

IDEOLOGICAL PRODUCTION: THE MAKING OF COMMUNITY MEDIATION

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Through an analysis of the structure of the community mediation movement in the United States and an ethnography of the practices of mediators in local programs, this paper examines how community mediation is made, and how it is ideologically constituted. The ideology of community mediation is produced through an interplay among three ideological projects or visions of community mediation and organizational models, and by the selection and differential use of mediators to handle cases. We argue that ideologies are formed through the mobilization of symbolic resources by groups promoting different projects. Central to the production of mediation ideology is a struggle over the symbolic resources of community justice and consensual justice. Although various groups propose differing conceptions of community justice, they share a similar commitment to consensual justice, and this similarity is produced through reinterpretations of the same symbols. The ambiguities in community mediation are, it appears, being overtaken by consensus on the nature of the mediation process itself.

Behind the hue and cry of alternative dispute resolution reform and critique, a quiet struggle is taking place over the meaning of community mediation itself: the nature of its reform mission, the strength of its ties to the state, its use of symbols of legality, and its methods for handling disputes. That it should be difficult to precisely define community mediation is not surprising in light of the history of informal reforms, and their gradual legalization over time (Auerbach, 1983). Community mediation reforms have been initiated by judicial reformers, religious leaders, and community organizers. There has been a gradual infiltration of legal concepts and actors into non-legal reforms. Moreover, legal reformers have adopted the language of community organizing.

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The making of community mediation is not simple or obvious, but is a subtle transformation of language, personnel, and procedure.

This article focuses on the making of community mediation through a study of ideological production. Through the interplay of social action and structural constraints ideologies are constituted. We describe two processes that shape and constitute community mediation in the United States. One is the process of mobilizing funding, institutional support, judicial connections, caseloads, and legitimacy within the national alternative dispute resolution movement. In the debate over what community mediation is and what it can accomplish, various groups have attempted to capture the powerful American symbols of community justice and consensual justice as labels for their projects. The second process concerns the selection of mediators within local programs. Groups of core mediators have emerged from the selection process and work with staff to refine practice, train other mediators, and articulate a vision of mediation to themselves and others.

Both the resource mobilization process and the mediator selection process produce mediation ideology. This ideology is constituted by the interplay of several conceptions of community mediation and organizational models. Although the main struggle within the reform movement may appear to be a simple contest between opposing camps (e.g., court-based v. community-based reformers and programs), the most important point derived from our analysis is the way in which the different conceptions and organizational models have influenced one another.

We have identified three analytically distinguishable projects within community mediation: the delivery of dispute resolution services, social transformation, and personal growth. We call these conceptions ideological projects to highlight the fact that visions of community mediation are associated with differing organizational interests, models, and resources. Each has appropriated pieces of the other, borrowing the language of community participation to expand mediation as a judicial service, mobilizing arguments about personal growth and satisfaction behind institutionalized mediation services, leaning on the coercive power of justice-system referrals to gather cases into socially transformative programs. This article explores these different conceptions of community mediation and the similar focus on consensual process in all three projects. The contest between the projects is mediated through a consensus on the nature of the process.

This paper examines the processes by which a definition of community mediation and its practice is created and established. Thus this analysis differs from existing studies of community mediation in that it does not focus on the impact of community mediation on social justice questions, or the protection of rights, or the benefits to users. Here, empirical study is not directed toward documenting and measuring the effects on law and society but toward

understanding law as a signifying agent, as a system of meanings. This ideological perspective asks how sociolegal phenomena are constituted: by what set of ideas, practices, and material conditions. This approach connects understandings of the 'sociolegal world with its material organization.¹ The contests over community mediation are not just in the realm of ideas but organized around activities and resources.²

Ideology is not simply a set of ideas or attitudes; it is constitutive in that it forms and shapes social relationships and practices. Ideology contains symbolic resources that can be drawn on by groups who use their power to promote their interests (Cohen, 1974; Edelman, 1977; Bourdieu, 1977). Brigham, for example, shows how legal ideologies shape social relations and provide symbolic resources in social movements (1987). Since symbols contain multiple layers of meaning (see Geertz, 1973), they are subject to various interpretations and political uses (Bourdieu, 1977; Edelman, 1988). Ideology has often been used within the critical tradition to describe the ideas, conceptions, and categories that express and promote the interests of a dominant class (Larrain, 1979; Therborn, 1980; Hunt, 1985). Critical scholarship on ideology has moved away from this position, however, and instead more recent work on ideology focuses on how it contributes to creating social life, within the constraints of material relations, as well as being created by social life. We are interested not only in exploring the processes by which dominant groups construct and promote ideologies, but in the dynamics of contest in the production of these ideologies.

