

COMMUNITY JUSTICE, CAPITALIST SOCIETY, AND HUMAN AGENCY: THE DIALECTICS OF COLLECTIVE LAW IN THE COOPERATIVE

STUART HENRY*

This paper examines the relationship between social structures and community justice. It rejects both those arguments that see community justice as independent experiments for the development of an alternative system of justice and those that see such experiments as functioning solely in the interests of dominant legal and social structures. Based on a study of the collective justice systems of a variety of small-scale cooperatives, the paper develops a theory in which community justice is shown to be ambiguously related to the larger system in which it is set and to the groups and individuals who make up that system. This ambiguity, it is argued, is capable of transforming the wider structure, and the theory allows us to glimpse a potential for broad-based socio-legal change.

This paper is about the relationship between the structure of whole societies and the rules and sanctions of collective social forms existing within them. Taking the recent debate over the role of informal community justice as a starting point, the paper moves through a series of critical arguments toward the development of a new theoretical perspective for the analysis of the relations between social structure and collective normative orders. It concedes that advocates of community justice (Danzig, 1973; Fisher, 1975; Longmire, 1981) have been justly criticized for ignoring the influences of a society's wider political and social structure. But it also argues that the critics

* This paper is the outcome of my dialectical interchanges with a number of scholars, each of whom has claimed some of my territory as I have claimed some of theirs. Their influence should be apparent throughout but I acknowledge special thanks to Richard Abel, Richard Lempert, Rue Bendall, Peter Fitzpatrick, Nigel South and Brian Hipkin. An earlier version of the paper was presented at a meeting of the Research Committee on the Sociology of Law, International Sociological Association Conference, University of Antwerp, September 9, 1983. The present version, in somewhat shortened form, was presented to the American Society of Criminology Conference in Cincinnati, Ohio, November 7, 1984. I wish to thank the British Economic and Social Research Council for funding the research on which the paper was based with grant no. HR5907/2.

(Brady, 1981; Abel, 1981; 1982a; Santos, 1980) are wrong when they claim that the power and influence of the wider society is so pervasive that it necessarily shapes and constrains all but the most radical normative orders, using institutions of community justice to sap the strength of any serious challenge to the overall system.

My view is that the independence of community justice institutions is not an either/or phenomenon. The positions of both the advocates and critics of community justice are partial perspectives rather than fundamentally conflicting ones. Recognizing this, I attempt to resolve the debate over the role of community justice institutions by formulating a theory that acknowledges the integrity of both social structures and local normative orders and recognizes that relations at each level are affected by those at the other in a dialectical fashion.¹

The paper begins with a discussion of the theoretical limitations of much of the current thinking about community justice. Then I build on a series of stimulating articles by Peter Fitzpatrick (1983a; 1983b; 1984) to develop an integrated theoretical perspective that posits a dialectical relationship between social elements and more encompassing forms. Finally, I speculate on the implications of the theory I have developed for the attainment of socialist legality. Throughout, the argument is illustrated with data on the collective justice systems of a group of cooperatives that I studied.²

I. THEORETICAL LIMITATIONS IN THINKING ABOUT COMMUNITY JUSTICE

The sense that the system of law in capitalist societies has become increasingly formalized, bureaucratic, and routine

¹ By dialectical I mean that local normative orders cannot be separated from the total society because they are integral to it in the sense that some of the relationships of the local order are some of the relationships of the totality and vice versa. There is a constant movement and tension between the whole and the parts, and both part and whole change with changes in the other. Thus, the parts and the whole may be described as "codetermining." Although there is a considerable tradition in the sociology of law for relating the normative orders of groups and organizations to the law and structure of the wider society (see for example Gierke, 1913; Ross, 1932; Renner, 1949; Ehrlich, 1936), with the exception of Gurvitch (1947) this has rarely been done in a dialectical fashion.

² The research on cooperatives entailed tape-recorded unstructured interviews with 27 members of 12 different housing, producer, and consumer cooperatives; correspondence with 81 housing cooperatives and 20 producer cooperatives; and attending 19 meetings of one housing cooperative over a four-month period, during which disciplinary issues were discussed and disciplinary action was taken. The data were gathered in England in 1979 and 1980.

(Danzig, 1973) has led a number of writers to propose various forms of decentralized informal justice. Two not completely separable goals are sought. The first is to increase most people's contact with and access to legal functionaries (Galanter, 1974). Here the call is for "access to justice" and "justice with a human face" (Capelletti and Garth, 1978), through the introduction of informal dispute processing institutions such as arbitration, conciliation, and mediation (Eckhoff, 1966). Cynically summarized, this goal requires no more than that judges and lawyers discard their wigs and robes. It has been described by Whelan (1981) as "informalizing law."

The second goal is to achieve greater popular involvement in the justice system through increasing participation in the actual administration of law (Versele, 1969). Some who advocate this goal also call for the increased use of arbitration or mediation, but the favored institutional forms are community-based, democratically structured popular courts or tribunals (Christie, 1976). Although some say these should form "a complementary decentralized system of criminal justice" (Danzig, 1973) that only handles certain matters (Statsky, 1974), others favor "independent alternatives" (Fisher, 1975). Thus, Fisher (1975: 1278) takes the view that "A true community court . . . should be an alternative to the formal system" and "remain independent of any political organization and influence if it is to operate effectively as an instrument of justice." Likewise, Longmire (1981: 22) argues for "popular" radical alternatives that are "a complete replacement for, rather than complement to, the existing law enforcement system."

There have been a number of criticisms of proposals for increasing democratic participation in the administration of justice by introducing local popular courts that dispense collective justice. The most virulent attack has come from those who have analyzed the proposed changes from a societal or "macro" perspective. This group includes both supporters of the existing system of law in capitalist society and, perhaps surprisingly, those who are radically opposed to existing arrangements and would prefer a socialist society.

