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THE POLITICS OF INFORMAL JUSTICE

VOLUME 1

The American Experience

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The administration of justice in the advanced capitalist countries enters the 1980s with a growing concern for the development of alternatives to the traditional, official court system and formal judicial procedures. Such concern is being translated into reforms and reform proposals that have variously been called informal justice, community justice, delegalization, informalization, conflict resolution, and dispute processing (Felstiner, 1975; Nader and Singer, 1976; Sarat, 1976; Blankenburg and Reifner, 1978; Felstiner and Williams, 1978; Reifner, 1978; Abel, 1979; Galanter, 1979; Merry, 1979; Nader, 1979; Harrington, 1980; Singer, 1980; Felstiner et al., 1981; Garth, 1982; Hofrichter, 1982).

In the following I will offer a theoretical analysis of these trends. I will start by presenting in brief outline a theoretical model of legal domination in the

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capitalist state in order to provide the background for analysis. At the end of this chapter I will try to measure the impact of current reforms and reform proposals on the nature of state power and legal domination.

THE LAW OF THE CAPITALIST STATE

In historical terms the capitalist state and its legality owe much to the precapitalist state forms, if only because the establishment of capitalist social relations often took place under the rule of noncapitalist states and noncapitalist legality. But this does not preclude the possibility of establishing structural relations and homologies between the capitalist state (the "political" realm) and the capitalist nonstate (the "social" and "economic" realms), which together constitute bourgeois society. Furthermore, these structural relations—which on the "surface of bourgeois society" (the realm of "Freedom, Equality, Property and Bentham") (Marx, 1976: 280) appear as disparities and contradictions—find their theoretical coherence in a logical derivation of the state form from capitalist social relations. Thus the capitalist state form and capitalist social relations are united in specific structural relations that develop and change in concrete historical situations and processes.

As an entity peculiar to bourgeois society the capitalist state is the political form of capitalist social relations. Its basic characteristic is its externality to these relations that, on the surface, are defined as "economic." However, the externality of the political is the condition of its immanence within capitalist social relations. This occurs by reason of a double contradiction in the process of capital accumulation and capital valorization; the real presence of noncapitalist elements in the reproduction of capitalist relations (aspects of social reproduction within bourgeois society that are not subjected to the law of value) and the fictive absence on the surface of bourgeois society of the logic of capital (exploitation as extraction of surplus value through the use of labor power appropriated in the market by means of a contract between free proprietors).

This double contradiction develops historically in the context of two struggles, both inherent in the capitalist mode of production: those between capital and labor and those among individual capitals. These contradictions and struggles reproduce themselves inside the state. The major function of the capitalist state is

precisely to "disperse" such contradictions and struggles into an apparently chaotic sequence of administrative failures and successes, honored and violated political compromises, and acts of facilitation and repression (whether enforced or merely announced). It performs this function through a conglomeration of its apparatus and quasi-apparatuses, measures and nonmeasures, and positive and negative selections.

The dispersal of contradictions is a complex phenomenon that operates through a set of mechanisms involving integration, trivialization, neutralization, and exclusion, according to the historical conditions and specific forms of class struggle. Since state action is subordinated to the logic of capital (though this subordination is never homogeneous, stable, or without tension), the contradictions can never be resolved but are at most kept latent, and even such latency is neither general nor permanent. On the contrary, at each moment the state has to concentrate itself in those areas of social life where the intensification of class struggles has become disruptive and where, accordingly, a more intense activation of dispersal mechanisms has become an urgent political task. This sectoral concentration implies that other areas of social life will consequently experience a more diffuse state "intervention." Depending on the specific historical conditions, this fact may in itself contribute to the intensification of class struggle in the latter areas with the result that, sooner or later, the state will be forced to concentrate its dispersal mechanisms there. The capitalist state is thus compelled to engage in constant shifts without ever achieving global pacification. This process, though chaotic on the surface of social life, develops according to an internal logic that I call the negative dialectics of the state (Santos, 1973: 74).

The form of the capitalist state as external is the logical condition for its performance of the function of dispersing contradictions. But just because the form manifests itself only through the functions and structures it preconditions, it should not be misperceived as a static entity; for these very structures and functions are performed and developed in history. The capitalist state is thus a flexible form that allows for structural and historical specification and, as such, is an object of struggle. At the structural level, the historicity of the state form means that the capitalist state is not monolithic but rather is a fragmented and asymmetrical structure (or set of structures). This fragmentation and asymmetry is reproduced throughout the state apparatus and in its internal relations.

