FROM THE EDITOR

In a recent issue of this journal (Vol. 11, No. 4, Spring 1977) Steele, Hannigan, and Best and Andreasen sought to illuminate the relationship between two-party negotiation and third-party intervention as responses to consumer disputes. Several of the articles in this issue continue that analysis. Ross and Littlefield confirm the fact that consumers overwhelmingly prefer to handle their differences with sellers by direct negotiation. Furthermore, both the process and its outcome seem to afford them considerable satisfaction. Indirect evidence that similar factors affect the criminal process can be found in Casper's report of the judgments criminal defendants make of the fairness of their treatment: surprisingly, perhaps, those who engage in plea bargaining evaluate their treatment more positively than those who go to trial. Attorneys appear to concur: we have long known that they prefer to settle civil cases without litigation, and to negotiate a plea of guilty to a criminal charge; Patricia Crowe describes their conciliatory stance in administrative hearings of complaints about discrimination. And Jack Katz's study of the careers of legal services lawyers suggests that part of their discontent stems from their inability to structure relationships with clients and adversaries so that they can negotiate satisfactory resolutions to conflict.

Not all disputes are equally amenable to negotiation, however. The very characteristics that make negotiation an attractive process in controversies dominated by a utilitarian calculus (where both parties seek to optimize some instrumental good, usually money) make it inappropriate where matters of principle are at stake. Thus plea bargaining may be impossible when the crime is particularly heinous, politically salient, or widely publicized, or where the accused insists on maintaining his innocence. And though most civil litigants are motivated primarily by material concerns (see Mayhew, 1975:413; but see Upham, 1976) those who complain about discrimination usually seek vindication of ultimate values. As a result, discrimination cases may invert the well-documented sociological observation that disputants seeking an amicable settlement view lawyers and legal institutions as rigid obstructionists, to be avoided wherever possible (see, e.g., Macaulay, 1963, 1977). Victims of discrimination, determined that the offender admit his guilt, apologize, and affirm the principle of equal treatment, view lawyers and enforcement agencies as un-

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This editorial represents my views alone, and not those of any author in this issue.

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principled pragmatists, far too eager to concede in the interests of peace.

These and other studies of two- and three-party dispute institutions also support another common generalization: that those processes tend to converge, to approach each other along a continuum rather than occupy the polar extremes of the "market" or "politics," on the one hand, and "law" on the other. Two-party negotiation is always to some degree principled: Ross and Littlefield demonstrate that consumer disputes are settled by certain sellers on terms that are more generous, if anything, than the law of warranties requires; bargained pleas, by definition, are strongly influenced by substantive and procedural criminal law. Less well recognized, perhaps because it poses a greater threat to the prevailing legal ideology, is the fact that third-party intervention (whether denominated mediation, arbitration, or adjudication) necessarily consists in large part of negotiation between the adversaries facilitated, but not controlled, by the intervener. The victims of discrimination described by Crowe are disappointed by the delays they experience within the antidiscrimination agency, the incompetence of its attorneys when faced with the superior skill and resources of defense counsel, and the inability of the agency to protect them from retaliation. Their disappointment is all the more acute because they were encouraged by the agency to believe that it had the power to judge and punish instances of discrimination. Yet if the complainants were unduly credulous in accepting such a claim—every lawyer knows that adjudication is merely the continuation of negotiation by other means—surely lawyers must take responsibility for hypocritically fostering a belief in the omnipotence of legal institutions.

The picture I have constructed thus far is of disputants who prefer to negotiate directly with their adversaries rather than seek the intervention of an intermediary, and are generally satisfied with the results of that negotiation. Even the rare complainant, such as the victim of discrimination, who seeks principled vindication, finds that the legal institution prefers compromise and, in any case, lacks sufficient power to enforce a nonnegotiable demand. If this portrayal of the preferences of the "consumers" of law is at all accurate, it is surprising to turn to efforts at legal reform and discover that they are largely devoted to improving access to third-party dispute institutions. Why improve access to institutions that relatively few want to use? Can access be improved significantly when Crowe reports that the victims of discrimination—a category of grievants unusually predisposed to seek an authoritative adjudication—are dissuaded in large part by

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the psychological cost of publicly admitting that they have been discriminated against? Is it not troubling that greater access is demanded by the middle and upper middle class whose use of legal institutions, already disproportionately high, would presumably be increased by such reforms? Perhaps, as I shall argue more fully below, reform of third-party dispute institutions can better be understood as symbolic legitimation of the legal system.