Kamenka and Tay (1975; 1978) are the leading defenders of the status quo. They dismiss the yearning for community and its concomitant personification of law, with its preference for "people's courts" and "people's judges," as a sentimental, romantic, utopian quest to return to the dark ages, and as no more than a "humanizing cosmetic" for the growing

bureaucratic practices in law—one that contains “great dangers to liberty and human dignity.” Indeed, they ridicule the growing disenchantment with objectivity and with those rational legal methods that hold that people must be judged by universal principles grounded in long pondered and carefully recorded experience. Kamenka and Tay believe the move to community justice reflects the excessive growth of bureaucratic regulation, and they argue that the resultant “crisis in legal ideology” can be resolved by fighting the drift to bureaucracy and returning to an earlier equilibrium in which capitalist legality, embodying due process principles, was the core integrative mechanism of society.

Those critics who are opposed to the existing organization of society and its system of law acknowledge that community justice institutions may well increase popular participation in the administration of law. They believe, however, that in doing so these institutions help maintain the overall system of societal organization because they are concerned only with relations between individuals and small groups, and not with relations between larger powerful collectivities like multinational corporations or those between social classes. Community justice institutions, these critics tell us, do not confront fundamental social problems; they serve to reinforce existing social arrangements and to preserve the stability of the state rather than to reallocate power between groups. For example, Brady (1981) believes that popular justice, community participation, and neighborhood justice are being actively promoted and funded by the very government agencies their supporters criticize precisely because these forms of citizen participation actually serve the dominant legal order, handling low priority cases that would otherwise lay claim to professional and judicial resources. Moreover, according to Abel (1981; 1982a), the restriction of alternative dispute settlement mechanisms to trivial and systemically inconsequential matters—such as neighborhood disputes over noise, pets, and fences—coupled with a mandate for intervention that treats disputants as atomized individuals, has the effect of dispersing conflict. Any discontent is channeled away from societal-level class and structural issues toward personal and individual conflicts. Abel argues that under the guise of providing more humane, more accessible justice, informality in law shapes conflict so that essentially political struggles about the ownership and distribution of property are translated into interpersonal disputes that draw attention away

from the capitalist structure of domination and exploitation. Echoing this view, Brady (1981: 31) says that the true nature of popular justice is revealed by the fact that whenever experiments in popular justice begin to challenge powerful interests, they are abandoned by government. They serve merely to "extend the legitimacy and power of the state in a time of fiscal and political crisis."

The positions of both the radical and conservative critics of community justice are themselves open to criticism. As Nelken (1982) points out, Kamenka and Tay's position, that the eclipse of due process law by both bureaucratic and informal community-based developments has led to a crisis in legal ideology, is neither clear nor well founded. Indeed, Kamenka and Tay (1975: 141) note an inevitable tendency toward coexistence among the community, due process, and bureaucratic kinds of law "in all, or at least most societies." This seemingly calls into question their assertion that "in the western world there is no doubt that the immediate trend is toward the immeasurable strengthening and extension of the bureaucratic administrative strain" (1975: 142). In short, Kamenka and Tay recognize the integral nature of community and bureaucratic forms to law in a capitalist society, but they apparently do not recognize that by their own analysis changes in one element might be expected to give rise to changes in another as the system returns to equilibrium.

The critics from the left, on the other hand, are guilty of both one-sidedness and inconsistency. In suggesting that capitalist society inevitably shapes systems of community justice to serve its ends and maintain the existing social order, these critics (Abel, 1981; Brady, 1981) overemphasize social structural influences and underplay the degree of autonomy that community justice institutions can have. Santos (1980) recognizes this when he points out that informal institutions of community justice do not merely reflect the ideology of capitalism, but instead symbolize ideals of participation, self-government, and real community, which express popular aspirations. Whether such sentiments can be coopted into the wider social control system of a society without meaningfully affecting that overall system is what is at issue in this paper. As I shall demonstrate in the next section, I believe that cooptation cuts both ways.

The inconsistency of the argument becomes clear when we contrast the radical critics' analysis of community justice with their proposals for a structural transformation from capitalism

towards socialism and a concomitant transformation from capitalist to decentralized socialist legality. Here the independence that was denied to institutions of community justice is granted to conflicting normative orders. Thus, Brady envisions social movements for equality that seek to bring about social change through raising consciousness, challenging social and economic inequalities, and criticizing the state and its justice system. Similarly, Abel (1981) sees the possibility of radical conflict in capitalist society only in those non-legal institutions that “transform parties, disaggregating those that were corporate and organizing previously atomistic individuals” (Abel, 1981: 255). In neither vision does the pervasive power of capitalism coopt the movement and lead it to serve systemic needs. In neither case do the authors explain why the cooptation that they see as inevitable in the case of institutions of community justice does not endanger other movements whose premises differ from those of the dominant capitalist order. Abel (1982b), in particular, recognizes that the transformation to a socialist order may be gradual and that partial advances are meaningful accomplishments, but he, like others writing from the radical perspective, fails to recognize the possibility that community justice institutions themselves may represent a gradual and partial transformation of the capitalist system of dispute processing.

II. TOWARDS AN INTEGRATED THEORETICAL PERSPECTIVE

The structural analyses of radical theorists such as Abel, Santos, and Brady reflect an overly mechanistic and deterministic theory of change that focuses on only one aspect of the link between social structure and dispute resolution processes. To develop a more convincing perspective without discarding the insights of the structural theorists requires us, first, to allow for the possibility of mutually interconnecting relationships between parts and wholes, in this case between local normative orders and capitalist legality, and second, to consider the relationship between human agency and legal and normative orders.

A useful starting point for addressing the first issue is Moore’s concept of the semi-autonomous field, a social unit which can “generate rules and customs and symbols internally” and “has the means to induce or coerce compliance,” but which is also “vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded”

since "it is set in a larger matrix which can and does invade it" (Moore, 1978: 55). Fitzpatrick draws on Moore's concept and argues that semi-autonomous fields have their own discrete normative orders which, as in the case of the family, both shape and are shaped by state legal order:

the state legal order itself is profoundly affected by the family and its legal order. There is a constituent interaction of legal orders and of their framing social fields. One side of the interaction cannot be reduced to the other. Nor can both sides be reduced to some third element such as the capitalist mode of production (1983a: 159).

As Fitzpatrick argues elsewhere,

It is not . . . so much that family relations function in support of relations of reproduction within the totality; family relations *are* some of those relations of reproduction . . . the family cannot be reduced to this totality or seen as only subordinate to it (Fitzpatrick, 1983b: 8).