In tracing the formation of community mediation, we combine an analysis of the structure of the reform movement with an ethnography of the culture and practices of local mediation programs. Our observations are based on eight years of researching the development of the national reform movement and on data from a more detailed study of three different local mediation programs in New England. One program is closely affiliated with a court, one based in a community, and one allied with a social service agency.³

¹ This approach to the study of law is part of the broader social science critique of positivism (see Winch, 1958; Gunnell, 1975; and Taylor, 1979; and in anthropology, Marcus and Fisher, 1986). In the law and society field, work by Balbus (1973) and Scheingold (1974) are early examples of this approach. See Brigham (1980) for a more elaborated description and analysis of this sociolegal research tradition.

² To adopt the language of ideology may seem foolhardy to some. The term brings with it a long history, stretching back hundreds of years, with multiple meanings, contexts, and connotations (see Larrain, 1979). It therefore carries the conceptual baggage of shifting meanings and applications. Yet sociolegal research on mediation and informalism is riddled with the term ideology. Apart from more functional theories of mediation ideology, discussed below, ideology has not been fully articulated as a perspective on mediation.

³ The data on programs was collected from 1980–84. This research includes participant observation in the training sessions of all three programs, interviews with the entire staff in each program, informal observation over

Part I is a discussion of sociolegal perspectives on informalism that have influenced our work. We examine the major approaches developed from critical analyses of informalism and describe how an ideological mode of analysis advances this work. Part II applies this perspective to community mediation. It examines the two processes of ideological production: the mobilization of symbolic and material resources and the selection of mediators. Within the reform movement, we explore the interplay of three ideological projects—service delivery, social transformation, and personal growth—that we use to characterize the community mediation movement for purposes of analysis. Within local programs, we examine the selection of mediators by program staff.

I. SOCIOLEGAL PERSPECTIVES ON INFORMALISM

To some extent, since its publication in 1982, *The Politics of Informal Justice* has shaped the debate about informal justice (Abel ed.). Abel and his collaborators argue that informal justice expands state power through non-state forms. Our analysis begins with that proposition, but focuses on its implications and limits. Some individuals and groups attempt to define and constitute mediation in ways that do not extend state power and supervision. Some reformers and program mediators borrow judicial language although others resist it. There has been a florescence of programs rooted in and funded by the courts, but there has also been a proliferation of religious-based, social service-based, and community-based programs. Some speak of avoiding court, others of personal transformation. The field of community mediation is diverse and somewhat untamed; not all programs follow the judicial mold.

Much of the critical scholarship on mediation has examined its relationship to existing legal processes and has looked at the ways mediation *maintains* or *challenges* these processes. The first wave of critical sociolegal research on informalism examined its *social control* function, i.e., the ways it promotes conformity to norms. This early work on informalism describes mediation as a product of the changing nature of state power (Santos, 1980; Harrington, 1985; Hofrichter, 1987) and corresponding changes in the form of law (Abel, 1981; Spitzer, 1982). Together, the state and its legal apparatus have generated new forms of social control (Cohen, 1985). This social control perspective self-consciously seeks to shed the skin of a legal analysis marked by economic reductionism and takes seriously the contemporary criticisms of formal legal institutions, rights, and process-based justice. But it does not treat mediation simply as a false promise, a conspiracy by those in power

several months in each program office, observations of 169 mediation sessions, observations of the relevant courts, and interviews with 47 mediators. Susan Silbey collaborated with Sally Engle Merry on some of this work and Ann Marie Rocheleau on other parts (see also Merry and Silbey, 1984; Merry and Rocheleau, 1985; Silbey and Merry, 1986, 1987).

against the powerless, or even a simple reflection of the existing power structure. Informalism represents the expansion of state power, but the form of state power represented by informalism is significantly different from traditional state social control mechanisms. There is a certain irony, if not ambiguity, in this particular form of social control because it adopts the language of the helping professions,⁴ the language of anti-coercion and anti-punishment. The symbols of community participation, represented by concepts such as neighborhood justice and community justice, are not merely masks for state power but are expressions of it. This interpretation grows out of Foucault's work on power relationships and changing styles of social control (1979). It locates power in socio-legal concepts and understandings rather than in simple brute force or official punishment.

This critique of informalism does not, however, reinstate the "myth of rights," it identifies the "politics of rights" (Scheingold, 1974).⁵ It keeps alive on-going debates concerning the limits of rights as a vehicle for social change by examining the different social ordering functions of various forms of dispute processing, the relationship of informalism to formalism (Harrington, 1985; Dezalay, 1987), and the limitations of a law-centered view of socio-legal relations (Silbey and Merry, 1987; Merry 1987; Sarat, 1988).