If we are seriously interested in improving the capacity of individuals to redress their grievances, it makes more sense to concentrate upon two-party negotiation. The nature of the negotiation process as well as its outcome are obviously determined by the relative power of the disputants: only if the parties are roughly equal can negotiation satisfy both. Ross and Littlefield show several ways in which such a balance can be achieved in consumer disputes: an individual consumer may be viewed by the seller as a valued customer because the consumer is likely to make similar purchases in the future or to influence the purchases of other consumers; a high volume retailer may have considerable bargaining power with respect to even a fairly large manufacturer. Crowe reveals how essential it is that the victims of discrimination have the resources of a group to support them in their struggle. And we know from other studies that lawyers can often help to aggregate the claims of weak individual clients so as to increase the power of the latter, as when public defenders refuse to negotiate pleas and insist on the constitutional right to trial in every case, or when public interest lawyers file class actions. Marc Galanter has developed the concepts of one-shot and repeat-player disputant to clarify the structural advantages of these parties, and has offered suggestions for transforming the former into the latter (1974, 1975).

But often these structural inequities cannot be altered, at least in the short run. Neither the poor consumer nor his network of acquaintances represents the potential for repeat purchases that the retailer may see in the middle class consumer. Most victims of discrimination do not have organizations to support them. And lawyers may not aggregate the power of their clients but rather appear as adversaries to those very clients. Crowe reports the all-too-common perception of clients that their lawyers are closer to the third party, and even to opposing counsel, than they are to the clients themselves. There are several reasons for this. A problem that must seem momentous to the individual client (or he would not seek legal representation) is often small potatoes to the lawyer; in this sense, the relationship of poor client to lawyer is that of one-shot disputant to repeat-player. Indeed, a professional has

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been defined as someone who treats other people's crises as routine. As Katz argues, the reference group of the lawyer whose relationship to his client is transitory is not that client but the bar and bench. For where the client is poor, and his individual problems therefore insignificant to anyone but himself, too close an identification by the lawyer with that client will diminish the lawyer's status. This inability of lawyers for the poor to achieve higher professional standing (except by disassociating themselves from the population they wish to serve), and their incapacity to function as repeat players, vis-à-vis adversaries,[1] are both caused by the segregation of those lawyers in institutions that represent only poor people—legal services and public defenders. As long as these structural barriers remain, it will not be possible to achieve the relative equality of bargaining power that is indispensable to satisfactory negotiation.

Because the structural changes necessary to equalize the strength of adversaries are difficult and costly to implement there is a tendency to resort to solutions that seem both more attainable and less expensive. A frequent alternative is to seek to educate potential claimants about their rights and remedies. Sometimes education can be extremely powerful: the increase in the number of sex discrimination complaints before the Massachusetts Commission Against Discrimination is clearly related to the growth and dissemination of feminist ideology; conversely, the loss of momentum by the civil rights movement seems to be responsible for the decline in complaints about racial discrimination. But ideology is only likely to affect matters of principle, a very small minority of legal disputes. There is no evidence that more information will substantially increase the number, or success, of claimants who pursue material objectives, because information costs are not the primary barrier to the use of legal institutions. And there *is* evidence that changing another variable—personnel—whether in dispute institutions or institutions of representation, is not an effective way to change process or outcome. Erlanger shows that though the passivity of legal aid may partly be accounted for by the marginality of its staff, the activism of legal services cannot be explained by differences between its law-