The structural analysis of law and the legal "system" must start from the fact that the capitalist legal form is external to both capitalist social relations (the "economic" realm) and the state (the "political" realm). In each case externality is the condition of immanence and therefore not inconsistent with the state monopoly of the production of legality. This monopoly is both fragmented and asymmetrical, as is the legality it produces. These characteristics are revealed in

1 Liberal theorists have always criticized the idea that the state has, or should have, a monopoly
the articulations among the basic structural components of capitalist legality: rhetoric, bureaucracy, and violence. Each is a form of communication and a strategy of decision making. Rhetoric is based on persuasion and the production of voluntary compliance through mobilization of the argumentative potential of socially accepted verbal and nonverbal sequences and artifacts. Bureaucracy is based on authoritative imposition through the production and mobilization of the demonstrative potential of professional knowledge, general formal rules, and hierarchically organized procedures. Violence is based on the use or threat of physical force.

Taken separately, none of these elements is specific to capitalist state legality since all of them existed in one form or another in the precapitalist state. What is new is the complex structural articulation among them. Each element has its own structure and discourse. Every structure and discourse has its own internal logic and organizational principle. But they are interrelated in multiple ways. Indeed, what we call “law” and “legal system” in capitalist societies is a terminal concept that both expresses and hides the complex articulations among the partial structures and their discourses. These articulations are both fragmented and asymmetrical as well as complex and dynamic, and these characteristics account for what is frequently referred to, without adequate specification, as the ambiguity of the law in capitalist societies. I will distinguish three major types of structural articulation: quantitative covariation, geopolitical combination, and qualitative interpenetration.

Quantitative Covariation

Based on the rich tradition of legal anthropological and legal historical research and on a systematic comparison between the totality of informal and unofficial juridical and judicial processes inside a squatter settlement in Rio de Janeiro on one side, and the official legal system of the Brazilian capitalist state on the other (Santos, 1974; 1977), I postulate the following relationships: (a) The higher the level of bureaucratic institutionalization of juridical production, the smaller the rhetorical space of the legal structure and discourse (and vice versa); and (b) the more powerful the instruments of violence in the service of juridical production, the smaller the rhetorical space of the legal structure and discourse (and vice versa) (Santos, 1980: 59). If we look at the development of capitalist legality in the light of this correlation it seems clear that legal development has involved a gradual retraction of the rhetorical element of the law and a gradual expansion of its bureaucratic and violent elements (Santos, 1980).

Geopolitical Combination

The fragmentation and asymmetry of the state structure and the constraints under which the dispersal of contradictions is performed account for the fact that political domination is not equally distributed across the universe of social relations. In some areas (which I call the core) the state concentrates its investment in dispersal mechanisms, preferring neutralization and exclusion; there state and nonstate are sharply distinct. In others (the periphery) the state diffuses its investment in political domination, preferring to use the mechanisms of trivialization and integration; there state and nonstate may hardly be distinguishable at times.

The use of methodological tools developed by positivist (structural functionalist) social science in a Marxist analysis represents an attempt to create a new working relationship between the two analytic traditions. Without abandoning the logic of Marxist theory scholars seek to open new analytic fields that are more rigorously mapped out by employing the methodological contributions of positivist social science. The objective is to jolt Marx' thinking out of stagnation that resulted from naive theoretical purism and anachronistic conceptions of political strategy (see Keat and Urry, 1975; Wright, 1978: 9).

Though the relations between bureaucracy and violence in capitalist legality are still to be determined in detail, it is important to recognize that they have developed in the same direction. This accounts for the illusion that the capitalist state is less violent than previous state formations (an illusion that is one of the foundations of liberal political theory).

This expression is meant as a suggestive metaphor justified by the (also metaphorical) underdevelopment of theory on this topic.

The distinction between core and periphery is not meant to imply that the former is more important for global political domination. The underdevelopment of the state at the core probably cannot be understood without its underdevelopment at the periphery. Nevertheless, the distinction remains essential to an understanding of the bond between the capitalist state and the working classes and the relationship between repression and legitimation in its synchronic and historical variation. This is not inconsistent with the fact that, from a strategic point of view, the core defines the periphery and not vice versa. Since the state invests most of its institutional resources in the core, it finds there a kind of reserve repressive armory to be activated in particular crisis situations.

