further odd consequence of both these approaches, which differ primarily in degree of subtlety, is that the object of inquiry—law or education—becomes *equated* with society. The effects of the one on the other are considered as if they had equal theoretical and/or empirical status. Todd (1978: 17) expresses this strange inversion when he refers to "the part that social relations play in the disputing process" as his interest, rather than the part that disputes play in social relations.

Dispute has hitherto been an ideological object of this kind. No theorist to date has elaborated a theory of society in such a way as to construct a theoretical object (concept) of dispute. On the contrary, the concept of dispute has typically been constructed inductively, by the method of abstracted empiricism; more naively, disputes have on occasion been treated as self-existent, as phenomena which do not need to be constructed theoretically but which self-evidently are. Platt (1981) has recently discussed how and why this form of so-called positivism came under attack. In these cases theory has been developed about an apparently pre-given object.

In a minority of cases logical deduction has also occurred. Rather than facing the problem of finding a theory of society which encompasses the phenomena described (the inductive problem), the deductive approach faces the problem of identifying phenomena which fit the theory. These two approaches need a closer examination.

Scholars as various as Gulliver (1963; 1979) and Abel (1974) have attempted empirical definitions of disputes. This strategy involves looking at the world and attempting to carve out a researchable unit. What is achieved may also be described as

an operational definition. Further units of the kind identified by this practice may then be collected systematically and subjected to examination, or logical elaboration about the unit (the dispute) itself may occur.

But disputes defined in this way have, as noted above, no existence in sociological theory.[6] Such theorists establish the boundaries of what they believe to be a thing-in-the-world. Theory, for them, comes later, when they seek to develop classifications of the social forms associated with these things (dispute treatment models) or explanations of the frequency of occurrence of these things, or of who becomes involved in them. For this reason we cannot accept Lempert's (1981) prescription that the study of other and different conflicts could be added to the study of disputes. We sympathize with the objective, but consider that the starting point of this enterprise would be incorrect.

The inductive or abstracted empiricist approach is an idealist one. In the first place a concept or an idea (dispute) is treated as if it were a thing. The idea is treated as if it embodies and has primacy over the material for which it claims to stand. This is a disguised idealism which denies the role of thought in knowledge and by so doing appropriates the material to thought. Again this is a recurrent problem, but one which major social theorists have always sought to avoid (see Cain, 1980).

Inductive idealism of this kind makes possible the presumption of universality. That this is related to the way in which the object of investigation is defined has already been demonstrated. According to the presumption of universality disputes are, or can be, present in all times and places. Dispute is, therefore, a conception that lacks historical specificity. Whereas, say, the bourgeoisie, commodities, or even law according to some scholars (Pashukanis, 1980) can exist only in capitalist society, disputes exist (or can be conceived) in all societies. Disputes, it is thus claimed, are trans-historical. Either as concept or as thing, they exist outside time; their existence is independent of concrete material events. This is the second sense in which the approach is idealist.

[6] There is evidence from two British studies associated with the LEG project that "disputes" are not part of the everyday consciousness of people either. Concepts with broader connotations such as "trouble with" are used for interpersonal matters. Difficulties with retailers and other matters about which no action is taken are not seen as disputes. It seems that in everyday consciousness the term dispute is restricted to its legalistic usage, or else to labor relations. The term could not, therefore, have any standing in emic theorizing either.

Empiricism leads to this second form of idealism precisely because the theory of disputes is not integrally a part of a theory of society. A theory of society such as we espouse would necessitate an historical periodization. Pre-capitalist societies of various kinds would have to be distinguished, as would socialist and capitalist societies. So too would pockets within each of these forms of organization: commodity producers in socialist societies; peasants or residual feudal forms in capitalist societies. Concepts appropriate to the forms of organization and practices within each mode of production would need to be elaborated. It would be a matter for careful comment and explanation if objects so constructed were then identified in societies of different types. Certainly if one starts one's analysis from forms of fundamental social relationships there would be no *prima facie* grounds for assuming that one would encounter the same phenomenon in societies with different forms of such fundamental relationships. One would make no assumption. One would elaborate the concepts in the setting in which they proved necessary, and use them elsewhere if and when they proved appropriate.

