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Culture, Power, and the Discourse of Law

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CULTURE, POWER, AND THE DISCOURSE OF LAW*

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I. INTRODUCTION

During the past decade, I and many other sociological scholars have been developing an approach to studying law that complements and, I believe, contributes in significant ways to lawyering theory. This approach blends cultural anthropology, critical legal studies, and discourse analysis. It focuses on the production of legal consciousness and on the possibilities of control lodged in the discursive power of law to define identities, to fix and name fluid events, and to exercise coercion to enforce this discursive power. Collaborative discussions over the last several years in the Amherst Seminar on Legal Ideology and Legal Process and the work of members of this group have contributed greatly to the development of this theoretical position.[1] My own research has been on family and neighborhood cases that arrive in lower courts or mediation programs, or are handled by police or within local communities.[2] Most of my research has been in urban New England, but I am now doing research on a post-colonial plantation town in Hawaii. I will use both of these situations to illustrate the theoretical arguments. This is, of course, my account and does not mean that the others necessarily agree with my portrayal of the dominant themes of our discussions.

The focus of our work is not on law *and* society but on the ways in which law and society are mutually defining and inseparable. One fundamental point is that law is intimately involved in *the constitution of* social relations and the law itself *is constituted through* social relations. Daily talk about the law by ordinary people contributes to defining what

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1. I cannot do justice to the publications of this prolific group. I will mention a few as they are relevant in the text of this article. The group collectively produced a special issue in 22 LAW & SOC'Y REV. 623 (1988) (issue four), and edited a special issue on law and ideology in 9 LEGAL STUD. F. 1 (1985).

2. *See generally* MERRY, *supra* note *, at 21, 96 (1990) (examining the important differences between plaintiffs' perspectives and the courts' perspectives in the dispute process).

law is and what it is not. Ordinary people share understandings of law and the way it affects their lives and defines their relationships. These understandings, which can be called *legal consciousness*, include people's expectations of the law, their sense of legal entitlement, and their sense of rights. Popular legal consciousness is not necessarily the same as the professional understanding of law. As I show below, property rights of working class New Englanders differ in significant ways from the way property is defined in the law.[3] Legal consciousness is fundamental in influencing who goes to court with what problems because it shapes which problems are defined as worthy of legal intervention and which are not. The legal system sets up expectations for providing remedies; people use it, and as they do, they provide the social problems on which the law works.

Research in a variety of settings has illustrated facets of this mutually constitutive relationship between law and society. Susan Silbey and I argue, for example, that there is an ideology of mediation practice that shapes what mediators do and how they settle cases.[4] Lawyers' practice is also shaped by such ideologies.[5] In the case of mediation, these ideologies come from mediation training as well as general cultural

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3. *See id.* at 45; Sally E. Merry, *Everyday Understanding of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253 (1986); *see also infra* part III.

4. *See* Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1986); *see also* KRISTIN BUILLMER, THE CIVIL RIGHTS SOCIETY (1988) (arguing that redressing injustice for discrimination victims through legal intervention has failed because the laws addressing these issues are largely ineffective); CHRISTINE B. HARRINGTON, SHADOW JUSTICE (1985) (focusing on the neighborhood justice center as an area of alternative dispute resolution that reflects the dominant ideology and institutionalization of informalism); John Brigham, *Rights, Rage, and Remedy: Forms of Law in Political Discourse*, 2 STUD. AM. POL. DEV. 303 (1987) (analyzing how political images are mobilized in a variety of social movements); Patrick Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992) (discussing variations in legal consciousness and the ways ordinary people understand and make sense of the law); Christine B. Harrington & Sally E. Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709 (1988) (examining how community mediation is made and how it is ideologically constituted); Sally E. Merry & Susan S. Silbey, *What do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984); Neal Milner, *The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups*, 8 LAW & POL'Y 105 (1986); Susan S. Silbey & Sally E. Merry, Interpretive Processes in Mediation and Court (1987) (unpublished manuscript, on file with author).