In his latest statement, Fitzpatrick (1984: 115) offers a sophisticated elaboration of this approach as he introduces the dialectical concept of "integral plurality." Here, "state law is integrally constituted in relation to a plurality of social forms."³ Drawing on an interpretation of Hegel's concept of dialectic,⁴ Fitzpatrick argues that state legal orders tend both to converge with and maintain a distance from other social forms. Relations with state law tend to converge because, "Elements of law *are* elements of the other social form and vice versa" (Fitzpatrick, 1984: 122). For example, custom and law can have the same imperatives for behavior because law has incorporated custom into its codes and derives support from such incorporation. During incorporation, Fitzpatrick argues, "law transforms the elements of custom that it appropriates into its own image and likeness" (1984: 122). This process of appropriation and transformation involves mutual influences,

³ Fitzpatrick does not in this paper distinguish between a social form and the normative order it generates. He uses the term "social form" for either case. In an earlier paper discussing legal pluralism in the Third World he does make the distinction, but his dialectical theory of "integral plurality" is less well developed. See Fitzpatrick (1983a).

⁴ Use of the dialectic is, as Fitzpatrick points out, not new, even in Hegel's formulation and Marx's reformulation. Moreover, the idea has been employed in fields ranging from the philosophy of Sartre to the biology of Lewontin *et al.* (1984). For a sociological overview of the use of the concept see Schneider (1971). A concern for dialectic processes is not necessarily associated with any one interpretation of events nor with radical politics. See, for example, Van den Berghe (1963) and Kettler *et al.* (1984). For a useful discussion of the politics of dialectics see Carr (1983). For one of the clearest expositions of the dialectic method of analysis see Swingewood (1975).

such that "Law in turn supports other social forms but becomes in the process part of the other forms" (1984: 122). These mutual relations can have both supportive and opposing aspects, as is illustrated by my study of the normative orders of cooperatives in capitalist society.

Cooperatives develop their own normative orders, which are partially rooted in their own social forms and, to this extent, tend to be organized along different lines than state law. The coops surveyed in my study generally developed normative orders similar to those that Abel (1982b) describes as consistent with the needs of decentralized socialism, and to that Schwartz (1954; 1957) found in his study of the Israeli kibbutz. For example, in most of the coops studied, a decision about someone who had broken the coop rules was made by a general meeting of the cooperative. It was felt that coop members should take personal responsibility on an equal basis within the collective structure and, through their shared individual contributions, reach a collective decision.

Efforts at social control in the coops I examined, like those in the kibbutz Schwartz (1954: 476) studied, "must be considered informal rather than legal." Written rules were thought to be incompatible with the kinds of spontaneous, collective decision-making that provide the only context in which individuals can be fully and personally responsible, so rules were generally not fixed in advance or written down. As a member of a housing cooperative said to me, "the cooperative spirit is actually doing the right thing without the formality." This, as a member of an electronics commune explained, took the form of a continual openness to correction, which by its nature forestalls disciplinary problems: "All the time I'm asking them what they think about the standard of what I'm doing." Thus, as in the kibbutz (Schwartz, 1954: 477), social control was a consequence of "continuous face-to-face interaction." This is not, however, necessarily effective. For example, three members of the electronics commune left,

because they had trouble fitting in with the way the rest of us worked. . . . They were told in the way the rest of us are always criticizing each other. This hurt their pride too much and they left.

Similarly, a member of a housing coop described how "people had just had just enough" of two

obnoxious sort of dominant figures . . . and people decided to give them the boot by no other way than making them feel unwelcome at committee meetings.

Nor are social control efforts in coops limited to purely informal, interpersonal messages. For example, in dealing with those who failed to pay their rent, a housing cooperative in my study found that the relatively more formalized collective meeting was useful because, "If friends are there, they find out you're not paying rent; then there's much more pressure to pay . . . group pressure." Here, consistent with the findings of Schwartz (1957) and Rosner (1973), an organized forum focuses the control effort, but the sanction remains one of collective opinion.

Schwartz (1954: 473) also argued that when disturbing behavior is not adequately controlled through the informal process, law develops, in the sense of control by "specialized functionaries who are socially delegated the task of intra-group control." Schwartz thought that this development came at the expense of collective justice, but my evidence, consistent with that of Shapiro (1976), suggests that this tendency toward "legalistic" control coexists with informal controls. Thus, when a member accused of breaking a cardinal coop rule by "not participating" fails to attend the collective meeting, discipline is conducted in a communal way, via a "visit" from a delegation of the collective. A number of housing cooperatives used this system, with varying success, to encourage their members to pay their rent arrears. While such systems have legalistic elements (Shapiro, 1976), they may be institutionalized in a spirit of collective justice that is alien to the spirit of capitalist legality. For example, at one of the regular housing coop meetings that I attended, volunteers were invited to go on a "visit." There was much humor and joking, showing self-consciousness about how the visit might be viewed. One member asked, "What is it going to be then? A knee job?" Another replied, "They're not going to break his legs, just bruise him a little—where it can't be seen!"

Social forms like the cooperative and associated institutions of collective communal justice have complex relations with state law and the wider capitalist society in which they are embedded. Relations of support and opposition may simultaneously exist. For example, in spite of its proclaimed opposition to the existing structure of capitalist society, a housing cooperative is likely to benefit from laws that provide its members with certain rights, such as privacy and freedom from harassment. Similarly, even though its method of production and scheme of income distribution are diametrically opposed to the predominant forms of capitalist society, a

workers' cooperative may depend on contract and corporate law for rights that are essential in dealings with its customers and suppliers as well as with its own members (Weisbrod, 1980). As Shapiro (1976: 429) observes of the kibbutz:

The possibility that the kibbutz will not prevent the initiation of police action . . . has a subtle influence in strengthening internal controls in the kibbutz. This parallels the way in which tribal societies use the colonial power to strengthen traditional leaders.

