ON THE RELATIONSHIP OF STATE THEORY TO SOCIOLEGAL RESEARCH:

THE EXAMPLE OF MINOR DISPUTES PROCESSING

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This symposium, on the relationship between law and society research and state theory, brings together an unlikely group of scholars. It feels unfamiliar and yet provocative; I am uncertain what role an ethnographer such as myself can play among students of state theory other than that of the naive skeptic. I am intimidated by something so awesome sounding as "state theory" because I am not quite sure what is meant by the state in sophisticated theory. If, however, the collection of persons is eclectic, the sequence of contributions suggests a pattern of analysis. We began with an explication of the range and varieties of state theory in sociolegal studies, then moved to a discussion of several antipathies in analyses of the history of American national politics over the last century which center about alternative conceptions and assessments of the role of the state. This was followed by an example of law in what is sometimes viewed as stateless societies, but which is an instance of the imposition of a particular state over a native African people.

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In this movement from the general to the particular, from the abstract to the concrete, from the exploration of the American state to uncertainty about the moral and political status of an African state, I recognize the place and relevance of my research. Unlike some of my colleagues in this symposium, I have not studied the big picture such as the societal level of social organizations, nor the higher worlds of social life where state theory is more commonly deployed. My ethnographies provide micro analyses. I study not only little places but the lower social stratum. Rather than doing research on the Supreme Court, no less an appeals court or even a general jurisdiction court, my fieldwork has been in the lower courts. Instead of studying torts, class action litigation, or the federal regulation of markets, my work on consumer protection focused on individual consumer consumers. And in my most recent work on alternative dispute resolution and mediation, I have also avoided too great attention to environmental disputes, corporate negotiation, mini-trials, or regulatory negotiation, that is, the upper worlds of disputing: instead, I have spent my time on neighborhood quarrels, wife abuse, and assault and batteries in the local pub. Thus, I must try to locate the possible usefulness of state theory for studies of social interaction in these less prominent or prestigious corners of American legal culture.

If my research has been relatively silent on the role of the state, this omission derives from a general resistance to a concept which has been used too often in ways which have made it seem overly abstract, and without experiential authenticity or concreteness. Moreover, what has seemed to be a relatively unhelpful concept has nonetheless also played too large a role in sociolegal studies, misdirecting research from what might be more fruitful and helpful lines of inquiry. In legal scholarship, the state has been associated with instrumental and positive conceptions of law. We have spent much of our effort studying the implementation of state regulations as a way of understanding the role and consequence of legal authority. By focusing upon the violations of law and efforts to redirect and rechannel behavior, however, we have described the law in terms of the instances in which the law's resources are most nakedly exposed and least likely to be effective. By its concentration on state law, sociolegal research has too often demonstrated the impotence an ineffectiveness of law.

Because we have traditionally defined the law in terms of state intervention, we rarely look to instances of law abidingness, where the law is unproblematic, and possibly quite efficient. We seem to take for granted the norms and behaviors associated with legality and which, despite much of the evidence of sociolegal research, obviously play a role in our daily lives. As sociolegal scholars, we have rarely studied that routine law abidingness, the normalcy of legality which helps constitute social relations. By overemphasizing the instrumental importance of the state, we have systematically underestimated the law's constituent—organizational and ideological—consequences.

If, however, we were willing to eschew the traditional instrumental conception of both state and law, we might begin to look at law in different ways, to notice the ways in which law helps create consciousness, and to observe the ways in which law helps sustain state power. When something is understood as legal matter, we usually acknowledge an obligation or the possibility of constraint, whether or not we actually go along. More often than not, most people do go along. And more often than not, most people understand events and relationships, obligations, and prohibitions in ways described by law. Thus, much of our daily life is organized and understood in ways consistent with legal norms as much as it is consistent with moral percepts, or economic demands. This constitutive and ideological power of law is seen in the ability of law to inscribe what is arbitrary or conditional, what is the product of possibly unique and not merely particular forces of power, with the aura of the natural, the moral, as well as the objective and disinterested. When we begin to see that law shapes our conceptions of what is normal as well as what is right, we can begin to see the relationship between law in micro-social interactions and the state. It is through the law's complicity in the production of social consciousness, or what in state theory might be referred to as ideological hegemony, that we can see the state in interpersonal social transactions and relationships. The law, as well as friendship, affect, and reciprocity, provide the norms upon which it is possible to encourage compliance, induce consent, and compel obedience.