Here, again, the historicity of the state form is revealed. Though that form is always anchored in the contradictory logic of capitalist social relations, it undergoes constant historical transformation and can experience considerable internal differentiation. Thus, in some areas it may appear as a kind of superstate, whereas in others it resembles a watered-down state.
9. Law and Community

qualitatively “contaminated” by the dominant structures of bureaucracy and violence (Santos, 1980: 101). 9

I believe that the history of the capitalist state legal system in the last 200 years has been characterized by the displacement and domination of rhetoric by bureaucracy and violence in each of the three types of structural articulation I have identified. 10

Law, Informality, and Community

Using this theoretical model I will now try to analyze the current legal and judicial reforms that fall under the heading of informalization and community justice. These reforms, though diverse, tend to focus on dispute processing and conflict resolution and to share the following characteristics:

1. Emphasis on mutually agreed outcomes rather than on strict normative correctness
2. Preference for decision through mediation or conciliation rather than adjudication
3. Recognition of the competence of the parties to protect their own interests and to conduct their own defense in a setting that is depersonalized and a process that is conducted in ordinary language
4. Choice of a nonjurist as the third party (though one with some legal training) whether or not elected by the community or group to be served by the conflict resolution institution
5. Little if any coercion that the institution can mobilize in its own name

Once in operation these reforms may involve a more or less extensive change in the legal structure.

Let me start my analysis with the first type of articulation, qualitative covariation. The reforms (both those that have been implemented and those that are merely proposed) appear to employ a mode of juridical production dominated by rhetoric. Indeed, widespread legal knowledge and language competence allows the dispute institution to use an argumentative, persuasive discourse in order to

9 "Contamination" or "infiltration" is detected through a close analysis of the types of arguments that become more persuasive and thus more capable of eliciting voluntary compliance. Such "contamination" will exist if it is shown that arguments subsidiary to the logic of bureaucracy or violence tend to dominate the rhetorical discourse. An earlier attempt to offer sociological and psychological explanations for variation in the persuasive power of different rhetorical arguments is Apotel (1963).

10 This development is neither linear nor is it identical in different capitalist states. It represents a general trend.
gain acceptance of the outcome by both sides. Conversely, both bureaucracy and violence appear as recessive or retracted structures. Because they seem to be withdrawing from the foreground of legal domination they have occupied so prominently for the last 200 years, this may mistakenly be conceived as delegalization, but only by forgetting that rhetoric is as inherent in legal domination as bureaucracy or violence. Reading these reforms in the light of the first structural articulation, I am led to the conclusion that legal rhetoric is reemerging from two centuries of lethargy. But the importance of such reemergence depends upon the range of the reforms and whether they are carried out without major distortions. It is still too early to answer these questions.

Because the impact of these reforms cannot be determined exclusively at the level of quantitative covariation, it is necessary to look to the second type of structural articulation, geopolitical combination. If the rhetorical space of the legal structure is expanding, is this occurring in the core or the periphery? And what is happening in those legal fields and areas of political domination where legal rhetoric is not widening?

The answer to these questions involves complex comparisons across legal fields and corresponding areas of political domination. Here I will restrict myself to contrasting reforms in the areas of informalization, community involvement, and delegalization on the one hand and those in the field of criminal justice and penal policy on the other. The first striking contrast (which, amazingly, has hardly been noticed) is that these two fields are undergoing opposite or contradictory transformations. The former, as I have mentioned, is dominated by a therapeutic model and a treatment ethic that emphasizes consensus and persuasion, integration rather than exclusion, the regulation and normalization of behavior instead of punishment, mutually satisfying outcomes rather than strict observation of legal rules. In the latter we are witnessing the reemergence of what has been called the justice or the neoclassical model (Clarke, 1978; Mathiessen, 1980; Christie, forthcoming),11 which is grounded upon a radical opposition to the treatment ethic. The latter is seen as "a logical result of the individual responsibility ethic in an age of science, the welfare state, consensus politics and reformism." In opposition to all this, the justice model calls for: "a return of power to the judiciary; an end to treatment and its substitution by punishment as desert; increased concern for certainty and for legal rights; greater emphasis on the criminal act rather than on the actor" (Clarke, 1978: 28).