It is our hunch, not yet fully developed, that the concept of dispute could be theoretically elaborated in certain noncapitalist societies where ideological relationships predominate (Poulantzas, 1972; Hindess and Hirst, 1975). Here interpersonal relationships, relationships between kin or neighbors or even strangers, would have a power in determining both status and access to the means of life that they do not have in capitalist society where the economy can be conceived as the level of structure in dominance. Recent studies (Kurcewski, 1982; Naumova, 1982) suggest that in socialist societies, where the political level of structure can be argued to be dominant, a concept of interpersonal dispute might once again be relevant and open to theorization. But in capitalist society the evidence is that interpersonal disputes are not dealt with in the courts, with the large exception of marital matters (assaults and divorces) (e.g., Cain, 1982; Friedman and Percival, 1976; Galanter, 1974; Lempert, 1978; McIntosh, 1981; Sarat, 1976; Wanner, 1974). And where possible marital assaults, although they should almost certainly be conceived of as disputes, are shunted off to other agencies, either old ones such as the police (Danzig and Lowy, 1975), or new ones such as neighborhood centers (Felstiner and Williams, 1980; Merry, 1979; Tomasic, 1980).

In capitalist societies disputes outside of marriage lack salience. Conflicts of interest which *are* salient are conflicts across class lines: between manufacturer, retailer, and consumer; between landlord organization (housing trust, local authority) and tenant. We contend that to insist that all these matters are disputes, and in some sense the same kind of thing as interpersonal quarrels, is analytically confusing if not dangerous.[7] Distinctions between, say, individuals and organizations are not adequate to the analytical task because terms like "organization" tend not to be located in a theory of society, and thus the specificity of the relationship in conflict is lost. Using the single term "dispute" to encompass all these matters is likely to lead to a false theorization of courts, and to misdirected attempts at reform. At this stage, however, we simply plead for a conceptualization which starts from a theory of society, and which distinguishes between matters in theoretically relevant terms. So much for the assumption of universality. It will already be plain that the other basic assumptions can be related to the same empiricist mode of constructing the object of study and the same consequent lack of theorization.

Functionalism is latent. And certainly the more sophisticated functionalisms would have arrived at quite opposite conclusions to those discussed here. Perhaps it is the difference between the Durkheimian question of "how is order possible" and the reformist question of "how can order be created." Be that as it may, the failure to construct a theoretical object for investigation makes dispute theorists inadequate theoretical functionalists, while it also leaves them vulnerable to the view of ideological functionalism, i.e., the view that moments of disorder must be stopped. A strict functionalist acknowledgement of the normality and therefore presumed functionality of disputes would at least be consistent and legitimate in scholarly terms. But the question "how can we help people/society eliminate disputes?" is not conceptually related to any body of functionalist or other social theory.

We thus argue, and this is in partial opposition to Kidder (1981), that functionalism is not a necessary consequence of the methodology on which dispute theorizing is based. However, the methodology leaves its practitioners vulnerable to ideological assumptions, and one of these, possibly derived

[7] Kidder (1981) has made a similar point. But while we by and large accept his conclusions, we consider it necessary that the origin of the error be fully understood if it is to be eliminated.

from legal ideology, is that disputes are in some sense dysfunctional. Thus functionalist assumptions are not integral to the approach, but are commonly associated with it for extrinsic reasons.

The third presumption, that one or even the only task of courts is to settle disputes, again depends on an atheoretical conception of dispute, coupled with an even more gross failure to conceptualize the court adequately. Just as the failure to construct a theoretical definition of dispute leaves dispute theorists vulnerable to subtle political pressures from "ideological functionalism," so the same failure here again leaves them vulnerable to a very oversimplified legal ideology.

The qualitative identity of the parties, the fourth presumption, has been touched upon in the extended discussions of conceptualization and universalism. It also depends on the affinity between legal ideology and dispute theory mentioned above. If dispute is not integrally related to a theory of society, then no consistent or theoretically valid way of distinguishing between the parties is available for use. We indicated that in our view inter-class conflicts are not most usefully conceived of as disputes, and that to do so obscures what may be special and important about those interpersonal events which possibly can be construed as disputes, as well as the actual task of the courts. But class differences are qualitative: a rich peasant is not a capitalist, and a poor peasant is not a proletarian. A poor shopkeeper is not a proletarian. These distinctions are clear, and there are also distinctions within (perhaps) the white-collar employee category which are going to be increasingly important to the future (service worker, white-collar producer of surplus value, agent of capital, etc.; cf. Poulantzas, 1975; Carchedi, 1977). Such qualitative differences matter, and force fundamental reconsideration of the object of study and of the questions posed. They cannot be reduced to one (rich-poor) or several (well organized-poorly organized; experienced-inexperienced; powerful-weak) quantitative dimensions. But without a theory of society how can relevant qualitative distinctions be made? A theory which starts from an ideological/empirical conception of dispute cannot possibly generate such categories. An eclectic set of categories can be correlated with, say, different success rates: but as noted before, a correlation cannot yield a theoretical link; and if the logical/theoretical sources of the categories used cannot be made public, then by definition those categories are ideological.