Most recently, I have been studying a variety of institutionalized alternatives to law as specific forms of social control. It has been an effort to compare the ways in which legalized and what claims to be non-legal forms of dispute resolution shape the behavior and consciousness of ordinary folks. In particular, the research sought to understand the ways in which what were conceived of as voluntary and consensual forms of dispute handling might nonetheless function as effective means of authoritative social control.[1]

In this research, we observed disputes which arose in several neighborhoods in a small northeastern city and were brought to both the local court and a mediation program situated in that court. After three years of observations of 118 mediation cases, and daily attendance in court for six months, as well as interviews with participants in both processes, we were struck by the ways in which, despite some notable differences,[2] lower court processing of minor interpersonal disputes and the mediation alternative were in important ways quite similar.

In both settings, we found a blending of formal and informal decision-making. Sometimes we observed a strict adherence to set procedures irrespective of the parties or the case, while at other times we saw a self-conscious responsiveness to the particularities of individual circumstances. We could not describe lower court processes as the imposition of decisions by authoritative third parties nor mediation as a two party negotiation aided by

a non-authoritative third party. In court, most cases were disposed of through collaborative decisionmaking by a wide array of participants including social workers, police personnel, prosecutors, probation officers and attorneys as well as defendants, victims and judges. In mediation, although third party interveners lacked legal authority to impose solutions, they nevertheless generally relied upon manipulation or claims of authority, two distinct forms of power, to forge agreements between disputing parties.

In both arenas, third parties developed techniques to manage and contain the interpersonal troubles which came to them as cases. We realized that the similarity of the processes derived from the ways in which the troubles were perceived and constructed as demands for notice, intervention, or resolution; the similarities lay in the processes of interpreting social interactions and managing demands for help.

Three observations seemed particularly striking. First, both mediation and court handle cases through negotiation. However, the orchestration of the negotiation, that is, the timing and sequencing of interactions, the variety and roles of third party interveners, and the explicitness of the rules of participation varied in each setting. For example, mediation is a relatively continuous communicative transaction, lasting approximately two to four hours. Communication during court processing is quite different in tempo and form. The parties present their stories and information is gathered at several meetings, each of short duration, conducted over a period of weeks or months. Nonetheless, although the communicative format differed in mediation and court, neither relied on professional, legal, or technical talk, nor left the world of ordinary conversation.

Second, in both mediation and court, disputes are viewed as socially situated events with characters, locations, and histories, although a narrow definition is used to reach a settlement. Narratives developed by the disputing parties include a wide range of information which opens up the possibilities of response by third parties. Nonetheless, the responses and narratives are circumscribed through a process of typification which is similar in mediation and court. Although the range of categories and particular typifications varied in each setting at the outset of the research, there were indications of increasing similarity in both settings as mediation became an established alternative within the court.

Third, the outcomes of the two processes typically involve postponing a resolution of the conflict, severing the relationship and continuing some form of institutional monitoring by the court or the mediation program. In mediation, the problem is monitored by continuing contact with the several parties, while in court, the person who is named as the defendant receives continued supervision. Neither process regularly provides either punishment or reconciliation. Despite variation in the pattern of negotiation interactions,

we found little variation in the behavioral or situational outcomes of similar interpersonal cases in mediation and court.

The modes of dealing with these problems—the accounts constructed, the typifications employed, and frames of meaning governing discourse—were similar. Both processes focus upon character, future trouble, and learning to handle dispute and difference. Perhaps the accounts which are constructed and authenticated in mediation and court are similar because the available vocabulary of motives, that is in Mills' phrase the categories in which to understand and talk about the problems, are relatively limited and constant. The actors inhabit relatively consistent social space. Although sociologists and anthropologists can discern minute nuances of difference among the subcultures of this community, the various actors and groups acknowledge and participate within an encompassing and dominant culture. Indeed, the principal job of the third party dispute processors seems to be to determine whether the disputing parties are actually members of this implicitly recognized social world.