1. It is a violation of the rules of professional conduct for lawyers who represent one-shot clients to aggregate them for purposes of negotiation—for instance, to accept a lower settlement from an insurance company on behalf of one personal injury client in exchange for a higher settlement from that company on behalf of a different client, or plead a client guilty to a serious charge in exchange for an agreement by the prosecutor to accept a plea to a lenient charge against another client (see A.B.A. *Code of Professional Responsibility* DR 5-105, 5-106). Nevertheless, it is a commonplace that the structural advantage of negotiating as a repeat-player induces many lawyers to violate these rules (see Carlin, 1962:72-74; Rosenthal, 1974:103; Blumberg, 1967).

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yers and the bar as a whole. Katz completes the argument: the structure of legal services explains not only its successes but also its limitations, and neither can be altered by changing personnel.

Perhaps the most interesting lessons to be drawn from these studies concern the nature of public expectations about different legal institutions, the significance of satisfaction for reform proposals, and interaction between expectations, reforms, and legitimacy.

Our system of civil law helps to legitimate the polity from which it derives by proclaiming that citizens have rights to both material entitlements and ultimate values, such as equality. Those who enjoy such benefits—disproportionately middle and upper class individuals and organized entities[2]—tend to give the legal system some of the credit, that is, they accord it some legitimacy. At the same time, they invoke the legitimacy of law in order to justify their own privileged position, arguing that such privilege is simply their just deserts under a legal system that provides equal justice for all.

This relationship between privilege and legitimacy has two consequences. First, when privileged persons or entities use formal legal institutions to obtain material entitlements and pursue ultimate values they inevitably experience disappointment. Some of this disappointment is due to the fact that institutional structure and process are never adequate to realize the promised rights in full, an inadequacy that tends to be accentuated by bureaucratic inertia, routine, and insufficient funding. And some is due to the fact that even the most powerful of legal institutions must still take account of the power of the parties before it. In other words, the disillusion of privileged litigants derives from their perception of the "gap" between the law on the books and the law in action. But that gap is perceived, indeed it exists, only because privileged litigants, in order to legitimate both the law and their privileged position, construct an image of the law as an ideal elevated above the strife of the market and the political arena. Second, privileged litigants respond to the gap not by denying the legitimacy of the legal system but by seeking to repair that legitimacy by eliminating the gap, which they view as an aberration. Thus they advocate reforms of structure and process so that legal institutions can implement substantive rights more effectively. I want to make two observations about this response. First, the gap cannot be elimi-

2. Although it may appear paradoxical to write of the overprivileged enjoying the benefits of "equality," Austin Sarat (1977:444) has argued that the central meaning of equality for Americans is just that—no one is above you. Expectations of equality are not violated because the mass of the people are below you.

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nated. If legal institutions are rendered more effective and efficient, greater demands will be made on them, impairing both efficiency and efficacy and re-creating the gap. Therefore the cycle of disappointment and reform is unending. Second, since this crisis of legitimacy derives from the disillusionment of the relatively privileged, the reforms that it stimulates tend to increase that privilege.

If the civil law makes a significant contribution to the legitimacy of the state and the social structure in the eyes of the privileged, it does not appear to play a comparable role for the poor. Crowe suggests that the poor do not buy the myth of equal justice in the first place, for they do not idealize law as insulated from the influence of wealth and power. Consequently, they have low expectations about what they could get from the legal system were they to use it proactively. When they do use it, therefore, they are often pleasantly surprised. (It would be interesting to test this observation more thoroughly by comparing litigant satisfaction across class in those instances where use of the formal legal system is relatively nondiscretionary, e.g., divorce, some serious personal injury claims, etc.). But affirmative use of the civil legal system by the poor is so rare that the occasional pleasant surprise does not greatly enhance the legitimacy of the system in their eyes, nor that of the polity and society.