This makes clear the opposition between current developments in the two fields. But even more striking is that both tendencies are ideologically heterogeneous—sponsored by groups with mutually hostile ideologies and sociopolitical objectives. In the informalization field Richard Abel has shown how conservatives, liberals, and even radicals may support the same reforms (Abel, 1979: 29–31). In the field of criminal justice we find considerable agreement between the Struggle for Justice and the Schmelingers on one side and A. Von Hirsch, Fogel, and R. Hood on the other (Clarke, 1978: 28).

But it is not sufficient merely to acknowledge this opposition. It is also necessary to analyze how the two developments are structurally combined. My hypothesis is that bureaucracy and violence are being concentrated in those legal fields that correspond to the core areas of political domination, where their major function is to define the enemy (not necessarily a class enemy) as an enemy and to disperse that enemy through mechanisms of neutralization and exclusion; whereas rhetoric is being expanded in legal fields that correspond to the periphery of political domination, where their major function is to define the enemy as nonenemy and to disperse that nonenemy through mechanisms of trivialization and integration.12

If this hypothesis holds true, the different developments in the legal “system” are both unequal and combined into a larger whole that cannot be explained by either the ideologies that justify them or the policy orientations that guide them. The geopolitical distribution across legal fields of the three elementary components of the legal structure—rhetoric, bureaucracy, and violence—will enable us to develop a cognitive map of their appropriateness to the areas of political domination—a zoning system as it were.

The geopolitical distribution of legal structures will also enable us to see the question of access to law in a different light. This question cannot be dealt with in monolithic terms because access to law varies with combinations among the three structures. For instance, improved access in a legal field dominated by rhetoric may be accompanied (or compensated) by diminished access in a field dominated by bureaucracy or violence. If the latter corresponds to a core area of

11The designation “neoclassicism” derives from the emphasis on a return to classical principles of imprisonment.

12This does not mean that the entire legal field of criminal justice and penal policy, and it alone, corresponds to the core of political domination. On the contrary, all traditional legal fields (labor law, contracts, torts, criminal justice, etc.) are heterogeneous in that they cut across the two poles of political domination, and such heterogeneity is reflected in the unequal distribution of rhetoric, bureaucracy, and violence inside each of them. The distinctions among legal fields lie rather in their unequal degree of correspondence to the two areas of political domination, so that some are situated more in the core and others more in the periphery.

The reasons for such differences can be obtained only through detailed historical analysis, which cannot be restricted to capitalist development. Under present conditions, the field of criminal justice and penal policy in the capitalist states tends to be located predominantly in the core of political domination. But this does not mean that the field “belongs” exclusively to this area of political domination, as shown by the fact that some of the informalization and delegalization reforms are also taking place within it. Moreover, it is not impossible that noncriminal legal fields may be located in the core of political domination in the future.

This analytic strategy may also be useful in comparing different states at a given historical moment. It might be hypothesized, for instance, that labor law occupies the core of political domination in one state but the periphery in another.
political domination, the example will show how an expansion of access may actually be a restriction—a grant of access that forecloses it.

The geopolitical distribution of legal structures is still of importance in determining the diversified nature of, and differential accessibility to, legal discourse because the latter varies with those structural combinations. In a combination dominated by rhetoric, legal discourse tends to be based on common-sense knowledge and to be framed in ordinary language; if bureaucracy and violence dominate, that discourse tends to be based on legal scientific knowledge and to be couched in technical language. As a result, some areas of legal discourse are more accessible or penetrable than others, characterized by shared rather than secret knowledge.

The analysis of current experiments with informal or community justice in the light of the two types of articulation already mentioned leads to the following hypotheses: First, such reforms involve an expansion of legal rhetoric. The more a legal field corresponds to a peripheral area of political domination, the greater the tendency for the expansion of rhetoric to concentrate there. Second, this expansion of legal rhetoric is combined with an expansion of bureaucracy and violence. The more a legal field corresponds to a core area of political domination, the greater the tendency for the expansion of bureaucracy and violence to concentrate there.