5. *See* Brinkley Messick, *Kissing Hands and Knees: Hegemony and Hierarchy in Shari'a Discourse*, 22 LAW & SOC'Y REV. 637 (1988); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 125-28 (1986).

assumptions about conflict and relationships. More generally, as mediators, lawyers, and courts handle problems, popular and professional conceptions of the law structure local practices, including the way that problems are labeled and solutions determined.[6] The ability to determine the way that cases are talked about and the relevant discourse within which an issue is framed is an important facet of the law's power.[7] Parts II and III develop this theme in more detail. Part IV applies this approach to the analysis of the way mediation sessions constitute meanings as problems are managed.

II. LAW AS CONSTITUTIVE OF SOCIAL RELATIONS

The way law constitutes social relations is a complex process related to the nature of interactions between individuals and the legal system. It is a product of culture, historically formed and locally distinct. My current research in Hawaii provides an illustration of the process. The study includes an analysis of changes in modes of managing domestic violence. In this research, I look at courts as creators of cultural meanings that are imposed upon day-to-day social life through force and threat of force. The ideological meanings of law and their modes of imposition are analytically distinct but equally important in understanding the way courts produce meanings that reinforce or alter interpretations of identities and relationships.

The setting is an old plantation town with a primarily working-class population representing a wide range of Asian and Pacific Islander cultural backgrounds, often with several generations' residence in Hawaii.

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6. *See* Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 777-79 (1980-1981).

7. There have been several recent studies of conflict and court talk that analyze, in various ways, how this talk creates meaning. *See, e.g.*, JOHN BRIGHAM, PROPERTY AND THE POLITICS OF ENTITLEMENT (1990); JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS (1990); Mather & Yngvesson, *supra* note 6; Merry, *supra* note 3; Messick, *supra* note 5; William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137 (1988); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661 (1985); Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC'Y REV. 737 (1988).

Anthropologists Comaroff and Roberts have developed an analytic model that helps to understand how conflict talk creates meaning. They describe the process of constructing an interpretation in disputing situations as the development of a paradigm of argument, which they define as "a coherent picture of relevant events and actions *in terms of one or more implicit or explicit normative referents*." JOHN COMAROFF & SIMON ROBERTS, RULES AND PROCESSES 6 (1986).

Domestic violence was historically outside the purview of the courts. Few cases were heard and even those were rarely prosecuted. The historical record indicates that from the time of the creation of Western-style courts in the 1850s until the 1970s, only very serious cases of domestic violence came to the attention of the courts. Only if the violence was exceptional—frequent and injurious—did it appear in the courts at all. The criminal-justice system generally did little to prosecute the offender: typically, either the government chose not to prosecute or the court dismissed the case.

Over the past decade, however, there has been a major transformation in the way the courts handle cases of domestic violence. In response to a politically powerful feminist movement in a state with generally liberal politics, a significant shift occurred in laws and in judicial and police policy during the 1980s and 1990s, resulting in a sharp increase in the frequency of domestic violence cases coming to court. Shelter administrators increasingly encouraged women to file charges. In addition, police were urged to arrest offenders rather than simply sending them away to cool off, and prosecutors more energetically sought to convict offenders. Laws passed since 1985 provide forty-eight hours mandatory jail time for people convicted of abusing a household member. From the early 1980s to the present, a precipitate increase occurred in the number of cases of domestic violence, both criminal and civil, appearing in courts.

In part, this change resulted from gradually introducing feminist ideas about domestic violence into the courts and into local legal consciousness. This leads to a very different definition of domestic violence. In place of the older view that saw domestic violence as an aspect of patriarchal authority and male entitlement, feminists now define it as a crime. In a marked shift in meaning, this group denies that any action by a woman justifies male violence, whether she has provoked a man's jealousy, refused to obey him, or failed to take good care of the house and children. This way of thinking about male violence is strikingly different from that of even a decade ago and certainly earlier. In the past, women who were battered were told, "You made your bed, now you have to lie in it." There was generally little support for leaving the man, both from the woman's family and her husband's family, and very little talk of the right not to be hit. Thus, the present situation represents a very different mode of thought about the meanings of violence between spouses.