Even more conceptual work needs to be done in relation to those interpersonal disputes which we have suggested may uniquely continue to have salience in capitalist society. The ways in which gender differences cut across or are related to class categories are still being theorized: it can be argued that housepeople occupy a unique class position. Were that so, many marital matters would not qualify as disputes either. The problem is complex, and work on it barely begun: we simply record that it is a theory of society which ultimately will need to be elaborated to provide the necessary categories here, as it alone can provide distinctions more relevant than the blanket term "dispute."

The fifth presumption identified was that of comparability. It was argued that debates about transferability (Friedman, 1978) and about the potentially benign character of the state in relation to "dispute treatment" stemmed from this presumption. From the standpoint adopted here, comparisons within modes of production, say between different societies, or between different transitional or different capitalist societies, have a different character from comparisons between modes of production themselves. Theoretical distinctions of this kind also have a marked effect on the "transferability" question. One can pick up ideas from any source, but one cannot transport institutions and practices between modes of production without, most probably, transforming the practice, or possibly bringing about a change in the political or ideological structure of the recipient society.

But detailed research is required in each specific case to elaborate historically (materially) apposite concepts with which to make sense of what is going on and also, of course, in order to make grounded and valuable political contributions. Mode of production is a concept at a very high level of abstraction, and each concrete social formation will vary in its historically specific structure. It is thus useful to learn of "pockets" of people in capitalist society (for example) among whom disputes routinely occur. This enables us to develop a more sophisticated theory of the articulations of capitalist society, and also to again approach noncapitalist societies with the more refined concept of dispute which may result. This is the dialectic of comparative research.

Before ending this section, the deductive approach to conceptualization must be mentioned. Although well represented in contemporary sociological work (Gessner, 1982; Kurcewski, 1982), it has not been found so frequently in

dispute theorizing as the various neo-empiricist starting points described. Deductive approaches do locate the concept of dispute within a consistent web of related concepts—a theory. However, deductive approaches are also vulnerable to the charge of idealism. Deductive theorists approach the world with a preformed set of categories and concepts, the task being to identify in the world concrete approximations to these concepts. Thus while the concepts themselves exist outside time, and can be challenged only in the realm of thought (their logical interconnections challenged, and so on) their manifestations may be historically specific. Real-world events become examples or manifestations of thought. However, the lack of a manifestation in the concrete does not challenge the concept. It can remain as a "blank category," or it can lead to a search in the real world for a pattern or event that can be made to fit the category. This happened in the heyday of Parsonsian systems theory (Parsons, 1951). Theory is not modified in a continuous relationship with research. Rather the idea has primacy, and the dialectic between thought and unthought is not allowed to exist.

We are not, therefore, arguing for an approach to the world with a preformed theory of society, elaborated to conceptualize disputes, which is to be formed by logical work in advance of research. We are arguing for an approach with some preformed interlocking theoretical categories which can be elaborated and refined in light of the data constituted by our research. We would not expect such an approach to yield neat typologies, for the world is untidy. We would, however, know how to use theoretically any "data" relating to our object of inquiry which our work might generate. We would hope too that the research enterprise would enable us to refine the concept of that which we were investigating.

V. WHY DISPUTE THEORIZING IS A GROWTH INDUSTRY

That dispute theorizing is indeed a growth industry can no longer be in doubt. The European project in which we participated (see acknowledgements) has formed part of this growth. The multi-faceted Civil Litigation Research Project (CLRP) and the Disputes Processing Research Program (DPRP), based in Madison, Wisconsin,[8] are further evidence of this development. According to Koch (1979), the studies

[8] Reported in *Law and Society Review* (15: 3-4 [1980-81; special issue on dispute processing and civil litigation]).

collected together in his volume of the *Access to Justice* series all formed part of a "comparative research project on law and conflict management" financed by Harvard University. In the United States, the Law Enforcement Assistance Administration (LEAA) has financed practical experiments in mediation and other nonadjudicative techniques, mainly as an alternative to the largely discredited practice of "diversion" in criminal proceedings, but also dealing with some potential civil actions. The LEAA and the Department of Justice have also (and wisely) financed a number of evaluation research studies, notably in Brooklyn and in Dorchester, Massachusetts (Tomasic, 1980). The bandwagon, then, has already been rolling for several years. And in spite of the lack of a theory of disputes rooted in sociological theory, sociologists, including ourselves, have played a large part in these developments.