But these hypotheses still fail to capture the full significance of current developments. It is therefore necessary to take into consideration the third type of structural articulation, interpenetration. The question to be asked is this: Once the space of a given structure is defined, is it possible to detect the presence of other (dominant) structures inside that space? Is there structural “inflation” or “contamination”? This is important because a given “contaminated” structure may be used to secure the expansion of another “contaminating” structure even while the latter seems to be retracting. More concretely: Is it possible to see signs in current informalization reforms that bureaucracy and violence are expanding within the form of legal rhetoric? With respect to bureaucracy, this type of structural articulation would lead us to analyze the types of arguments that tend to be persuasive in informal settings in order to see if reasoning that depends on bureaucratic logic and discourse is being advanced in the nonbureaucratic setting. For instance, one characteristic of informal dispute processing is that the third party (judge, mediator, or arbitrator) is not a jurist or legal professional. We therefore refer to such a third party as a “layperson.” But he or she may still be a professional and be employed in some other state bureaucracy. And since all state bureaucracies are structurally homologous and have the same operational logic, the latter may filter down into the argumentative discourse in the informal setting.

With respect to violence, some reformers have claimed that disputes arising out of “ongoing relationships” are more suitable for processing in an informal setting, which may draw upon the sanctioning power inherent in such relationships (Harrington, 1980: 134). One way of interpreting this phenomenon is that the state is mobilizing “native” coercive power, integrating it in the overall structure of state political and legal domination. Once integrated, this “native” power loses its autonomy and is put to work in a peripheral area of political domination. In this capacity it functions as a kind of state-produced nonstate power, penetrating the argumentative discourse and mutually agreed decisions in the informal setting.

Another symptom of violence infiltrating or contaminating legal rhetoric may be seen in the way in which cases are referred to community justice. Christine Harrington conducted an empirical study of the Kansas City Neighborhood Justice Center and concluded:

an examination of the sanctions and incentives to participate in NJC suggests that disputants are more likely to participate in mediation when there are strong ties with the official remedy system [Ibid.: 153].

If these interpretations are correct, I would conclude that legal rhetoric tends to expand only in the peripheral areas of political domination and, even there, is a recessive structure infiltrated by the logic of bureaucracy and violence.

These very tentative ideas on the three modes of structural articulation have the merit of leading us: (a) to analyze partial or sectoral developments and reforms in the light of the global legal structure; (b) to conceive this global structure as highly contradictory and unstable and internally asymmetrical in its correspondence with the different areas of political domination; and (c) to recognize that resistance to such domination must also be highly diversified, especially if it is to be a global resistance.

Since, in this conception, any reform, however partial, always involves changes in the overall structure of domination, the next question is this: If informalization and community reforms proceed, what will be their impact on legal and political domination and thus on the nature of capitalist state power?

THE CHANGING NATURE OF STATE POWER

It has been argued that the reforms under analysis serve a triple objective: They help reduce the fiscal crisis; they cushion the impact of a possible loss in the legitimacy of the capitalist state resulting from cuts in state expenditure; and they stabilize power relations in society.

The fiscal crisis argument is well known. The advanced capitalist countries in the 1960s witnessed the emergence of new and more advanced forms of class struggle. Highly mobilized grass roots movements brought new pressures upon the state, which invariably responded with an expansion of social rights and a
consequent increase in state expenditures. Though obtained through struggle, the state expansion was made possible (and probably necessitated) by the conditions of capital valorization in this period (which called for an increase in unproductive spending). As a result of this state expansion, the relations of repression and legitimation between the capitalist state and the working class changed significantly. In the early 1970s the conditions of capital valorization started changing. Since state intervention is subordinate to the logic of capital, the state expansion carried over from the previous decade was soon redefined as overexpansion, and the bourgeoisie insistently demanded that it be reduced to a "functional" level. In the realm of law and justice, legalization was reinterpreted as overlegalization, accessibility as overaccessibility. The court system was said to be a costly bureaucratic apparatus; informalization—delegalization reforms would make spending cuts possible in this area by relieving the judiciary of conflicts that could be processed in informal settings at a lower cost.

Two objections can be raised to the fiscal crisis argument. First, it assumes that informal justice is less expensive than formal justice, which is debatable. Second, it explains adopted solutions by their external necessity and not by their internal logic; in other words, it fails to explain why a specific spending cut is chosen instead of any other.