Insofar as the rules and sanctions that constitute the conflicting normative order of a cooperative are concerned with fundamentally different issues from those of state law, such as rules enforcing participation in coop activities and rules against individual domination of the collective, enforcement of the cooperative's rules will only occasionally lend support to the larger normative order (as when a member is socially sanctioned for stealing by shaming and ostracism). However, a conflicting normative order can support state law by its very separation from it. As Fitzpatrick points out, "Law . . . assumes some separate, some autonomous identity in positive constitutive relations with other social forms. . . . Law would not be what it is if related social forms were not what they are (and vice versa)" (Fitzpatrick, 1984: 123). This should be understood in the same sense as Durkheim's famous dictum on the functional role of crime: "Crime brings together upright consciences and concentrates them" (Durkheim, 1893: 102). By this Durkheim meant that crime provides an occasion for the celebration and maintenance of law by evoking collective shock and generating a cohesive response against activities defined as unacceptable. We might say, to paraphrase Durkheim, that conflicting normative orders bring together capitalist legality and concentrate it. A good illustration of this can be found in one housing cooperative's use of the "visits" system for controlling its rent arrears. When a group of coop members are sent to another's house, without prior warning, to discuss why that member has not paid rent, the visit is intimidating and can provoke hostility on both sides. As one member explained:

It freaked me out. We went as a group of six and stood around shuffling our feet feeling very uncomfortable. . . . One girl in particular . . . was taken aback and abusive. . . . If there isn't hostility, then the person who is being visited is bound to get overwhelmed. It is rather intimidating when six people suddenly descend on you with no prior notice at all. It's not a good forum to discuss personal things

like, "Are you going to pay your rent?" and "Why are you not paying it?"

Not only does such an experience reinforce for both the visitors and the visited the capitalist view of credit and debt, but it also demonstrates the value of capitalist legality's impersonal, rational, and predictable procedures. As a result it may infuse aspects of capitalist legality into the collective system. Weisbrod (1980), for example, shows how nineteenth-century American utopian communistic religious societies used an orthodox legal framework to "create and defend their quite unorthodox institutions" (Weisbrod, 1980: 11) and "they tended to use that device with considerable sensitivity" (Weisbrod, 1980: xv). Similarly, the visits system of communal control was sufficiently stressful and insufficiently rewarding that the housing cooperative discussed above switched to a rationally organized model in which the ultimate sanction was the use of state law. The following extract from an interview with one of the members shows how state law can support the cooperative even though the cooperative's normative order conflicts in many ways with the ideology that underlies the state's legal norms:

We reached a stage then when we sent out eviction notices and nobody believed we'd carry them out. People just saw it as an empty threat . . . and meetings just delayed things further. We invited them to come along and explain. But I mean you can talk till you're blue in the arse and still nothing gets done about it. . . . Then the visits were a bloody disaster. There was a rumpus which was over totally personal things. It had nothing to do with rent. . . . The reason for people getting at each other's throats about those visiting and calling them the "heavy mob" was because of their own personal feelings towards those people that came. . . . You see, the problem when you're trying to use discipline or just logic is that people get in the way. . . . To run an efficient rent system you've got to get the human element out as much as possible because that's what messes the whole thing up—people's emotions. . . . A system where you don't have to go and explain why you haven't paid and involve yourself in totally irrelevant personal problems has to be preferable. . . . So that's why we introduced the new system. Now, if they are four weeks behind with their rent, they get a warning letter; if they're eight weeks behind, they get a notice to quit, and when that expires, we take court proceedings. Of course the main objection . . . is "Oh that's a bit heavy, isn't it?" or, if it's a possession order, "getting the law involved." But if the law wasn't involved, people wouldn't be

secure in their short-life housing. . . . So the law is already involved. . . . I'd much rather not get the law involved. . . . I think it's a drag giving credibility to the law in this sense because the law doesn't particularly like coops or the people who are in them. . . . We are allowing the police to harass our members, more or less, which is very heavy, but there's no option. . . . If there isn't another way, then you've got to do it.

Note the dialectical aspect. By resorting to ordinary landlord-tenant law, the cooperative helps validate for both society and its members a body of law to which it is, in principle, fundamentally opposed. At the same time, it is supported by that law; thus, an institution providing an alternative to capitalist forms of landlord-tenant organizations becomes more viable and more likely to be heard.

Finally, conflicting normative orders like that of the cooperative and the capitalist state may challenge and oppose each other. Fitzpatrick identifies two ways in which this may occur. The first and more obvious way is by "outright rejection," as when state law restricts the activities of conflicting normative orders. For example, the law may demand that worker cooperatives shape their disciplinary actions to the practices of capitalist industry, or the judgmental and compensation standards of capitalist legality may apply when individuals sue their former cooperatives for unfair dismissals (Weisbrod, 1980).

Law may, on the other hand, accept the validity of other norms within their own spheres:

law sets and maintains an autonomy for opposing social forms keeping them apart from itself and purporting to exercise an overall control, but this control is merely occasional and marginal. . . . In this limited nature of its involvement with other social forms, law accepts the integrity of that which it "controls." Its penetration is bounded by the integrity of the opposing social form (Fitzpatrick, 1984: 126).

Thus, cooperatives may have the right to police their own members even to the point of harassing or otherwise victimizing them because the law refuses to intervene in matters that are seen as the "private" concern of the coop and its members. In these circumstances cooperatives can reject and to some extent undercut capitalist legality. For example, by invading members' privacy and subjecting them to intimidation, as in the case of "visits," the collective justice of

the coop rejects, sometimes contemptuously, state laws that elevate individual protections over group aims.

Thus, Fitzpatrick concludes that, "law is the unsettled resultant of relations with a plurality of social forms and in this law's identity is constantly and inherently subject to challenge and change" (Fitzpatrick, 1984: 138). The same is true of alternative normative orders in their relations with state law.

Fitzpatrick's contribution to dialectical or integrated theorizing in his series of well crafted expositions increases our understanding of law by enabling us to grasp the complexity of the relations between the law of society and the normative orders of the social forms that make up a society. Before examining the implications of this analysis for socio-legal change, I should like to point to a number of areas where Fitzpatrick's theory of integral plurality might be developed and to illustrate with the aid of examples from my research on collective justice within cooperatives how these developments might be used to examine the relations between law and normative orders.

III. INCORPORATING THE ACTION-STRUCTURE DIALECTIC

Fitzpatrick does not tell us what counts as a social form or what counts as a normative order. It is possible to abstract parts from a whole, such that what is originally seen as a part becomes the whole. A cooperative, for example, is both a part of the capitalist society and a whole made up of its own constituent parts such as factions and subgroups. These parts may be similarly broken down until only individuals remain. At all levels, however, each element is a part of something larger that exists in relation to both the larger whole from which it is extracted and to the other parts that make up the original whole.

