MOVING FROM INTEGRATIVE TO CONSTITUTIVE THEORIES OF LAW: COMMENT ON ITZKOWITZ

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Private Justice examines disciplinary practices in different workplace settings (i.e., hierarchical, participatory, and cooperative) in light of theoretical debates about the relationship between social structure and human agency, on the one hand, and the relationship between formal and informal law, on the other hand. This book challenges us to rethink how these relationships are conceptualized in a wide range of sociolegal theories and it examines the organization of "private justice" or nonstate law, in workplace discipline. Itzkowitz states that Henry succeeds in showing the "existence" of private justice, but he argues beyond that Henry's integrated theory of law is limited in a number of ways. Among its limitations, according to Itzkowitz, is that the aspiration of integrated theory *not* to separate parts (i.e., structure and action, formal and informal law) makes it "difficult to know where the analysis should begin" (p. 954). Rather than oppose the aspiration for integrated theory, Itzkowitz argues that "an integrative theory of law requires a different approach" (p. 960). Itzkowitz's disagreements with Henry exemplify some of the contemporary debates in law and social theory. In particular, as I read Itzkowitz's comment on *Private Justice*, he takes issue with two aspects of Henry's approach. First, he questions the utility of legal pluralism as a methodology and/or basis for integrated theory. Second, he questions the value of approaches that deconstruct relations of social control as opposed to those that predict which forms of law will prevail under certain social conditions.

Although Itzkowitz embraces legal pluralism, for him it is only a way of describing the existence of different legal systems. He argues that Henry has "misplac[ed] the theoretical emphasis" by focusing on "the mere existence of elements and layers rather than the dynamics of their integration" (p. 956). But Henry wants more from legal pluralism than simply descriptions of multiple legal forms. In his study, Henry uses legal pluralism as both a framework for describing semiautonomous legal forms (formal and informal), and a methodology for studying disciplinary practices at work. Both applications are at odds with Itzkowitz's implicit understanding of legal pluralism. Legal pluralism for Itzkowitz organizes "various formal, structural elements of law

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and informal, micro-elements of social control (private justice)" along what he calls "the continuum of law" (p. 954). In contrast, Henry seeks to avoid the kind of legal pluralism that assumes an *a priori* ordering or hierarchy among legal forms.

Instead Henry designs an analytical map made up of different layers of sociolegal relations. With this map as his guide, Henry examines the relationship *between* semiautonomous and interdependent legal forms (formal and informal) in the *context* of everyday experiences that are also comprehended as part of a larger social structure or "totality." Henry finds fault with traditional theories of legal pluralism and the ethnography of dispute processing literature, because both fail to "achieve a dialectical analysis" of relationships of social control that, for Henry, explain the constitution of workplace discipline (1983: 57). For Henry, legal pluralism is a dialectical theory of sociolegal integration.

If, however, Henry said more about what a successful dialectical analysis was and paid less attention to restacking the lumber of previous generations of sociolegal theorists with whom he takes issue, we might have a clearer sense of his contribution to integrated theory. It is conceivable that a reader, even one who is more theoretically sympathetic than Itzkowitz, might not fully appreciate Henry's project because there is a lingering ambivalence in his work about the connection between where we have been and where we are heading in the "sociological movement of law."[1] For instance, Henry objects to approaches that link social structure and law in a correspondence fashion (e.g., formal law corresponds to hierarchial organization and informal law corresponds to cooperative organizations).[2] He also does not want to argue for what he calls "macro" theories, which emphasize structural determinants of workplace discipline (i.e., economy and state) over the meaningful actions by managers, union leaders, or workers. Nor does he claim to privilege "micro" theories that focus on motives and interests of managers and workers. Nonetheless, Henry retrains the macro/micro distinction in his own study, albeit with the purpose of integrating them. He takes us back to what he has argued are limiting paradigms and says it is "necessary to explore the processes of interpenetration of the micro-structures with the macro and vice versa" (ibid.: 62). Toward the end, Henry appears to let go of these paradigms when he says it is "not necessary that the two explanations given above [micro and macro] are mutually exclusive," but then he returns to them when he concludes that "an adequate theory of law must address both the macro and the micro without losing the autonomy of either" (ibid.: 216). Henry

[1] This phrase is borrowed from the title of Hunt's (1978) book on the intellectual roots of sociolegal theory.