Within the critical tradition, another perspective on mediation has emerged in recent years. It stresses the role of human agency, as well as the constraints of social structure, and argues that informalism may in some instances function to resist state law. In this view, informalism enhances legal pluralism. The social control perspective is cast as having produced a pessimism about informal justice, deregulation, and popular justice, which Cain claims results from a "failure to distinguish between types of informal justice in a theoretically adequate way" (1985: 335). These scholars agree that the social control perspective on informalism has "over-emphasized social structural influences and underplayed the degrees of autonomy that community justice institutions can have" (Henry, 1985: 307). The objective then is to identify informal set-

⁴ See Edelman's (1977) discussion on the role of ambiguous political concepts in establishing policy. In particular, he examines how those concepts are employed by the helping professions.

⁵ Advocates of mediation have responded to the social control critique by saying that "negative evaluation(s) create[d] a growing chorus of despair, a feeling that the devil of formal justice whom we know may after all, be better than his dangerously unfamiliar informal brother" (see Cain, 1985: 335). This response may have been provoked by those critics of mediation who have asked the reformers if they would advocate informality when "the bank sought to foreclose their mortgages or repossess their cars, if their employers fired them or the school expelled their children," or whether this reform is limited to the problems of the poor (Abel, 1985: 379). Why is it white middle-class reformers find racial discrimination disputes ideal for mediation, while the black civil rights community does not (Delgado *et al.*, 1985)? And perhaps experiments with informality might begin among the haves instead of the have nots (Minow, 1987).

tings that enable “counter-power” to appropriate power versus settings where this is less likely to happen (Fitzpatrick, 1988: 25). Fitzpatrick calls this the “new informalism” (Ibid., 4):

There is now a profusion of academic perspectives bearing on the informal-varieties of poststructuralism and post-modernism, feminism and anti-racism, of hermeneutics and cultural critique. By and large, these would oppose surpassing reductions of the informal and would espouse difference and diversity.

The new informalism shares with the social control perspective a theoretical concern with studying the relationship between formal and informal legal processes and institutions. This relationship is the critical social context for identifying the social bases of counter-power. It is also important for determining the social function of informalism. Cain believes researchers need to establish a “stand-point specific” evaluation of informal justice—that of the working class (1985: 365). Henry believes attention should be given to the ambiguous relationship between a small-scale housing cooperative and the legal system—a relationship wherein the cooperative is capable of interacting with rule systems in a “dialectical way such that both the alternative system and the capitalist order are vulnerable to incremental reformulations” (Henry, 1985: 324). And Handler believes a theory of public action is needed to view the informal exercise of discretion in the welfare bureaucracy as not only inevitable but necessary and desirable for individual/agency relationships in the area of special education policy (1986: 11).

Our study of community mediation draws on insights from both the social control and social resistance analyses. But instead of emphasizing the functions of ideology it turns more explicitly to an examination of how this ideology is produced.⁶ We argue ideologies are formed through the mobilization of symbolic resources by groups promoting different projects.

II. THE PRODUCTION OF COMMUNITY MEDIATION

The topography of contest over the meaning and organization of community mediation in the United States can be divided *analytically* into three distinguishable ideological projects:

1. *Delivery of dispute resolution services.* According to this project, the courts are inappropriate for interpersonal problems; they are too slow, public, and adversarial. The motto, “let the fo-

⁶ In Hunt’s discussion of issues within the theory of ideology he examines theories that direct attention to the functions of ideology. Hunt notes that “Functionalism assumes that there are necessary functions that must be fulfilled and then proceeds to search for the agency that realizes or fulfills each function. The deficiency of functionalism is that functions are reified. Their existence is assumed and all social practices and institutions must be classified in terms of them” (1985: 17). Also see Harrington (1985: 13–14) for a discussion of the limits of functional analysis in studies of informalism.

rum fit the fuss," zeros in on notions of sorting problems into appropriate conflict-resolution processes (Sander, 1976). Mediation promises efficiency, specialized forums for particular kinds of problems, and the rational allocation of judicial resources. It promises to relieve court congestion by tracking cases more efficiently. The earlier concern with access to justice is folded into this project, in that more informal forums were, at least initially, held to be more accessible and attractive to potential litigants (see Tomasic and Feeley, 1982). The interest in rationalizing, streamlining, and fine-tuning the judicial system to cope more effectively with a wide range of problems has been a theme in court administration and court reform throughout the twentieth century (Harrington, 1982).