The possibility of this dual perspective raises two crucial issues. First, how far should one abstract parts from wholes or, to put the question another way, how many stages of abstraction should there be? Second, how does one meaningfully and intelligibly cope with the myriad of mutually supportive and opposing relations between parts and wholes that may exist at different levels of abstraction? Fitzpatrick's analysis does not go beyond the first stage to consider the constituents of the parts he examines. In particular, his analysis never penetrates to the level of the individual and so ignores all relations of human agency. Thus, in discussing the

dialectical relations between law and social forms, Fitzpatrick talks of law maintaining an identity, having an autonomy, etc., but he ignores the fact that it is through human interaction that law relates to other normative orders. Social action and the social structure, social action and the law, and social action and particular normative orders all exist in mutually constitutive relations. Ignoring the action-structure dialectic can lead one to take for granted the forms institutions take and to overlook the implications of the fact that institutions are social constructions.

Theorists have addressed these issues in different ways (see Giddens, 1979; 1982; 1984; Collins, 1981; Knorr-Cetina, 1981; Archer, 1982). Giddens, for example, argues that any examination of structure without reference to human agency or to agency without reference to structure is essentially misleading because action and structure presuppose one another in a mutually dependent relationship. He argues that the structural properties of societies are both the medium and the outcome of the practices that constitute these societies and that structure both enables and constrains actions that can change it. Each action is at once new and performed in an historical context that, without either barring or mandating the action, shapes it by setting constraints and providing the medium through which the meanings of action are expressed. Thus, Giddens maintains, "institutions do not just work behind the backs of the social actors who produce and reproduce them"; rather, "all social actors, no matter how lowly have some degree of penetration of the social forms which oppress them" (Giddens, 1979: 72).

Incorporating this insight into Fitzpatrick's theory provides a more coherent perspective that not only recognizes the dialectical relationship between state law and other normative orders but also considers the relationship between these orders and the structures in which they are embedded, on the one hand, and social action as human agency, on the other. Humans, in other words, are shaped by and shape the groups in which they are involved just as these groups are shaped by and shape the larger social structure. A theory that seeks to explain institutions of communal justice and their place in capitalist society must recognize this.

Just as the social institution is an abstraction from social structure, it is possible to identify a second level of abstraction, which I shall refer to as "factions," and a third level which, following Giddens (1979; 1982), I shall describe as "human

agency.” The structural correlates of these abstractions are the subgroups that exist within institutions and the individuals who are members of subgroups.⁵

Factions

Take the case of a workers' cooperative as an illustration. Factions are formed by all subgroups within a cooperative, whatever their basis. Thus, within a cooperative of foreign language teachers one faction was “a little clique who did not attempt to consult other members of the cooperative.” Factions can include as few as two members who have common interests they seek to promote. The coalition strategies that such interest groups generate may be accommodated, or they can split a group. A member of a collective designing software for computers spoke of the inevitability of factions: “Find some equilibrium size, which might be 7, 10, 15. . . . Anything bigger than that and problems start to arise, so the best thing is to split.”

Factions, like the social institutions of which they are a part, may generate their own rules and sanctions that specify acceptable ways of proceeding. These ways of proceeding may apply only to faction members, or the faction may seek to impose behavior it legitimates on the larger institution. What is legitimated at the factional level may, but need not, reflect the core norms of the embedding institution. A cooperative that expressly adopts informal reintegrative disciplinary procedures may or may not generate factional forms that espouse similar norms. Thus, a clique within a cooperative that is committed to reintegrative collective justice may legitimate for its members formalized, elitist, and hierarchical methods of social control. This may create tensions that transform both the clique and the cooperative. As a member of a cooperative arts group said:

We are actually struggling with two systems, and the fact that we have two systems means we never fully commit ourselves to either. There are the two different wheels. They [elite clique] will always step in if you want them to. They will always say, “I’ll wield

⁵ While for sociological purposes the individual is the irreducible minimum, one could in principle identify groups within groups within groups and corresponding levels of abstraction. For theoretical purposes, I think we need only recognize the following levels: (1) the encompassing state with its institutions of capitalist legality; (2) semi-autonomous institutions of communal justice and their alternative normative orders; (3) subgroups of these institutions with particularistic norms and interests; and (4) individuals as motivated social actors.

the big stick.” It’s there in the background. . . . To that extent we are not using one or the other.

Here, the elite clique’s willingness to eject those who fail to abide by the cooperative’s rules at one level serves the interests of the cooperative but at another contradicts the cooperative’s core ethic and basic organizing principles. Harsh discipline by the elite faction may induce particular individuals to conform to particular rules but in the process may reduce the overall level of compliance with cooperative norms. For example, an elite clique’s effort to enforce participation may diminish the average member’s involvement both by making the cooperative less attractive and by reducing the average member’s responsibility for social control. The result is likely to be a reduced willingness to participate and even greater need to resort to the use of discipline. The cooperative may hang together because of attractions extraneous to the cooperative ideal, such as access to markets, or such factionally legitimated activity may cause the coop to collapse:

We put together this motion: “Every member of the coop shall assign themselves to one predetermined area of work in List A within which their skills may lay, and can be called upon to utilize their skills and assist in the running of the coop. Anyone who persistently fails to help when asked will have their membership questioned by the participation subcommittee. . . . In addition no member shall be exempt from assisting in any one of the activities in List B.”

On precisely this motion people just happened to be wandering out. They were going home to tea or something and the finger was pointed: “These people are leaving the meeting. Isn’t it a disgrace?” Well there was no evidence to suggest that they were acting in the wrong way so they took offense. They said, “Fuck you!”