[2] Similarly, Nelken (1986) argues that Henry is ambivalent in his treatment of the "correspondence thesis."

seeks to transform the dominant explanations into distinct but compatible analytical frameworks.

Is integration a theoretical problem that demands attention, or is it a barrier to the larger theoretical project Henry wants to advance? I am inclined to argue that it is a barrier, but join with Henry's aspiration to build a social theory that does not reduce law to an outcome of behavior or social structure. His larger claim is that (ibid.: 61):

> By recognising the dialectical relationship between structure and social action and how these are interdependent and mutually implying, we begin to see the possibility of transcending the view that law is either the product of structure, or the outcome of interaction. We begin to glimpse how informalism is not so much an alternative form of law but a necessary part of the ideological process whereby the crystallised, formalised, objective-like qualities of law are created and sustained in an on-going manner. It is necessary to reveal the ways in which in acting at the informal spontaneous level of interaction, total social structures are conceptualised and implied as though they were objective realities having real consequences.

Instead of calling this move an effort to establish integrated theory, it might be more accurate to call it a constitutive theory of law. As Henry himself states (ibid.: 68):

> An adequate theory of law, then, must be sufficiently sensitive to capture both the totality of social structure and the particular of human action, the macro and the micro, without absorbing the one into the other. Neither is a product of the other, but each implies the other. Both have autonomy but neither is completely free from the influence of the other. From the integrated theoretical perspective then, law can only be adequately analysed through the processes whereby it is constituted.

His study of discipline at work focuses on "the ways people in their doings with each other construct and reconstruct the manifest appearances of law" (ibid.). Thus, similar to some contemporary studies of legal ideology,[3] Henry's study of factory law takes us beyond the task of bridging structure and action and moves us toward a constitutive theory of workplace discipline.

Itzkowitz holds on to the macro/micro distinction, but for reasons other than those mentioned by Henry. Specifically, Itzkowitz wants an integrated theory that is able to *predict* which factors are likely to determine the form of law. Henry is instead engaged in the deconstruction of factory law; "showing what is taken to be the reality of private justice . . . is merely one surface appearance of a wider range of social control" (ibid.: 98). Henry argues that the nature of factory law itself "is actually part of the process whereby

[3] For example, see the "Special Issue on Law and Ideology," 22 *Law & Society Review* (1988).

it [factory law] is constituted as a reality, separate from the actions of those who create it" (ibid.: 71). Thus, while Itzkowitz seeks an integrative theory that can predict which factors determine law, Henry's approach takes us in the opposite direction—toward an analysis of the ways in which factory law is constituted as a reality about the workplace.

In addition, Itzkowitz questions whether a theory can address the "possibility of dominance" (p. 956) if it does not specify which elements of law will prevail under particular social conditions. Under what conditions might semiautonomous legal forms come into conflict with one another and as a result become relatively less "semiautonomous?" This raises an important yet difficult issue for Henry's approach because in his study private justice is thoroughly imbricated in workplace discipline. Yet the question of dominance is central to Henry's study. British workers in companies with joint management-worker disciplinary processes, for example, speak of "aspects of the social control package," and from their narratives Henry concludes that "although some general protection exists through union involvement in many cases it would seem that management were able to impose their own views on what should happen" (1983: 165). What follows from these insights is not a set of general principles or a hypothesis on the relationship between social structure and social action, but an approach to sociolegal research that "emphasise the *partiality* of any particular form and the interdependence of it with the totality" (ibid.: 216, emphasis added).

The problem of linking human agency and social structure in studies of law is a common problem whether one's goal is to predict or deconstruct sociolegal relations. It is also not a new problem. There are, however, new sets of issues that have come into the discussion concerning agency and structure. Integrative approaches that unite macro- and micro-perspectives in a single theoretical framework (see Giddens, 1979) may provide new insights concerning law in society such as the partiality thesis. Beyond merely reformulating the relationship between micro- and macro-explanations, they may also raise additional theoretical problems. For as Henry notes, "above all else [an integrative approach] recognises that action and structure presuppose one another and as such cannot be addressed separately" (ibid.: 64).

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