There appear to be four illegitimate reasons for the burgeoning of a sociological interest in disputes. This does not preclude the possibility of legitimate grounds for such studies also existing. But it is important to understand with whom one is forming ideological alliances and what their motives may be so as not to be trapped at some future stage in the interpretations which others may wish to impose upon one's work, and thus into the directions which others may argue "follow" from one's results. It is an essential part of scientific or scholarly work to be clearheaded about how one's results may be used, and to make reasoned choices in the light of these analyses. Thus we now pose the question why, in spite of these very obvious methodological and presumptive weaknesses, has dispute theorizing caught on?

Mathiesen (1980) and de Sousa Santos (1980) have both argued that what the western world is witnessing under late capitalism is a transition to the absorbent state which deals with opposition by the twin processes of co-optation and defining as extremist. Co-optation, or absorption, is achieved in part by restructuring (diversifying, decentralizing, and fragmenting) various control mechanisms, so that a new unity between political and civil society, dominated in its totality by the state, is established. One of the processes which both authors point to is the delegalization, or, as de Sousa Santos also calls it, the informalization of adjudication. Abel (1981) has pointed to similar dangers involved in the practice of informal justice.

If the separate analyses of these scholars are correct, then these processes themselves require legitimation, although in

the long run their effect is to enhance the legitimacy of the state as a whole. It is our contention that studies of disputes and in particular romantic suggestions that both dispute and informal processes in a class-stratified capitalist society are or can be "the same" as informal processes in precapitalist societies which are stratified ideologically (in terms of age or conceptions of kindred, for example) provide just such a legitimation. Dispute theorists could thus find themselves lending support to an appearance of popular justice which disguises either direct class justice or a new form of state-controlled adjudication which is not accountable via the usual democratic representative and parliamentary processes.

Second, we have argued that the notion of dispute derives from and embodies fundamental tenets of legal ideology. This explains the presence among the founding assumptions of ideological functionalism, of the idea that the task of courts is dispute resolution, and of the notion of the qualitative identity of the parties. These are compatible with, but not necessary to, the idealist empiricist methodology which most dispute theorists have employed, a methodology giving centrality to an ideological notion of dispute rather than to a theory of society.

It is fundamental to legal ideology that law (a) resolves disputes, (b) deals with legally equal parties, and (c) benefits society by doing so. Law in this view is not just a form of social control (Ross, 1901), but a necessary and inevitable one in "advanced" societies. The notion of the benign state is also often empirically present, although not logically and intrinsically related to the foregoing.

In this paradoxical way, dispute theorizing supports legal ideology at the same time that it provides both grounds and models for delegalization.

Third, dispute theorizing provides the best support for delegalization processes, because the concept of disputes depoliticizes conflicts, and in so doing implies that a particular remedy for each case is all that is required. This political neutralization is effected by the embedded presumption of the qualitative identity of the parties, which holds even in United States' style class actions[9] and has not been challenged theoretically even by those critics who recognize the "individualizing" tendency of the concept of dispute. The concept of dispute, even the concept of expanded dispute

[9] The use of courts for more political purposes has been attempted with varying success, but this is exceptional. See Bankowski and Mungham (1976), and Hughes (1973).

(Mather and Yngvesson, 1979; Moore, 1978) tends to render issues discrete, and to focus on precipitating and temporary rather than structural and long-term issues. To conceive of a slave woman, say, as in dispute with her owner would be to ignore the class difference between them, and the structure of her life space. It would be to operate at the surface level, perhaps of some tiff connected with the affairs of the household or of an accusation of domestic pilfering. Conflicts between peasants and wholesalers, workers and management, consumers and manufacturers similarly straddle a qualitative class divide. The concept of dispute diverts academic attention from examination of the more fundamental structural features of our society. And one cannot get around this by saying "OK, so you study class structure and I'll study disputes," because to focus on disputes as the (ideological) object of study precludes the emergence of a theoretically rooted taxonomy of conflicts, including interpersonal conflicts. Such a theory and taxonomy must start in the theory and analysis of social orders.