For the law to constitute domestic relationships as an arena from which male violence is excluded, it is essential to have both new laws and new systems of imposing them through force. Changes in the laws alone did not produce social changes. The first law specifically targeting spouse abuse was passed in 1973, but it had little impact until: (1) a feminist political movement formed a shelter; (2) a new family court was created with a judge who was very concerned about domestic violence; and (3) a state-funded treatment program for men was established along with

mandatory participation for men convicted of abusing a household member. Leaders of the movement against domestic violence, in this town as elsewhere, devote considerable attention to persuading women seeking refuge in shelters to go to court and seek temporary restraining orders against men. These leaders also persuade women to conceptualize their situation as a matter of rights rather than as justifiable punishment or as a regrettable but inevitable aspect of married life.

With increasing numbers of users, the courts may be reshaping popular legal consciousness about violence and domestic relations. Men and women learn a new language: terms such as male privilege, emotional abuse, psychological battering, economic abuse, and intimidation become part of their everyday talk about human relationships. Men who batter are increasingly required to attend training sessions in which they are taught this new language. Thus, the law creates authoritative pictures of the way things "are" through its categories, principles, and assumptions. Law not only constructs authoritative visions of the social world, but also exerts force behind these interpretations.[8] It not only establishes one way of construing events but silences others, thus channeling and determining the outcome of legal proceedings.

III. LAW AS CONSTITUTED BY SOCIAL RELATIONS

The converse is also important: popular legal consciousness reshapes law itself. Users are constantly hearing stories about what the law is and what it can and cannot do. In these moments of talk, problems are defined in terms that the legal system recognizes as being either within or without its scope. In turn, this talk defines what law itself is and can do. Sometimes the media, neighbors, or friends provide this talk, but at other times judges, lawyers, and court officials play crucial roles in defining what law is and can do.

A case from my research in New England provides a good example of this process.[9] A woman came to the district court on a Friday afternoon and told the clerk of the court that she was afraid for her life because her neighbor and her neighbor's friends were threatening her, writing graffiti on the stairs, and carrying around knives. The clerk agreed that the situation sounded serious and put an extra police watch on her house over the weekend. When he heard the case on Monday morning, however, it appeared that: (1) the plaintiff had a bad record with the welfare office; (2) her father was harassing the neighbor; (3) the children were fighting with each other; (4) she pounded on the ceiling with a

8. *See* Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 170 (1987).

9. *See* MERRY, *supra* note *, at 100-04.

broom all the time; (5) there was jealousy between the parties; (6) they fought over who cleans the stairs; and (7) many other issues existed between the families resulting from living close together in an old apartment building with paper-thin walls. The clerk sent the case to mediation after deciding that it was not a case of an innocent victim in danger. He determined that this problem did not belong in court, thus defining what law can handle and what it cannot. In the process, he defined the scope of the law for the parties.

Therefore, one could say that law is defined and made, in these local encounters, as court officials interpret it to the parties and that the parties use these interpretations to make sense of their own lives. The meaning of the law is not simply what the statute says, but also the way it is talked about and understood in these local settings.[10]

Ideas about what law is and what it can and cannot do were widespread among the working-class Americans I studied in New England. Their ideas were derived from their experiences in court and with lawyers as well as from the media. These ideas, however, were not necessarily the same as the doctrines of the legal system itself. For example, people who sought judicial relief in the lower courts for neighborhood problems in the New England towns I studied in the 1980s based their actions on conceptions they had of rights to property and protection—conceptions often at variance with the law itself. Many people felt that they could control who stepped onto their property, and many felt entitled to shoot anyone who did. Thus, they held an expanded notion of property rights that were less circumscribed than those actually enforced by the courts.[11]

On the other hand, court practitioners often describe the law to litigants differently than they would to one another. For example, when women alleging abuse by their boyfriends brought cases before the New England court I studied, court officials would routinely tell the couples that these were serious charges that could earn the defendant significant jail time. They did this to persuade the women to drop the charges and the men to behave less violently. Yet, these cases very rarely resulted in any serious penalties such as jail time. Similarly, in status-offender cases in which teenagers were truant, rebellious, or runaways, juvenile-court judges told them that the penalties were serious and that they could be sent

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10. In her work on court clerks as gatekeepers and as creators of meaning, Barbara Yngvesson shows how these officials create meanings, channel cases, and, in so doing, construct the law. *See* Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409, 410-11 (1988) [hereinafter Yngvesson, *Making Law*]; Barbara Yngvesson, *Legal Ideology and Community Justice in the Clerk's Office*, 9 LEGAL STUD. F. 71, 74 (1985) [hereinafter Yngvesson, *Legal Ideology*].