We argue that it is the nature of the problems themselves, their tendency to expand beyond institutional boundaries, and their embeddedness in ongoing social relations which preclude easy resolution. These are problems which are often not resolved by any intervention available to the court or the mediation program and are likely to recur and reappear in dispute processing fora. The problems are perceived as demands for response and thus opportunities for intervention by both the mediation program and the court. The responsiveness of both the court and the mediation program to the parties disputes—perceived as pleas or demands—encourages the similarities in the two processes.

Although mediation is claimed to be informal, open-ended, without clear boundaries and categories, it tries to define and respond to conflicts and human troubles in reasonable and yet predictable and routinized ways. Similarly, lower court processes are surprisingly informal and open, challenging stereotypical images of rote processing adjudication. Lower courts offer a variety of therapeutic and supportitive services for defendants and victims, providing outcomes not unlike mediated agreements. Both processes provide settings for making sense of and monitoring various forms of local social conflict.

At this point it is possible to begin to construct the connection between the micro and macro levels of analysis. We began by asking what kinds of continuities in social control could be perceived in mediation and lower court handling of interpersonal disputes. We looked at the format of the communicative interactions and the outcomes of the processes in terms of behavioral and material effects as well as the substance and meanings constructed through talk. Observation revealed parallels in the two settings as interpretive arenas and an overall similarity in the shape and discourse of case processing. Although the institutionalized availability of mediation as a supposed alternative to law and courts suggests that something different is

being offered, our research suggests otherwise. Mediation is not simply one of many possible discursive arenas; like the lower court, it seems to provide a forum, and thus an opportunity, for developing and exerting normative and behavioral control over and within a variety of social relationships.

We could discern significant differences only in the format of the negotiations, in the sequence of talk by which these cases were handled. In one setting, mediation, communication is more continuous, consisting of a more private and uninterrupted sequence in which there is relatively more direct communication between the parties and in which they are part of the authenticating audience. There is more of a chance to tell a story whole, more opportunity to sense that one is being heard. In the court process, communication is more segmented and discontinuous, less direct and less private. It often occurs in snatches.

Nonetheless, these different in the format, rather than the substance, of talk may provide an important opening when viewed from the perspective of the state, especially the state's ability to secure political legitimacy and normative hegemony. Although the structure of neither process is particularly malleable to disputants' efforts to shape negotiations to their own style, disputants' experience the two processes quite differently. Disputants in mediation believe that they are engaging in a volutary process in which they need not agree to the outcomes; the deployment of professional and institutional authority, as well as the subtle forms of manipulation employed by mediators to forge agreements are less obvious to disputants than the official, although unused, capacity of courts to impose decisions. In addition, parties to mediation report a higher rate of satisfaction with the process than do litigants in court. Getting a chance to tell your story whole in mediation might explain the consistently high rate of user satisfaction reported in the literature despite the fact of similarly consistent reports of low rates of voluntary usage of mediation services, and despite the similar behavioral outcomes in mediation and lower court. Perhaps, the reports of user satisfaction in mediation can be read, from the perspective of state theory, less as satisfaction than as an indicator of the successful cooptation of the parties to their own control. Perhaps this research is a demonstration of what Richard Abel predicted at the outset of this most recent wave of informalism in American law; perhaps the satisfaction of parties in mediation is a way by which disputants participate in, and welcome, the expansion of the state.

This analysis of mediation as social control, and as an example of the expansion of the state, is supported by a marvelous book by Stanley Cohen titled *Visions of Social Control* (1985; cf. Ewick 1988). Cohen's work focuses upon changes in the patterns and rhetoric of social control. He describes relatively opaque and difficult to pin down situations which are "not quite what [they] appear to be" (1985, p. 14). Although contemporary 'delegalization' and 'deinstitutionalization' reformers claim to shift control away from the state,

away from experts, away from institutions, and away from the mind, Cohen focuses upon "the gap between the rhetoric of the destructuring movement and the reality of emerging deviancy control system" (1985, p. 36). He concludes that