However, the fiscal crisis analysis becomes much more persuasive when coupled with the second argument. Since the state expansion generally took the form of new legal rights, any spending cuts will produce changes in the relations of repression and legitimation between the capitalist state and the working classes. Faced with a legitimacy crisis the state resorts to informalization reforms (and to the spending cuts they permit) because they appeal to popular participation, self-government, a renaissance of real communities, consensual social life, and the struggle against bureaucracy and therefore have the potential to compensate for the loss of legitimacy resulting from spending cuts.

But this argument proves too much: The capacity of these reforms to legitimize the state by appeal to transcendental values is checked by the logic of the reproduction of political domination in the capitalist state. This leads to the third argument—that these reforms stabilize power relations in society. Abel has reminded us that in the liberal state powerful institutions have to be formal institutions (Abel, 1979: 38). Indeed, the so-called absolutist state ceased to be absolutist (and became liberal) when formal law became absolute. In the formulation advanced earlier in the chapter, bureaucracy and violence have been developing hand in hand ever since. Informalization thus means powerlessness. It will help to stabilize social relations since no dramatic changes can be expected from institutions or settings that must be oriented to consensus and harmony because of the limits on their coercive powers.

Many disputes that are intended to be processed by the new informal settings share two characteristics: There are structural differences in social power of the parties, and they occur repeatedly. Landlord—tenant and merchant—consumer disputes are examples. In such cases mediation or arbitration becomes repressive because the setting lacks coercive power to neutralize the power differences between the parties. Repressive mediation leads to repressive consensus, which, I submit, will more and more characterize the exercise of capitalist state power.

In this sense informalization means disarming and neutralizing. Poulantzas (1973) has emphasized that the major function of the capitalist state is to disorganize the working classes through the legal form.

What is new in the current informalization and community justice programs is that whereas the oppressed classes have hitherto been disorganized at the individual level, as citizens, voters, or welfare recipients, in the future they will be disorganized at the community level. I suggest that state-sponsored community organization will be the specific form of disorganization in late capitalism.

Community production of services, whether these involve justice, legality, social control, or regulation, is a nonautonomous mode of production. At most it has a merely negative autonomy—the freedom not to depend on the state for the performance of certain services. There is no positive autonomy—the capacity to struggle for measures and services that, though structurally possible, are functionally incompatible with the corporate interests of the dominant class.

The preceding analysis does not go deep enough in identifying the basic mechanism through which the nature of state power may be changing before our eyes. Bourgeois society is based on a dualistic power conception—two basic modes or forms of power that, though complementary, have been kept separate and even treated as mutually exclusive. I call them cosmic and charismatic power. The first is centralized, "physically" located in formal institutions, and hierarchically organized. This is the traditional conception of juridical power. It is a macropower that, since the seventeenth century, has found its most complete embodiment in state power. The second is the power emerging wherever social relations and interactions are unequal, in the family, at school, on the street, etc. It is a micropower. It is eccentric, atomized, multiple, without specific location, mobile—in sum, chaotic.

13 Libera. Political theory is based on a militant refusal to recognize this dualistic power structure by reducing it to a unity, namely, state or juridical power. And...

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13What I call cosmic power echoes Foucault (1971; 1976). But whereas he identifies it as the general form of power and denies the existence of the centralized top-down power (what I call cosmic), in my conception the coexistence of these two forms of power, and the dialectical relations between them are what constitute the "deep structure" of social domination in modern societies. Foucault merely inverts liberal political theory (which identifies cosmic power as the general form) and therefore remains inside its intellectual universe, no matter how radical his formulation.
this, of course, is the source of the distinction between state and civil society. The state is the realm of power and violence, whereas civil society is the realm of freedom and equality.

The present, deep crisis of this theory is the result of two changed perceptions that have been stimulated by transformations in the accumulation process. First, there are two forms of power corresponding to the two basic forms of inequality: macro (or class) and micro (or interactional). Second, these forms of power, though structurally very different, are complementary—each is made tolerable (and is reproduced) by the other.