11. *See* MERRY, *supra* note *, at 2.

away from home. At the same time, the judges told the parents, when the young people were not present, that few placement opportunities were available and that the placements were hard to get. Thus, court officials, for reasons of expediency, may give very different impressions of the severity of court penalties than is the routine practice.

Clearly, discussions inside and outside the courtroom are important in understanding how law is constituted in popular consciousness. The lawyer's role is of critical importance. Austin Sarat and William L.F. Felstiner found that divorce lawyers present to their clients particular images of the lawyers themselves, their practices, and what the court is like. In so doing, these lawyers provide an account of the law.[12] The lawyers they observed pointed to the law's arbitrary, chaotic features and its tendency to provide personalized justice dispensed by particular judges. Barbara Yngvesson studied lower-court clerks who performed similar communicative roles.[13] These clerks take the complaints of parties, reframe them, and define what the problem really is and what can be done about it.[14] Susan Silbey and I looked at the ways mediators construct images of problems through their talk and at the ways their different approaches to mediation lead them to define problems in terms of bargaining or therapeutic solutions and ultimately in a third language of relationship.[15] Indeed, in mediation as in court, the nature of the interpretation imposed on a case shapes its outcome.[16]

One of the significant ways in which popular legal consciousness shapes the law is by determining which problems come to court. As courts handle problems, they redefine relationships and identities. The capacity of courts to affect social relationships depends to a great deal on the kind of problems they handle and how often. People's decisions to submit their problems to legal management provide the raw material on which the law works. People only go to court when they feel that they have a problem that the court will consider and in which they have legal entitlement. The way the law constitutes social relationships depends, then, on the way the law is defined in popular legal consciousness. As Barbara Yngvesson and Lynn Mather note, this is a function of the way disputes are

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12. *See* Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 125-28 (1986).

13. Yngvesson, *Making Law*, *supra* note 10; Yngvesson, *Legal Ideology*, *supra* note 10.

14. *See* Yngvesson, *Making Law*, *supra* note 10; Yngvesson, *Legal Ideology*, *supra* note 10; *see also* MERRY, *supra* note *, at 122.

15. *See* Silbey & Merry, *supra* note 4, at 19-20, 26.

16. *See id.* at 25-27.

transformed[17] or, as William L.F. Felstiner, Richard Abel, and Austin Sarat put it, shift from blaming to claiming.[18]

Which problems are appropriate for legal attention changes enormously over time. To return to the example of domestic violence in Hawaii, until the last decade, the courts did little to help abused wives, and wives rarely turned to the courts for help. Yet, in the 1850s, a man could seek help from the court if his wife moved in with another man. In the 1940s, if a girl under sixteen had sexual relations with a man who refused to pay her, he could be prosecuted for the felony of sexual relations with a girl under sixteen years of age. Not until the late 1980s could a woman expect the court to impose any significant penalties on a spouse who beat her, unless the injuries were very serious. These examples suggest that the way the court intervened in family life and sexual relations changed significantly over time. Consequently, ideas about what problems the court will or will not consider changed, and as they did, so did the problems that people brought to it.

The problems that are brought to the law in turn shape the law because they are the raw material that provides the opportunity for the law to define social relationships. They determine what relationships the law constitutes. In some ways, they affect what the law is. Obviously, this description of the process neglects those areas of behavior controlled through police and prosecutorial initiative. Yet, even there the participation of complaining citizens and witnesses is critical. Moreover, this description takes the substance of the law as given; yet the substance itself is produced through interactions with constituencies and by judges aware of local priorities rather than through only top-down decision making by legislators and higher court judges.

IV. CONSTRUING SOCIAL RELATIONS IN MEDIATION

To give an example of this theoretical perspective, I now take a brief look at mediation. Mediation is a quasi-legal process, outside the court but connected to it. This example shows how the mediators' talk defines relationships and shapes the way the parties think about the problem. In addition, by implication, it defines the nature of law itself and what it can and cannot handle. Mediation works on problems only because people bring their particular problem to the law for its consideration.[19]

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17. *See* Mather & Yngvesson, *supra* note 6, at 776-77.