> instead of destructuring . . . the original structures have become stronger; far, from any decrease, the reach and intensity of state control have been increased; centralization and bureaucracy remain; professions and experts are proliferating dramatically and society is more dependent on them; informalism has not made the legal system less formal or more just; treatment has changed its form but certainly has not died (p. 37)

Cohen argues that just as many, in fact more persons, are being incarcerated. New community programs have generated new clients. There is an increase in the total number of persons being handled in the system of control, many of whom would not have been subject to this kind of observation and management when the system was ostensibly more formal, more centralized, and more legalistic. It appears, according to Cohen, that new, informal, community based agencies are supplementing rather than replacing the more traditional set of control mechanisms. Thus the system of social control is getting bigger. Cohen's description is one of a shallower, yet significantly expanded system of social control. The serious offenders are still in prison, while more minor, less serious offenses, disputes, troubles—especially the kind which we observed in the mediation program—are coming into the orbit of helping agencies and professionals.[3] The range of diversionary, pre-delinquency, work study, drug and alcohol, and family counseling programs have brought into the formal system of control, populations of women and youths who may have heretofore been excluded.

Our study comparing mediation and lower court processing illustrates Cohen's analysis by describing the ways in which local, decentralized, and sometimes informal types of intervention are nonetheless authoritative and controlling. Moreover, we have observed the ways in which these local forms of authority and control are connected through systems of knowledge and interpretation. In this recognition of the power and continuities in processes of interpretation and response, we may be observing the behavioral mechanisms through which the state exercises social control.

Finally, it is probably important to make the connection to the state rather than simply observe the operation of unsituated or unstructered "power" without that association. By connecting the processes of authority and interpretation in mediation and court to theories of the state, one is able to challenge individualistic and voluntaristic conceptions in which power is simply an array of incoherent multidirectional forces. Indeed, too much microsociological and anthropological analyses rest content with the observation that society is "no unitary thing" and is a world of competing

realities. This opportunity to consider more self-consciously the connection between my research and state theory has helped me to understand what it is I worry about in many pieces of interpretive scholarship. I worry that the attention to cultural and legal pluralism and to processes of interpretation, meaning making, and polyvocality challenge abstract and reifying theories of the state but may nonetheless too often dissociate those systems of meaning from the organization of social and political power and systemic domination. By avoiding the error of associating law exclusively with the power and violence of the state, sociolegal scholars do not want to commit the error of constructing benign visions of law, and dispute resolution, as a veritable marketplace of normative and interpretive arenas. Foucault has instructed us well about the immanence of power in all social relations; but that universality should not suggest incoherence, nor should it suggest the lack of structural consequences. State theory may be able to provide a locus for discerning some of the structure, indeed it may be a very important coordinate in the forces of social power which we do not wish to overlook.

NOTES

1. This research was conducted in collaboration with Sally Merry with funding from the Law and Behavioral Sciences Program of the National Science Foundation. SES 80-12034, and the National Institutes of Justice. It has culminated in several publications (Merry and Silbey 1984; Silbey and Merry 1986; see also Silbey and Sarat 1989). The following description of the research comes from an unpublished manuscript, "The Problems Shape the Process: Interpreting Disputes in Mediation and Court," presented at the 1987 annual meeting of the Law and Society Association, Washington, D.C.

2. There are obviously clear differences between court and mediation. For example, there is variation in institutional capacity and authority in terms of the third party's ability to unilaterally impose decisions. And although most cases are disposed of through bargaining and negotiation in both mediation and court, the variation in third party authority is relevant to the ways interpersonal disputes are handled. Any description of these processes, including descriptions of the presentation of narratives and development of accounts within these settings, must acknowledge the decisionmaking power of the third party. Therefore, the ability of judges to unilaterally accept or reject accounts stands as the limiting parameter for this analysis of the routinized practices in mediation and court. With that caveat stated, however, we suggest that interpersonal dispute management in court and mediation bear important similarities when analyzed as interpretive arenas.

3. The expansion of state control is not to be confused with an expansion of social control generally. There may be a shift from informal social control to formal, state associated control, while the total may remain theoretically constant. In other words, the shift to state control does not necessarily suggest that there is any greater freedom within systems of informal social control. The distinction is, however, one of location, forms of authority, and distribution of access to the exercise of social control.

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