Finally and briefly, for the categories are not fully discrete, dispute theorizing supports that view of individuals as having equal, indeed the same, potential status as bearers of commodities which Pashukanis (1980) has argued is the defining characteristic of law (individual bearer of rights). Whether or not this theory of law is accepted, there is little doubt that Crusoism emerged with capitalism, and that the idea of individuals as separate and nonsocial is, in cultural anthropological terms, very odd, not to say unique to western industrial societies. It is so contradictory of human cooperative experience and fulfillment that it needs constant ideological buttressing. Dispute theorizing, because it tends to individualize even collective conflicts by treating all collectivities as simple units of 1+power provides a minor buttress for the idea of the individual as separable and nonsocial, and for the associated underlying conception of human nature as nonhistoric and therefore ideal.

VI. THE DISPUTE AFTER DISPUTE THEORIZING

We turn now to two related questions: first, how have dispute theorists themselves sought to counter some of these attacks and then, to the questions which really matter about the positive contributions which we hope our analysis has made possible. There has already been a widespread recognition that on occasion disputes have consequences which

are not satisfactory to either party, and the notion of dispute *outcome* has therefore been substituted for that of settlement.

Again, there has also been a growing emphasis, influenced by phenomenology, on the *choices* which individual disputants make, although the choices of organizational disputants have not been examined. One of the earliest examples of a study which explicitly makes such choices the object of its analysis is Collier's brilliant *Law and Social Change in Zinacantan* (1973). In industrial societies the question "why do people go to lawyers" has very much concerned both administrators and the legal profession, but it is also at least concordant with this academic tendency to emphasize individuals' choices between apparently available alternatives. And with the emphasis on choice there enters also the possibility of unwise choices, of mistakes. Again, the idea that disputes necessarily have a happy ending or are functional is breached.

Third, Gulliver (1963) early emphasized the idea that disputes within a particular community or locality are interrelated. Thus, although the concept of dispute is derived virtually unchanged from a legal ideology and practice which treats units of conflict as discrete, social science practitioners dealing with concrete research situations have found these trailing clouds of ideology a limitation.

Fourth, there is in recent social scientific work a recognition that disputes have histories. This is related to the emphasis on choice, but also deserves separate attention. Most recently Moore (1978), Mather and Yngvesson (1979), and Felstiner, Abel, and Sarat (1981) have pointed out that a dispute is not an event but a process; that it may be expanded or contracted; and that the choices, agencies, and influences governing these processes warrant careful examination. Mather and Yngvesson explicitly relate this dispute transformation process to a form of conflict theory.

While Mather and Yngvesson argue that an elaboration of dispute theory should take account of the mediations and interventions of a number of structures (to be theorized and identified by a separate body of theory), other contributors—most notably, Abel (1979; 1981) and Lempert (1981)—also feel that dispute theory can and should be inserted into a wider theory of society. Both have traveled some intellectual distance from their earlier positions (Abel, 1974; Lempert, 1978) in coming to this conclusion. We suspect that, as in our own case, the very attempt to work with the concept is what has forced the reappraisal. The distinction (which they do not

recognize) between their position and that of those concerned with dispute transformation theory is that Abel and Lempert are moving closer to the position which we have advocated here. They are taking social order as their concern and dispute processing as one issue, the examination of which can throw light on the larger question. The dispute transformationists still take the dispute as the focus of their concern and ask how the social order can illuminate that process. The transformationists need at least two theories: one to give them concepts of the structures constituting the social order, and generating "power relations," for example; another to give them concepts of the process of disputing. Abel and Lempert are moving, albeit implicitly, to a view in which one theory of social order may be elaborated to include disputes. Is this, then, possible or necessary?

These new emphases indicate that changes in dispute theorizing are needed, but the presumptions identified here are not seriously challenged by them. None of them in any way conflicts with the presumptions of universality and comparability. Order maintenance remains the outcome, although it is now clear that the order achieved is often to the advantage of those already in entrenched positions of relative privilege and that disputants themselves may not be happy with that order which is achieved or imposed. The presumption of the qualitative identity of the parties comes close to being challenged by the transformationists, and those interested in comparison have become more skeptical about the essential (potentially reliable) benignity of the state and cognizant of the fact that some state forms may be essentially inimical to the interests of certain disputants.