Indeed, this very imbalance in the use of legal institutions by the over- and underprivileged constitutes another threat to legitimacy. From the viewpoint of the former, it jeopardizes their attempt to justify privilege as the inevitable outcome of neutral procedures. From the viewpoint of the latter, it confirms their suspicion that the legal system reproduces relationships of inequality that they experience everywhere in society. These threats, like those discussed above, stimulate an effort to recreate the myth of equal justice by improving "access" to legal institutions. But once more the reform is cyclic and unending, since it is not possible to create an oasis of equality within an environment of inequality. And again, since the reforms are introduced at the initiative of the privileged (even though they purport to speak to the dissatisfaction of the underprivileged), and because they do nothing to alter inequality in the extralegal environment, they actually tend to increase differential use of legal institutions by increasing "access."

We see a mirror image of this relationship between expectations, reforms, and legitimacy when we turn to the criminal law. It is the poor, not the privileged, who are disproportionately subjected to its processes. They cannot benefit from their encounter with

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the criminal law—even an accused who ultimately is acquitted has been harmed. As a result, the problem of justifying criminal law is greater than that of justifying civil law. Casper suggests that the concept of fairness most salient to criminal defendants, and thus most significant for the legitimacy they accord the system, is equality of treatment. But the criminal process in an unequal society is no more able to satisfy the desire for equality than is the civil law. For one thing, it must be patently obvious to the accused that, qua accused, they are disproportionately underprivileged, whether or not differences in privilege among them produce inequities in subsequent treatment by the legal system. Consequently, the criminal law is forced to ground its claim to legitimacy upon adherence to procedural due process. Casper indicates that this is recognized by criminal defendants as another meaning of fairness, but not its most important meaning. Furthermore fair procedures, by themselves, appear to be insufficient to sustain the burden of justification: the full-fledged criminal trial, which most closely approximates the ideal of due process, elicits less satisfaction from the defendants who experience it than does the process of plea bargaining. Nevertheless, the most frequent response, when the legitimacy of the criminal law is threatened because defendants perceive its outcomes as harsh and unequal, is to emphasize the fairness of its procedures.

But focusing attention on procedure inevitably highlights deviations from the ideal of due process—the "gap" between procedural law on the books and procedural law in action. This gap, like the others, generates pressure to eliminate it in order to restore the legitimacy of the system. Yet these efforts, too, are ultimately self-defeating, if also self-reinforcing. Enhancing the procedural rights of the accused inevitably stimulates a public outcry against the "coddling" of criminals that leads to either dilution of those rights, or an increase in the severity of criminal penalties, or both. These procedural rights are in any case "paper" rights; society never allocates sufficient resources to insure that they are fully and equally enjoyed. Consequently, the privileged are better able to take advantage of procedural safeguards (as shown by the higher conviction rates for blue than for white collar crime), which thereby aggravates inequality of outcome. Thus the reform of the criminal law through reaffirmation of the ideal of due process tends to legitimate it in the eyes of the privileged, who rarely endure the onus of prosecution, but still disappoints the underprivileged, to whom the experience continues to appear unfair and who, in any case, are more interested in outcomes that are less harsh and more equal. This disparity is not surprising since the

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reform of criminal procedure, like the reform of civil legal institutions, although announced in the name of the underprivileged, is in fact directed by the privileged.

Recently, the limits of procedural reform have begun to be acknowledged. One increasingly popular alternative is to constrict the scope of criminal law by decriminalizing certain behavior, an example of which is the proposal to decriminalize heroin, discussed by Bayer. Such a reform appears superficially to answer the desire of criminal accused for leniency and equality. But as Bayer persuasively argues, to create equality *within* the legal system by withholding its sanctions from all heroin users while disregarding the characteristics of the environing society that produced the antecedent inequalities in heroin use, is simply to intensify those inequalities. It is no more possible to create meaningful equality in a fundamentally unequal society by withdrawing law from social interaction than it is possible to do so by promulgating substantive rights, elaborating procedural rules, or expanding legal institutions.