18. *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming . . .*, 15 LAW & SOC'Y REV. 631, 633-37 (1980-1981).

19. Parts of this discussion are taken from MERRY, *supra* note *; *see also* Sally E. Merry, *The Discourse of Mediation and the Power of Naming*, 2 YALE J.L. & HUMAN.

Mediation sessions, lower-court magistrate hearings, and lower-court trials of family and neighborhood problems are instances of talk in which individuals present images of themselves and events in ways designed to justify and convince. The conversation is a contest over interpretations of ambiguous events. Did the children throw rocks at the neighbor's car, or were they simply playing a stone-tossing game and hit the car by accident? Did someone put a stick through the spokes of a boy's bike as he raced down a hill, or did he run into a stick, lose his balance, and fall? Were the husband's angry slap and tirade against his wife's slovenly housekeeping instances of punishment or of spousal abuse? It is difficult to determine exactly what happened in these situations and to decide what they mean. Most of the arguments in mediation sessions and lower-court hearings about personal problems concern issues of meaning and interpretation and struggles to agree on what these events mean. Disputants couch their descriptions in language intended to persuade, labeling events and explaining actions in terms they expect will be effective for both the other party and the mediator, clerk, or judge. They interpret their own actions as fair, reasonable, or virtuous and those of the other side as unfair, small-minded, and irrational. Third parties (mediators, magistrates, and, very occasionally, judges) also develop interpretations of the event and of the character of the people involved and then introduce them into the discussion. Power lies in the ability to establish one or another interpretation of events and to make it stick with the rest of the group.

As examples of this process, I draw on four years of ethnographic research, including observations of mediation and court proceedings, interviews with parties, and participant observation in several neighborhoods in two New England towns in the 1980s. The parties in these cases are primarily white, working-class, native-born Americans; it is people of this social background who tend to bring their family and neighborhood problems to the lower courts to ask for help. The mediators and court officials who handle these problems are more middle class, relatively more educated, affluent professionals who are also primarily white.

Based on my observations of many hours of mediation sessions and lower-court proceedings, I argue that these settings include rival ways of talking about problems and events. Parties contest particular interpretations of events by arguing about which interpretive framework—which way of talking about problems and events—will define the problem. I call these distinct ways of talking and of interpreting events discourses.[20] Every

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1, 35 (1990).

20. My notion of discourse draws on Michel Foucault's work. *See, e.g.*, MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-

discourse contains a set of categories, a vocabulary for naming events and persons, and a framework for interpreting actions and relationships. Each discourse includes an explicit repertoire of justifications and explanations for actions and an implicit, embedded theory about why people act the way they do. A discourse is usually only signaled through particular phrases or modes of explanation; it is rarely spelled out. Each is drawn from a particular normative order.

The names and interpretations I observed in the lower courts fell into three analytically distinct discourses: morality, legality, and therapy. The first is drawn from neighborhood and family life, the second from the law and the legal system, and the third from the helping professions. In each case, the discourse is based on conceptions and myths of these institutions as well as on their practices. Each discourse uses particular words and phrases to evoke the authority of the institution in which it is grounded.

The following case illustrates the discourses and their interplay as a problem moves through mediation and court. The mediator or court official eventually succeeds in establishing the reigning discourse. In doing so, he or she converts a problem that the plaintiff has framed as a legal one into a moral or therapeutic one. The plaintiff is shown that the problem that brought him or her to court is not really a legal case and does not really involve rights and evidence, but instead is a matter of how people relate to each other. Consequently, he or she is urged to see that legal remedies are not necessary. Thus, the practice of shifting discourses provides a way to discourage plaintiffs from using courts for their interpersonal problems and a means of persuading them that the courts are not the right place for these problems. Reframing is one way plaintiffs are "educated" not to use the courts and are helped out the door. Thus, the process defines what the law is and is not for the parties.

Reframing is an aspect of the power of naming—the power to assert what a problem is and what should be done about it.[21] In these settings, naming is done by people who are perceived to hold particular authority by virtue of their institutional location and their professional expertise, often revealed in their language. Consequently, plaintiffs are persuaded to acquiesce to these names, to abandon their efforts to get help from the court for problems defined in legal terms, and to accept the court's redefinition of the problem as a social one deserving ongoing supervision of their social relationships.