2. *Social transformation.* This project is more readily appreciated by considering the experiments described in Cuba (Salas, 1983), Chile (Spence, 1978), and Portugal after the 1974 revolution (Santos, 1982). In the American context, the social transformation project is more subtle. In the revolutionary situations in Cuba, Chile, and Portugal, the public theater of the lower courts was seen as a powerful socialization experience. The hope that society could be restructured through new forms of popular justice appeared in earlier informal justice experiments in the United States as well (Auerbach, 1983). In the contemporary American movement, there is talk of community empowerment, the creation of a new sense of community through self-governance or neighborhood control, decentralized judicial decision-making, and the substitution of community members for professional dispute resolvers. Proponents of this project turned to socialist experiments conducted under revolutionary conditions for inspiration, deliberately taking on the social transformation agenda that accompanied these movements. This project advocates community mediation completely independent of the judicial system, with its authority based on the local neighborhood rather than on the state.

3. *Personal growth and development.* This project envisions the process of consensual dispute settlement as one which empowers individuals, permits them to take greater control over their own lives, enhances their personal skills in dealing with conflict, and endows them with techniques they can apply to other situations. Mediation is promoted as more humane and responsive to individual needs and better able to tailor agreements to particular situations than courts. Mediation should help people to feel better about themselves. The consistently high measures of satisfaction reported in evaluations of community mediation point to the success of this project, although it is not clear what satisfaction means (Pearson, 1982). The emphasis on personal growth is part of a more general psychotherapeutic disposition increasingly pervasive in American society: the notion that developing interpersonal skills of interaction and conflict management will not only help

people live better lives but also hold better jobs.⁷ There are also religiously inspired mediation programs which argue that learning to settle differences through sharing ideas and talking will diminish dependence and improve spiritual well-being (Beer, 1986).

Local programs typically spin off from a single ideological project, but there are interesting mixes among them. Some programs emphasize social and personal transformation, others advocate increased efficiency as well as greater personal satisfaction. While the first espouses a close working relationship with the judicial system, the second rejects all ties with it, and the third derives its ideological inspiration from the helping professions rather than the judicial system. The description of these three ideological projects, however, is not our central concern. There are already a number of studies describing the belief systems and institutional settings of programs that can be associated with each of these ideological projects (e.g., Felstiner and Williams, 1980; Harrington, 1985; Beer, 1986; Adler, Lovaas, and Milner, 1986; Hofrichter, 1987; Silbey and Merry; 1987). We are interested in the interplay among them. To say, for example, that the service delivery project won out in the end, may tell us something about who prevails or dominates this reform, but it does not tell us how this happens.

We confront an immediate problem, perhaps unique to the American context, when describing the interplay of these three projects. The topography of contest over the meaning and organization of community mediation is diverse, but the political distance, as it were, between different ideological projects is subtle. Comparative studies of informalism reveal much sharper and deeper political divisions over the meaning of community mediation than those apparent in the American experience (see Abel, 1982). For example, in the Soviet Union (Henry, 1983), China (Lubman, 1967), Cuba (Salas, 1983), Chile (Spence, 1978), and Portugal (Santos, 1982) popular justice is associated with periods of upheaval and revolution. Informalism was harnessed to the task of reshaping society according to a new, revolutionary vision. Salas describes the political benefits to the Cuban government in the early post-revolutionary years of a public theater of local justice, carried out on the streets with a clear articulation of the new moral order (1983). Santos describes the role of popular justice in the social transformation in Portugal after the 1974 revolution (1982). And Spence describes the 1971 proposal in Chile to establish neighborhood courts promoted by Allende's recently elected party, designed to establish a nationwide system of elected, neighborhood, lay-staffed courts, framed in the critique that the poor had no access to the existing legal system and that the professional judiciary was part of the legal order that discriminated against the

⁷ See Bellah *et al.* (1985) for a more extensive discussion of this perspective.

poor (1978: 143). In other Third World countries, informal justice reforms were designed to promote modernization by pulling marginal and obstreperous elements into the center (Meschievitz and Galanter, 1982). All of these popular justice reforms developed within particular political contexts that allowed some to flourish and others to fade away.

The terms of debate over community mediation in the United States are not as stark: the underlying political meanings are more subdued and camouflaged. In the American context it is harder to find sharp divisions between self-government and state power, working class control and professional control, and the use of legal metaphors and relationship metaphors. Although the three ideological projects discussed above are analytically distinct, the boundaries between them are ambiguous, with considerable borrowing of ideas and central symbols. Indeed, the use of symbols in the community mediation movement lies in their very ambiguity, in the multiplicity of interpretations that are possible and that are mobilized as resources for the reform movement and within local programs.