The relationships between the expectations people hold about the legal system, the reforms they advocate in order to realize those expectations, and the consequences for legitimacy of the inevitable discord between expectation and reform, are complex and we lack both theories adequate to understand them and data that could test those theories. But the articles in this issue lead me to speculate as follows. The underprivileged appear to hold very limited expectations about the legal system. They use it so rarely as plaintiffs that they would be unlikely to possess definite opinions about the capacity of that system to enforce their substantive rights. Nor is it realistic to imagine that their use of the system could significantly be increased, given the "social organization" of law, legal institutions, and institutions of representation under liberal capitalism (see Mayhew and Reiss, 1969; Mayhew, 1975; Curran, 1978). The underprivileged encounter the civil law far more commonly as defendants, but we know virtually nothing about that experience. However, if it is anything like the experience of criminal defendants, a very large number must characterize their treatment as unfair. We know equally little about how the underprivileged would seek to reform the law, though we do know that their views are not likely to be solicited, and even less likely to be heeded. Does this disparity between expectation and experience, between criticism and reform, delegitimate the legal system in the eyes of the underprivileged? If so, does that reduce their willingness to obey the law? And does it also delegitimate the state and other social institutions in their eyes? We do not know.

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But even were all the answers to be affirmative, it is not clear to me that we would have been asking the right questions. There is virtually no evidence that conformity with the rules of law, or with those of any other social institution, are the product of respect for that institution and not a consequence of fear, desire for some reward (material or otherwise), or habituation. It may be that the concept of the legitimacy of law has no experiential referent in the lives of the underprivileged. If, nevertheless, it is discussed so often—if the need to create, preserve, or avoid destroying legitimacy is repeatedly advanced to justify existing or proposed legal institutions—there is reason to suspect that the legitimacy of the law is a projection, a mask behind which other interests are hiding, that it has greater meaning for the overprivileged who invoke it than for the underprivileged in whose name it is invoked. It is therefore essential to look at the expectations with which the privileged segment of society approaches law, the reforms it proposes, and the consequences of the relationship between expectation and reform for legitimacy in the eyes of the privileged.

The privileged appear to hold high expectations about the extent of substantive rights, the fairness of legal procedures, the capacity and resources of legal institutions, and the equality of access to those institutions. Why are their expectations so high? Partly because they reflect the experience of the privileged in using those institutions (and escaping their abuses). But even more because the privileged, by using those institutions to preserve the distribution of privilege, are obliged to justify them. By insisting on the "legitimacy" of legal institutions they seek to conceal *from themselves* the source of their privilege. But since such self-deception can hardly be acknowledged, they attribute the importance of the legitimacy of the law to the need to encourage conformity in others. This suggests that the ideological superstructure of legitimacy is significant not because it enhances respect for, and thus obedience to, the law (as liberal theory argues), nor because it conceals from the masses the nature of their exploitation and thereby inhibits revolution (as marxist theory argues), but because it permits the elite to perpetuate their *own* mystification—the delusion that the legal system can achieve the ideals by which it is legitimated.

Since it is the elite who hold the power to reform the legal system, the nature of the myth by which they legitimate that system has important practical consequences. I do not wish to minimize the value of the reforms that have been, and will be, implemented in pursuit of legitimation. Substantive rights have been expanded, procedures rendered fairer, access improved, en-

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forcement powers increased, and legal institutions protected from political pressure, all in the name of liberal ideals. Furthermore, the impetus for these reforms is inexhaustible, since the gap can never be closed, law can never be divorced from wealth and power. At the same time, each rediscovery of the gap between ideal and reality (usually accompanied with *faux naïf* exclamations of novelty) does not, and cannot, delegitimate the legal system in the eyes of the privileged for they have too great a stake in preserving their belief in its legitimacy. Rather, such discoveries lead to renewed proposals for reforms that will close the gap. This, to me, is the troubling aspect of the relationship between expectations, reform, and legitimacy: that the need by the privileged to continue to believe in the legitimacy of the legal system limits their notion of appropriate reform to incremental changes in that system which, though beneficial, are ultimately self-defeating. It is here that theory and empirical research should focus.

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