1977 (Colin Gordon ed. & Colin Gordon et al. trans., 1980); MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE (Donald F. Bouchard ed. & Donald F. Bouchard & Sherry Simon trans., 1977); MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT (Alan Sheridan trans., 1977).

21. This process is like the rephrasing of disputes discussed by Mather and Yngvesson. *See* Mather & Yngvesson, *supra* note 6.

The case involved neighbors who were strangers. The plaintiff clearly had a notion of law that justified his actions, but so did the defendants. The plaintiff initiated the court case in district court by filing a complaint about noise against three college students who live in the apartment above him. The plaintiff, Fred, is an older man who works as a machinist in a factory. He lives in the apartment with his wife and, from time to time, a daughter from a previous marriage. He wants quiet. The defendants, all students at a local college, had moved out of the dorm into this apartment. The students claim that they are fairly quiet, particularly in comparison to the dorm. Neither side had ever spoken to the other before. The young men said they did not even recognize the name on the court summons they received until they read the same name on the mailbox. Fred charged them with disturbing the peace. The court clerk referred the case to mediation, describing it as a "student problem."

At the mediation session, all the parties began by describing the problem as one of noise and disturbance, framing it in legal terms. Fred said that he wanted to put an end to the noise and disturbance above his apartment, particularly on Sunday and Monday nights. The young men retorted that they study at the library those nights. Fred came back,

> "If you don't want to settle, we can take this downtown [to the court]."

He pointed out that he complains all the time to the landlord about the noise but that it does no good. One of the young men observed that the building is old, that the walls are paper-thin, and that the young men are paying $500 per month rent and have the right to make some noise. Another continued,

> "We pay a lot of money for this apartment. We don't want to think about you whenever we walk anywhere. And we don't have loud parties, we are restrained, not like in the dorms. There it was loud."

Fred replied,

> "You have to live differently in an apartment."

Here the discussion shifted slightly to normative standards of quiet in different places. The young men quickly changed the discussion to a complaint about Fred's failure to talk to them directly before going to court with the complaint. They asserted that no one else has complained and denied again that they have parties or that they have more than ten people in the apartment. Fred countered that their living room is over his

bedroom and that it sounds like a basketball is being bounced over his head. One young man responded,

> "We can't be conscious of every footstep."

Fred fell back on his own reputation, pointing out that no one has complained about him, and he has lived in the apartment for two and a half years. One young man, tall, heavy, and assertive, said he could not change his habits of walking. All three students claimed that the problem is Fred's, not theirs: they have done nothing out of the ordinary.

Here, the discourse was largely of competing rights and evidence concerning infractions of these rights by the plaintiff and the defendants. To move the discussion away from this stalemate, the mediators emphasized to both sides that this is a difference in lifestyle and ideas about quiet and that they need to understand each other. Privately, the mediators decided that Fred is "very straight-laced," "kind of an oddball," and that the defendants are just boys, some of them big, who could not really be quiet.

In the private discussion with Fred, the mediators asked for his demands and pointed out that what one person thinks is quiet may differ from what another person thinks is quiet. The mediator went on:

> "They are big people. They can't really help the noise. They may think they are being quiet."

In the private discussion with the boys,the mediators again pointed out that they have different ideas of quiet and asked what they have to say, commenting that it does not sound as if they have been particularly rowdy. The mediators offered several concrete suggestions for masking the sound such as putting rubber coasters on the television or changing the room they use as the living room. The students continued to deny that they slam doors and make noise. They asked what would happen if they refuse to sign. The mediators said that the case would go to court, and the boys quickly asked how the mediators evaluated the strength of their case. The mediators refused, saying that they do not judge. They suggested an agreement that would provide that the boys would continue to be considerate and would be careful on Sunday and Monday nights. The students resisted signing anything that would make changes in their lifestyles. One continued:

> "I don't feel I should sign to do anything that I am already doing. I might be loud sometimes. I don't want my signature on that. I don't care about going to court. I don't mind. There is so much traffic noise there anyway. I am going to settle this by moving out. And what will he give?"