However, the methodological underpinnings of dispute theory cannot be escaped so easily. For if universality and comparability are accepted, then parties to disputes so conceived must be viewed as qualitatively identical, differing along the single dimension of power, a uniform attribute (*pace* Weber) of which they may have more or less. If this were not so, disputes would be different "things" in different societies, and universality and comparability would have to be jettisoned. The unidimensionality of the "variables" constituting power is a market conception: as money makes possible commodities, so power makes possible political exchanges and disputes; and as the money-commodity concepts disguise use values and concrete labor power, so the power-dispute concepts disguise qualitative differences between the parties in civil cases. Even

Kidder (1981), who in many ways has come closest to our position, conceives power in this unidimensional way, so that it is not clear from his argument precisely why dispute theorists cannot handle it

What is positive about the more explicit recognition of power structures by recent contributors to dispute theory is that economic determinism (the rich will win) and tautology (power is proved by a successful outcome) have increasingly been exposed, so that the actual qualitative bases of power in the formation under analysis can be examined more closely. The alternative to the presumption of qualitative identity is to examine structural differences between the parties. But this would lead to the conclusion that disputes are not the same thing in societies with fundamentally different structures, so that the presumption of qualitative identity would be called into question.

Dispute theorizing is thus rescuing itself from its own presuppositions, largely because the techniques of research employed by many of its adherents have included observation and in-depth interviewing. When this is done it readily becomes apparent that, for example, the invocation of an abstraction called power as an explanation will not wash. It leads, however, to the same cycle of problems as dispute theorizing itself—indeed, as all inductive theorizing does: i.e., is the power of a feudal chief the same as the power of a lawyer, or an international company, or a highly respected village woman. . . ?

So while the techniques reveal the need for theoretical elaboration, the methodology itself, caught on the idealist horns of the induction vs. deduction dilemma, and incapable of transcending it, cannot yield a way out. For both approaches, as we have seen, *start* with a concept of dispute, and a concern about these "disputes," rather than with a concept of the social formation, and a concern about social structures and social orders. The attempt to work from the dispute to the social formation is doomed to failure, for the concept of dispute itself is not and cannot be, if so formulated, an *integral* part of a social theory, a theory which should have itself created the space for such a concept. Thus to substitute the study of disputes for the study of law, as Roberts (1979) for example encourages us to do, simply replaces one problem with another identical one.

VII. WHITHER DISPUTE THEORIZING?

We have asked whether, in light of these criticisms, the task of elaborating a theory of social order to include a concept of dispute is possible or necessary. We believe that it is both. Abel[10] has pointed out that to attack every contribution which uses the word dispute is falling into the same trap as some of those whom we castigate, that is, of treating disputes as events rather than constructs. This we accept. However, we argue that dispute should be more than a construct; it should be a concept. By this we mean that the formulation should be elaborated from a theory of historically specific and concrete social orders.

In moving from a sensitizing word (dispute/conflict) the researcher whose aim is to elaborate a theory of the social formation will be seeking to make theoretically and materially grounded distinctions. In this process the sensitizing term itself may become a restriction on progress, and this is what has happened with the term dispute. Research discussed here suggests that interfamily and perhaps "interpersonal" disputes of the kind identified by anthropologists persist, for example, in western capitalist societies in divorce, custody, and family property matters. Here the presumptions of the concept may fit the real world, and its use may be legitimate and helpful. But here, as in pre-capitalist societies, "the individual" is constituted by a social status, whereas the political and social discourse of western capitalist societies in other respects constitutes the individual as a subject existing independently of all social relationships. Here we say no more than that a theory of disputes, and a concept of dispute, should be consistent with and account for this apparent difference between a subject of a dispute and a subject at law.

Research suggests too that whether court files or victim surveys provide the data, people in western capitalist societies most frequently find themselves in conflict across class lines. It is not helpful to conceive of such matters as special kinds of disputes, but here the presumptions which are built into the concept do not correspond to the emergent knowledge of the social formation (Cain and Finch, 1981). Here *new* concepts must be elaborated which are consistent with, and derived from, the theory which enabled one to identify and classify the qualitative (class) differences in the first place.

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[10] Private correspondence, December, 1981.

This is not to say with Trubek (1980-81) that we have research questions and that the concept of dispute helps us to address them. Rather it is to say that research questions and problems may be posed by a theory, or for a theory, by changes in the material world. Thus we are arguing not that the concept of dispute be jettisoned, but that it be refined and given a historically and materially specified place in theory. In this way it will be stripped of both its ideological content and its ideological function. Meanwhile we have the additional and perhaps more important task of generating a battery of better concepts to help us come to grips with the rest of what goes on in the various social formations in which we work.

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