Human Agency

Factions are, of course, composed of individuals whose action, following Giddens, I shall refer to as “human agency”:

To be a human agent is to have power to be able to “make a difference” in the world. . . . In any relationship which may be involved in a social system, the most seemingly “powerless” individuals are able to mobilize resources whereby they carve out “spaces of control” in respect of their day-to-day lives and in respect of the activities of the more powerful. . . . There are many ways in which the seemingly powerless, in particular contexts, may be able to

influence the activities of those who appear to hold complete power over them; or in which the weak are able to mobilize resources against the strong. . . . Anyone who participates in a social relationship . . . necessarily sustains some control over the character of that relationship or system . . . actors in subordinate positions are never wholly dependent, and are often very adept in converting whatever resources they possess into some degree of control over the conditions of reproduction of the system. In all social systems there is a dialectic of control, such that there are normally continually shifting balances of resources altering the overall distribution of power . . . an agent who does not participate in the dialectic of control *ipso facto* ceases to be an agent (Giddens, 1982: 197-99).

The social action of individuals, like social action at each level we have examined, may conform to special sets of rules. The normative order rooted in human agency is that which is referred to as “personal self-control,” “self-discipline,” or “conscience.” It is not, of course, independent either of the person in whom it is rooted or of other social forms with which it exists in a dialectical relationship.

The personal rules that human agents adopt are like the rules of the various subgroups we have discussed in that they both shape and are shaped by the groups of which they are a part. When association with a group is voluntary, as it is with a cooperative or a faction, one would expect personal norms and values to be largely congruent with those of the group to which the person belongs. However, groups have multifaceted attractions, and individuals are complex characters. Thus, human action may both support and challenge the core norms of membership groups, sometimes at the same time. For example, one member of a housing cooperative that I studied was renowned for excusing his rent arrears by blaming his uncooperative behavior on the wider structure of capitalism. In doing so, he confirmed the cooperative ideology while threatening its financial stability. The material advantages of this dual posture led inevitably to resentment, concern, and suspicion:

People think “Oh he’s got a lot of problems!” But it’s only because we know about his problems, because he’s made damn sure everybody knows about them, whereas other people in the coop . . . who’ve got really serious problems . . . haven’t made it their business to say so.

A member of the same cooperative explained that they were particularly vulnerable to this kind of individualistic exploitation because

None of us wants to get our fingers burned or to be seen to be heavy so what happens? . . . We'd be nice to them and make an arrangement for them to pay. . . . We start feeling sorry for them. "Ah poor dears. They've got all these problems. Let's make it easier for them. . . . Perhaps we ought to restructure the coop to make it more accessible!"

A member of a wholefood coop explained how this kind of toleration could eventually be disastrous:

Because everybody believes in being nice to everyone, one person could put a complete spanner in the works. . . . Apart from being bad from the financial side . . . it can have a very negative effect on all the other people.

Moreover, individuals subject to the collective discipline of the normative order can challenge it by arguing that individual vindictiveness rather than collective concerns is the motivating force. Cooperatives are especially vulnerable to such defenses because the members all know one another intimately. As a member of another housing cooperative said of those with rent arrears:

The individuals concerned almost expect to be taken to task but they are surprised and resentful when they see . . . a comrade knocking on the door. Quite a lot react aggressively . . . feel that they have to hit back. People think they are victimized.

This can be seen in the account of a member of an arts collective who blamed her expulsion on a feud she was having with the wife of a member of the disciplinary committee:

It seemed to me that it was rigged all the way through by these people—this particular woman who wanted me out. She'd got a lever through her husband to every committee.

Another member of the same collective pointed out that the size and close-knit nature of coop relations meant that

it's more likely than you might imagine . . . [that] the committee you get is possibly going to be influenced in that kind of way.

One may ask why organizations like cooperatives contain members and factions whose rules of proceeding contradict core cooperative norms and threaten to destroy it. The reasons are too numerous and complex to explicate here, but one aspect must be mentioned. The wider capitalist order both stimulates and supports the oppositional actions of both the human agents

and factions that are found in cooperatives. Thus, the social structure threatens oppositional institutions from below. These institutions are not foredoomed to failure, but even when they are not overtly challenged by capitalist society, they have a constant struggle to maintain themselves. As a member of a theatre cooperative expressed it:

Specialization is exactly the sort of contradiction that happens when you try and behave in a way that is contradicted by life . . . by the particular form of our society. . . . You can't avoid it.

A member of a housing coop pointed out that it is difficult for people used to a hierarchical system to suddenly change their whole approach and assumptions. They expect a landlord and tenant relationship and cannot imagine how Joe and Mabel from up the road can actually evict them, nor can Joe and Mabel easily contemplate this!

It's a question of people having been traditionally in a very weak position, and suddenly they are in a position of power but are not aware of it . . . cannot comprehend it.

Others point to contamination by the sexist divisions in the wider capitalist society. A member of the electronics commune made the point this way:

Meetings themselves are sexist. . . . The men seem to enjoy meetings as a sort of social interaction, a bit like being down the pub together or boys in the back room, and . . . it's quite a strong interaction for them. . . . The women are stronger in terms of one-to-one interaction during the course of the ordinary productive process, of talking, just sort of chatting over the shoulder. . . . Both are methods for achieving the same thing, which is to find opinions, interact, and through that you could make decisions. But if you're then going to say meetings are how this coop makes its decisions, it may be that there is a slight sexual bias to it.

Undoubtedly, one of the most important ways in which the wider capitalist society can be seen as shaping the collective is through the necessary interaction of its members with other capitalist organizations. A member of a wholefood coop, for example, noted that the wider capitalist structure means that cooperatives have to compete with capitalist companies on their terms:

Profit means . . . having a surplus at the end of the year rather than a deficit. And if you keep having a deficit, you go bankrupt. . . . I see a lot of cooperatives very concerned with the superficial image

of whether or not they are a kind of far out place . . . no authority structure, everybody just does their own thing. They're not actually concerned with building something up that is strong, that is actually going to generate some money and take the capitalists on at their own game.

A member of the theatre collective also accepted the inevitability of some capitalist contamination:

No more do I believe we operate perfectly as a collective could operate. Obviously its contradicted by lots of things in the outside world. We are on one level a cooperative experimenting with new ways of doing things and on another we are a small company . . . concerned with developing plays. . . . One thing beyond anything else that makes that possible is economic survival. If you want to eat and do community theatre, it's necessary to earn money, and that means endless concessions. . . . In order to exist legally there are certain accounting skills which you must have. . . . For Greg, who's learning about performing, to interest himself in the details of administration would destroy his ability to perform. Everything would numb out into a vague blandness. . . . It's clearly a division of labor, but I don't think a division of labor necessarily means a division of experience, nor does it imply hierarchy.