The proliferation of informalization and community justice reforms (which have counterparts in many other areas of social life) may signify changes in the nature of state (cosmic) power and its relation to the chaotic power inherent in the social relations of civil society. To the extent that the state tries to coopt the sanctioning power inherent in ongoing social relationships, it is explicitly connecting its cosmic power to the chaotic power, which until now had been outside its reach. Insofar as the state thereby manages to control actions and social relations that cannot be directly regulated by formal law, and insofar as the entire social environment of the dispute is integrated in its processing, to that extent the state is indeed expanding. And it is expanding through a process that, on the surface, appears to be a process of retraction. What appears as delegitalization is actually legalization. In other words, the state is expanding in the form of civil society, and that is why the dichotomy of state and civil society is no longer theoretically useful, if ever it was. And because the state expands in the form of civil society, social control may be exercised in the form of social participation, violence in the form of consensus, class domination in the form of community action. In other words, state power expands through a kind of indirect rule.

A CONCLUDING NOTE ON POWER, KNOWLEDGE, AND UTOPIA

Regardless of the accuracy of such long-range speculations, I have tried to show in this chapter that reforms in the field of law and justice may be manifesta-
tions of power dislocations occurring inside the capitalist state and that these dislocations result in increasing asymmetry in the structure of capitalist political domination: a high investment of formal institutional resources in the core and an expansion of informal, network-based resources in the periphery. This increasing asymmetry reproduces itself inside the legal system through the dynamics of the multiple structural articulations among rhetoric, bureaucracy, and violence.

Since power structures are always connected with structures of knowledge, we can predict that changes will occur in legal knowledge as a result of power dislocations inside the capitalist state. As state power becomes more heterogeneous, so does the knowledge through which it operates. A new form of lay, commonsensical knowledge will emerge alongside scientific, professional, disciplinary knowledge (Foucault, 1975, has pointedly noted the double connotation of “discipline” as both science and social control). As the increasing asymmetry of political domination reproduces itself in the increasing asymmetry of cognitive domination, a tendency will develop for a high investment of professional disciplinary knowledge in the core areas of political domination (which, for that reason, will become less and less accessible) and an expansion of nonprofessional, “trivial” knowledge in the peripheral areas of political domination.

In light of such tendencies there is no reason to think that capitalist domination can be effectuated only through professional scientific knowledge. On the contrary, if power is displaced from institutions to networks, there will be a parallel shift from scientific to nonscientific knowledge and thus from scientific legal knowledge to nonscientific legal knowledge. The new nonscientific, non-disciplinary knowledge will not be captured by the polarity of truth and falsity, which has been the basic matrix of the scientific paradigm, but will rather point (like utopia) toward a polarity of liberation and oppression. This would be the ultimate crisis for the scientific paradigm and the theory of knowledge upon which bourgeois society has based the permanent technological revolutionization of production and the concomitant degradation of the labor process.

It would be a gross mistake, however, to analyze current reforms as sheer manipulation and state conspiracy. In the particular case I have dealt with—informalization and community justice—the central contradiction is that the reform movement is associated with the powerful symbols of participation, self-government, and real community. This is its utopian transcendental element. It is true that these symbols are imprisoned within an overall strategy of social control. But though their form is distorted, the value of these symbols is nevertheless confirmed since even state-controlled community justice requires a certain amount of popular participation. It thus contains a potentially liberating element, if one that can be unleashed and made effective only through an autonomous political movement of the dominated classes.17

Let me illustrate this with an example from another field. I believe there is a structural homology between contemporary experiments with informal and community justice and mass or popular culture. One could say of informal and community justice what Fredric Jameson says about the Frankfurt School’s critique of mass culture. Mass culture is not to be grasped as an “empty distraction or false consciousness but rather as a transformative work on social and political anxieties and fantasies which must then have some effective presence in the mass cultural text in order subsequently to be managed or repressed” (Jameson, 1979: 141). Similarly, we cannot do justice to informalization or community reforms “unless we are willing to concede the presence within them of a more positive function as well, that is, an utopian or transcendental potential” (Ibid.: 144).

Community justice cannot be ideological without at some time being implicitly utopian. It cannot manipulate unless it offers some “genuine shred of content as a fantasy bridle to the community members about to be manipulated” (Ibid.). Resistance against manipulation must start from that genuine shred of content.

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Galanter, M. (1979) “Legality and Its Discontents: A Preliminary Assessment of Current Theories of into individual grievances. This individualization is what the legal form provides in a mystified way since, within it, individualization means insulation and atomization. It is up to the autonomous political movement to establish the missing link between the individual and the collective.

17In order to inspire a collective movement, the broadest political objectives must be translatable