The mediators continued to resist the legal definition of the problem, suggesting:

> "Maybe there is another way. Maybe you could sign that you are a little more aware that there is a problem and that you will continue to be considerate. You could say you are more aware of the problem."

One of the young men objected:

> "If we sign that, we are admitting we have done wrong. Now we are aware of his problem, but we don't need to sign it. I will sign only that I have been considerate and now am aware of the problem so I will continue to be considerate."

Another continued:

> "I won't change my lifestyle. I won't be quiet at 9 P.M. Movies may go on until 1 A.M."

The mediator shifted to therapeutic discourse:

> "But he wants to feel that you are taking his feelings into consideration. You study psychology [in college], you know he wants to feel he has some response from you."

This effort was to no avail. The men replied that they wanted to go to court:

> "We need somebody with authority to hear this. If he brings us to court, he is harassing us. I will file harassment charges against him. Let's go!"

The mediator made one more attempt:

> "You are all getting madder and harder in your positions. He has agreed to this. You didn't know about the problem, now you do."

Two of the young men had to leave for work, and the third stayed to negotiate for them. The mediator pressed moral discourse further:

> "If he comes to you and says it is too loud, you will know. You would then know his definition of unreasonableness. You could put things down quietly. You are dealing with a person who

> seems meticulous. But it takes all kinds to make a world. You have a little different kind here. If it were me, I am deaf in one ear, I wouldn't notice. But you could try to be a little more quiet. Is there anything you could sign that wouldn't mean changing your lifestyle, but give him some control?"

The other mediator returned to therapeutic discourse:

> "You study psychology. It is an attitude. It may be that he will only be happy if you take your shoes off at the door and whisper. You can't do anything then. But maybe if he feels he can have some say, he will feel better. To go to court may not get you any further."

After some further persuasion, the young man went along with the shift in discourse:

> "So it is a consideration thing, not what my friend was saying, that this is a matter of laws, and in that regard, we don't have to be quiet. But this is a moral thing, I can see that. He is a different sort, and nothing against him for that."

This young man finally went along with an agreement that said that he and his roommates were now aware of the problem of noise bothering the plaintiff, and that they would continue to be considerate of him and of the other tenants in the building. The man living below agreed to contact them directly if there were any further problems and to let them know the nature of the disturbance. In persuading Fred to accept the agreement, the mediators again turned to moral and therapeutic discourse rather than legal discourse:

> "They feel that they have been careful. But now they are aware of the problem and they weren't before. They thought the problem was their shouting up for the key. Now you can call them and tell them when you are bothered. This is really a difference in lifestyles. Part of it is a misunderstanding. They didn't realize this. You never went directly to them. Now you are a human being to them. The problem is communication."

In sum, the mediators successfully shifted the discourse from a legal one, including references to rights and the authority of the court, to a moral one of communication. The shift was aided by a few strategic references to therapeutic discourse, to understanding how the other person feels, and to the implication that Fred has some psychological weakness. When they are unable to persuade the parties to abandon their legal

framework, the mediators pulled in therapeutic discourse along with appeals to the defendants' sense of themselves as educated people ("You are college students, . . ."). This tactic finally succeeded in moving them into moral discourse, as the final statement by one of the young men indicates. The move to moral discourse was aided by the departure of the two more adamant defendants, however.

Comparing the initial complaint with the agreement reveals the shift in discourse, a shift that moved the plaintiff away from pursuing his grievance in court. Each side was eager to portray itself as reasonable, but each was also anxious to defend its rights. In this case, with no previous relationship to build on, the shift away from legal discourse to moral and therapeutic ones was more difficult. The mediators accomplished the shift by references to a shared moral discourse of consideration and tolerance and by psychologically diminishing the plaintiff, in a subtle way, to evoke sympathy from the young men.

This discursive shift is typical of most cases I observed. Some do not begin with as clear a legal framing as this one, although all plaintiffs interpreted their problem in terms of some legal claim to justify bringing it to court in the first place. Neighborhood problems are more likely to be presented in the language of property rights and entitlements, while marital problems are more often framed in terms of rights not to be hit or to be treated fairly. Cases involving intimate relationships between women and men are often described in terms of a need for help, although this is asserted as a need, rather than a right.[22] In each case, the mediators endeavor to shift the conversation to a focus on the relationship, standards of fair treatment in that relationship, and feelings, rather than on rights or entitlements. Indeed, the mandate of mediation is to take problems out of the adversarial process and to discuss them in terms of relationships.