It is, however, as I have already suggested, a mistake to explain entirely in structural terms the tendencies toward individualism, factionalism, specialization, and sexist role allocation that existed in the cooperatives I studied and were reflected in their normative orders. Human agency was also important. People are different in their abilities, motives, and values, and these differences both as an inescapable fact and as particular constellations of personalities necessarily affect the organizations that people create.⁶ As a member of an electronics commune put it:

Although we are very much a coop of equals, I do think we inevitably move away from this ideal . . . because we are all different people with different levels of confidence to work.

Another member of the electronics commune observed:

Even if you think you've got a consensus system, it is possible to find that people with the strongest personalities so often carry everyone else with them

⁶ This is not the same as saying that people are naturally different; rather, humans have the capacity to differentiate themselves and to make the differences significant.

that it's almost as if they control the direction in which we go.

And a member of the computer collective said:

I think a division of labor has to be inevitable in some fields. . . . There's going to be some things that I might find interesting that . . . somebody else doesn't.

The wider system of capitalism, with its individualist rewards and competitive ethic, may strengthen and lend support to these kinds of differentiation, but this does not mean that capitalism determines how or the extent to which differentiation proceeds within collectives, nor does it mean that collectives or other efforts at communal government are doomed to fail or inevitably to support the capitalist enterprise. The tendency toward differentiation that is associated with human agency is, no doubt, reinforced by the encompassing capitalist system, but it exists under socialism as well. And from this human agency arise the values associated with communalism and the commitment to work toward collective ends.

IV. CONCLUSION

In conclusion, let me sketch the most important implications of this paper for those who espouse socialism and who, like Abel (1982b), believe that the creation of small-scale collectives is fundamental to achieving it. First, my study of cooperatives suggests that in a capitalist society even radically independent collective structures are permeated by influences of the larger system. Second, we have seen that such collective institutions are especially vulnerable to crisis and collapse. This is not due just to the mutually opposing relations that the collective and its normative order have with the capitalist society and its law. It stems also from the sometimes anti-communitarian tendencies of factions and individuals within these institutions, which may be fostered by the wider society and its law. Third, the number of institutions, such as cooperatives and collectives, that are organized around principles inconsistent with capitalism is small in relation to the number of institutions permeated by the capitalist ethic. Even if it were possible for communally oriented institutions to remain free of capitalist influences, we could not expect these forms to be a vanguard for total social change unless we had some reason to believe that the example or efforts of such institutions would transform capitalist institutional structures. Abel offers neither theoretical support for this expectation nor

evidence that communal institutions have such effects. This study provides both, but not in the direct way that this expectation suggests. Alternative institutions and their associated normative orders do not work transformations on capitalist structures and rule systems but instead interact with them in a dialectical way such that both the alternative system and the capitalist order are vulnerable to incremental reformulations. Since capitalist rules and institutions predominate among the norms and organizations of capitalist society, the greatest potential for a social transformation lies in these dialectical processes. At one level the communitarian concerns of human agents are likely to interject more communal elements into capitalist society by penetrating and modifying capitalist institutions than are injected through the creation of alternative collective structures. At another level institutions of communal justice within employee work groups, neighborhood residence groups, mutual support, and self-help groups, none of which challenge the core organizing principles of capitalist society, are likely to do more to modify the shape of capitalist legality than the collective justice of cooperatives, communes, and other more socialistically oriented orders that are rarely encountered within capitalism and are generally marginal in the larger society. Indeed, capitalism may, as we have seen, successfully undercut opposing orders, but it cannot destroy its own institutions and therefore must continually contend with opposing internal tendencies. Thus, it is likely that the collective justice of factions that form within capitalism has a degree of persistence that is not found in conflicting orders. An implication of these observations is that, short of revolution, change towards socialist legality is more likely to be fostered by mechanisms of communal justice within institutions that do not challenge the basic premises of capitalism than through the development of more radical conflicting institutions.

Those who value socialist forms of interpersonal government should recognize that the desired communal collective form is already an existing, if unacknowledged, underemphasized, and undervalued, component of the capitalist legal order. Failing to see this, those who espouse socialism will miss the most promising ways of institutionalizing schemes of socialist legality. Moreover, in evaluating attempts to institutionalize socialist legality, those who are blind to the integrative perspective are likely to be continually frustrated

by what are in fact inevitable imperfections in the socialist ideal and will not recognize what they have achieved.

The spirit with which the movement toward socialist legality in capitalist society must proceed, if it is to proceed at all, is nicely captured in the remarks of a member of a theatre collective whom I interviewed:

We are trying to glimpse possible relationships in the present world. Unless you know what it would be like to have a society where people cooperate, unless you've got some glimpse of it, I really don't see what you're doing trying to get it. Or even if you manage to get it, what on earth are you going to do with it? . . . The only way things change, in my experience—all the things I'm referring to are a very intricate set of relationships ranging from personal ones to huge ones involving organizations—is in an imaginative, cooperative, creative way, where someone offers a possibility with a degree of conviction, energy, and forethought about how that possibility will be organized, so that it becomes evident to the other people that that's what happens. I really want to make it mundane, because I think it's very important to make it mundane. I don't want to end up talking about mass party organization. I'm not convinced that someone running a socialist center, however *au fait* he is with contemporary political ideas, is going to be able to handle society better than Sue Smith, who's 19, because she's doing it now. You know, she's actually trying to work out what happens when she's got a better idea than someone who is older than her, or apparently usually knows better, and how to explain to them without causing an argument and wasted time.

In conclusion, then, I would invert Abel's (1982b) observation that "partial advances need not await a total victory." Total victory is contingent upon partial advances, but such advances will be inconsequential in bringing about the desired end if they are restricted to peripheral institutions that reject capitalism at their core. While such advances are a form of progress, broad-based change requires transformations within mainstream institutions that do not begin by challenging the premises of capitalism and the capitalist legal order. As I have tried to show in this paper, there exists the potential for such broad-based change. It is rooted in the ability of human agents to "make a difference," and in the dialectical interplay of factions and the groups that contain them. Ironically, forces that often undercut bold attempts to achieve socialist legality, like those in the collective systems I studied, provide the greatest hope of ultimately achieving it.

REFERENCES

- ABEL, Richard L. (1981) "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice," 9 *International Journal of the Sociology of Law* 245.
- (1982a) *The Politics of Informal Justice*, 2 vols. London and New York: Academic Press.
- (1982b) "A Socialist Approach to Risk," 41 *Maryland Law Review* 695.
- ARCHER, Margaret S. (1982) "Morphogenesis Versus Structuration: On Combining Structure and Action," 33 *British Journal of Sociology* 455.
- BRADY, James P. (1981) "Sorting Out the Exile's Confusion: Or a Dialogue on Popular Justice," 5 *Contemporary Crisis* 31.
- CAPPELETTI, Mauro and Bryant GARTH (1978) *Access to Justice: A World Survey*. Milan: Sijthoff Giuffre.
- CARR, Jerry (1983) "The Synthesis of Functionalism and Conflict Theory: A Study in the Metaphysics of Sociological Dialectics," 7 *Quarterly Journal of Ideology* 14.
- CHRISTIE, Nils (1976) *Conflicts as Property*. Sheffield: The University Centre for Criminology.
- COLLINS, Randall (1981) "On the Microfoundations of Macrosociology," 86 *American Journal of Sociology* 984.
- DANZIG, Richard (1973) "Toward the Creation of a Complementary, Decentralized System of Criminal Justice," 26 *Stanford Law Review* 1.
- DURKHEIM, Emile (1893) *The Division of Labor in Society*. Chicago: The Free Press.
- ECKHOFF, Torstein (1966) "The Mediator, the Judge and the Administrator in Conflict Resolution," 10 *Acta Sociologica* 148.
- EHRlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press.
- FISHER, Eric (1975) "Community Courts: An Alternative to Conventional Criminal Adjudication," 24 *American University Law Review* 1253.
- FITZPATRICK, Peter (1983a) "Law, Plurality and Underdevelopment," in D. Sugarman (ed.), *Legality, Ideology and the State*. London: Academic Press.
- (1983b) "Marxism and Legal Pluralism," 1 *Australian Journal of Law and Society* 45.
- (1984) "Law and Societies," 22 *Osgood Hall Law Journal* 115.
- GALANTER, Marc (1974) "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Review* 95.
- GIDDENS, Anthony (1979) *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis*. London: Macmillan.
- (1982) *Profiles and Critiques in Social Theory*. London: Macmillan.
- (1984) *The Constitution of Society*. Cambridge: Polity Press.
- GIERKE, Otto von (1913) *Political Theories of the Middle Age*. Cambridge: University Press.
- GURVITCH, Georges (1947) *Sociology of Law*. London: Routledge and Kegan Paul.
- HENRY, Stuart (1983) *Private Justice: Towards Integrated Theorising in the Sociology of Law*. London: Routledge and Kegan Paul.
- KAMENKA, Eugene and Alice Erh-Soon TAY (1975) "Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology," in E. Kamenka and R.S. Neale (eds.), *Feudalism, Capitalism and Beyond*. London: Edward Arnold.
- (1978) "Socialism, Anarchism and Law," in E. Kamenka, R. Brown and A. Tay (eds.), *Law and Society: The Crisis in Legal Ideals*. London: Edward Arnold.
- KETTLER, David, Volker MEJA and Nico STEHR (1984) "Karl Mannheim and Conservatism: The Ancestry of Historical Thinking," 49 *American Sociological Review* 71.
- KNORR-CETINA, Karen (1981) "Introduction: The Micro Sociological Challenge of Macro Sociology: Toward a Reconstruction of Social Theory and Methodology," in K. Knorr-Cetina and A. Cicourel (eds.), *Advances in*

- Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies*. London: Routledge and Kegan Paul.
- LEWONTIN, R.C., Steven ROSE and Leon J. KAMIN (1984) *Not in Our Genes: Biology, Ideology and Human Nature*. New York: Pantheon.
- LONGMIRE, Dennis R. (1981) "A Popular Justice System: A Radical Alternative to the Traditional Criminal Justice System," 5 *Contemporary Crisis* 15.
- MOORE, Sally Falk (1978) *Law as Process*. London: Routledge and Kegan Paul.
- NELKEN, David (1982) "Is There a Crisis in Law and Legal Ideology?" 9 *Journal of Law and Society* 177.
- RENNER, Karl (1949) *The Institutions of Private Law and Their Social Functions*. London: Routledge and Kegan Paul.
- ROSNER, Menahem (1973) "Direct Democracy in the Kibbutz," in R. Kanter (ed.), *Communes: Creating and Managing the Collective Life*. New York: Harper.
- ROSS, Edward A. (1932) *Social Control: A Survey of the Foundations of Order*. New York: Macmillan.
- SANTOS, Boaventura de Sousa (1980) "Law and Community: The Changing Nature of State Power in Late Capitalism," 8 *International Journal of the Sociology of Law* 379.
- SCHNEIDER, Louis (1971) "Dialectic in Sociology," 36 *American Sociological Review* 667.
- SCHWARTZ, Richard D. (1954) "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements," 63 *Yale Law Journal* 471.
- (1957) "Democracy and Collectivism in the Kibbutz," 5 *Social Problems* 137.
- SHAPIRO, Allan E. (1976) "Law in the Kibbutz: A Reappraisal," 10 *Law & Society Review* 415.
- STATSKY, William P. (1974) "Community Courts: Decentralizing Juvenile Jurisprudence," 3 *Capital University Law Review* 1.
- SWINGWOOD, Alan (1975) *Marx and Modern Social Theory*. London: Macmillan.
- VAN DEN BERGHE, Pierre (1963) "Dialectic and Functionalism: Towards a Theoretical Synthesis," 28 *American Sociological Review* 695.
- VERSELE, Severin-Carolos (1969) "Public Participation in the Administration of Criminal Justice," 27 *International Review of Criminal Policy* 9.
- WEISBROD, Carol (1980) *The Boundaries of Utopia*. New York: Pantheon.
- WHELAN, Christopher J. (1981) "Informalising Judicial Procedures," in S. Henry (ed.), *Informal Institutions*. New York: St. Martin's Press.