What takes place in these interactions in mediation and court is the naming of events, actions, and situations. Naming takes place within one of these three discourses, as the conversation circles around naming a teenager as an "acting-out adolescent," "an irresponsible kid," or a "criminal," or naming the attentions of a young boy to an older woman as "harassment," "love," or an indication that he needs help. Framing and interpreting produce different renderings and different solutions. Naming can be considered a way in which power is exerted between third parties and disputants and among the disputants themselves. Power exists both in the ability to establish names and in the consequences that flow from that labeling. The struggle to name, to determine a reigning discourse,

22. On the assertion of needs rather than rights, see Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 472-96 (1989).

involves all the participants in the discussions, although they have unequal resources and authority.

The people who go to court in these communities do so not out of an eagerness to use the court, but out of a sense of entitlement: a sense that the courts are a resource that they, as citizens, have a right to use. They go with problems framed by their consciousness of the law. They present their problems to the courts in terms of fundamental rights to protection from violence, defense of property, or assertion of the authority of parents over children. In addition, some women present their problem as the right to security from violence by men. Some people go to court because using the law seems more civilized than using violence. Their consciousness of legal entitlement conforms to fundamental categories of the law itself: to protection of property and persons, to control over children, to management of the marriage relationship, and increasingly, to more therapeutic kinds of help available through the court.

As these plaintiffs arrive in court, they discover that their legal consciousness differs in subtle ways from that of the clerks, prosecutors, and mediators they meet there. The problems that they think are legally serious are interpreted as trivial in a legal sense although important in terms of the morality of interpersonal relationships. Their demands to be heard as plaintiffs with a case are typically rejected, but they receive consideration of their problems in a social sense. Court officials, endeavoring to provide what they consider justice, convert the problems from legal to moral or therapeutic discourse. They send the parties to mediation or handle the parties themselves, providing advice and refusing to go forward with criminal charges. Juvenile-court proceedings represent another example of a legalistic setting in which the law is rarely raised and problems are converted to moral discourse. Thus, within the overall framework of legal institutions, plaintiffs are encouraged to reframe their problems as inappropriate to its legal remedies and as fundamentally moral concerns. By implication, the problems are not suited for the court. The legal system exercises cultural domination in this situation by redefining these problems into a more powerless discourse, yet continuing to provide ongoing supervision for the settlements.

As these working-class court users seek to assert their sense of entitlement to legal relief for their problems, they find that the courts deny it. The courts do not reject their requests out of hand, but subject them to periods of monitoring, to probation, and to mandated social services. The problems are denied as legal but receive continuing supervision and management as moral or therapeutic problems.[23] The plaintiffs do not

23. Neal Milner describes a similar diminishing of rights, as he terms the process, in a very different context: that of mental health rights. During the 1980s, he argues, the assault on rights discourse produced by both the erosion of rights advocates on the bench

find their rights protected, but they do receive lectures, advice about how to organize their lives, encouragement to come back for mediation, and promises that something will be done to the defendant if the problem recurs. If it does recur, the complaint will be issued, the problem will go back to court, and perhaps the defendant will be fined or imprisoned. This can be seen as a form of power in that the court uses its legal authority to frame the problems in other discourses, to offer nonlegal solutions, and to deny the forms of protection and help promised by the legal system itself.

V. CONCLUSION

Thus, as problems are discussed in court and mediation, parties acquire conceptions of what the law is and what it can and cannot do—conceptions that in turn affect their readiness to use it again. The talk defines social relationships, but at the same time it defines the reach and the limits of the law itself. In the long run, it shapes who will come back. The approach suggested by lawyering theory provides the space to develop this interactive conception of law—one that sees law as constitutive of social life and as constituted by the legal consciousness and practices of ordinary people.

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and by a general critique of rights within the legal academy and in other organizations has reduced the inclination of mental-health groups to pursue a rights-oriented strategy for people with mental illness. *See* Neal Milner, *The Right to Refuse Treatment: Four Case Studies of Legal Mobilization*, 21 LAW & SOC'Y REV. 447 (1987).