A. Resource Mobilization in the Reform Movement

“Community justice” and “consensual justice” are important symbols for the reform movement (Johnson, 1978; Abel, 1981).⁸ Community justice associates mediation with democratic values, such as community participation and neighborhood self-governance, and it evokes the sense of a cohesive community (Abel, 1981; also see Barber, 1984). Consensual justice refers to justice produced through a voluntary process. This symbol associates mediation with the values of individual consent, such as freedom from coercion and external authority. All three ideological projects draw on these symbols, but interpret them in different ways. They are, in Bourdieu’s words, the “symbolic capital” of the reform movement (1977). Although these symbols are shared by all three projects, there are others that are not, such as efficiency and empowerment. To describe the process of ideological production in the reform movement we will focus on how the projects interpret and mobilize the shared symbols of community and consensus.

Among the three ideological projects, the social transformation project most clearly articulated a link between community justice and consensual justice early in the reform movement. In the early 1970s community organizers and anthropologists familiar with community moots in other cultures, endorsed decentralized,

⁸ Community mediation is a national reform movement. Unlike previous local justice reforms that began as municipal reforms and later developed into statewide efforts (e.g., the juvenile justice movement, the small claims court movement, and the domestic relations court movement), the contemporary community mediation movement is peculiar in that it emerged from federal experiments and national coalitions (see Harrington, 1982).

deprofessionalized, self-governing forums for resolving disputes (see Danzig, 1973).⁹ In 1977, Raymond Shonholtz, a former attorney for the California Rural Legal Aid program, founded the San Francisco Community Boards, which has become a model program for neighborhood self-governance and the creation of alternatives outside the courts (Shonholtz, 1984; 1987). Arguing that the expansion of the state was undermining community, Shonholtz envisioned a new justice system entirely outside the existing justice system controlled by the neighborhood rather than by the state.

Working from a Saul Alinsky model of community organizing, the Community Boards Program views community-controlled conflict resolution as one way of developing social networks among neighbors to help organize citizens so they will be empowered to address conflicts within their own neighborhoods. Shonholtz spearheaded the creation of a national organization in 1985, the National Association for Community Justice, to promote social transformation through community mediation. The leaders of this project oppose efforts by the service delivery and personal growth projects to establish uniform standards of mediation practice and credentials, on the grounds that such efforts will professionalize mediation and limit lay citizen participation as mediators.¹⁰ Funding for this project has come primarily from private foundations, with little help from the government.

Further, the social transformation project understands community justice and consensual justice to be inextricably connected; for them, voluntary participation is essential in building a sense of community empowerment. The social transformation projects eschew coercive pressures of the legal system and refuse to accept police or court referrals unless all pending charges are dropped. They view mediation as a more democratic, nonprofessional way of resolving personal and social conflicts if parties voluntarily agree to participate (Shonholtz, 1984). The service delivery and personal growth projects also support the concept of voluntary participation but do not view referrals from police, prosecutors, and judges as inherently coercive as long as the parties consent to participate in

⁹ In reconstructing this history, it appears that the meeting in Pittsburgh between Richard Danzig, who was interested in community moots; Michael Lowy, an anthropologist who had recently returned from research on urban moots in Ghana; and Paul Wahrhaftig, who was involved in community organizing and bail reform action for the American Friends Service Committee in the early 1970s, provided an important cross fertilization of ideas and impetus for this movement. See Danzig (1973) for an early description of the "community moot."

¹⁰ At the 1986 National Conference on Peace Making and Conflict Resolution, members of the National Association for Community Justice criticized the National Institute for Dispute Resolution and the American Arbitration Association for funding law schools to develop alternative dispute resolution curriculum on the grounds that the scarce resources were going to those who already had substantial institutional resources, and further that the impact of this funding would lead to replacing lay citizen mediators with professionals (i.e., lawyers).

mediation. Thus, pending charges constitute a form of coercion for the social transformation project, while the other projects have been more tolerant when it comes to accepting referrals from the judicial system.

The legal profession and the government have provided resources for building programs compatible with the service delivery project. These reformers speak about community justice in terms of expanding "access to justice" (Grossman and Sarat, 1981) through the establishment of mediation programs that train lay citizens to be mediators and provide this service in their communities (Johnson, 1978). The emphasis here is on the provision of services *to the community* rather than building social networks *from the community*. Community justice is equated with providing the community with greater access to dispute resolution services. It is still a symbolic resource for the service delivery project although it has not been mobilized to support what the social transformation project calls community empowerment.

In the case of the service delivery project, the legal profession in partnership with the federal government plays the leadership role in promoting court-based mediation programs and organizing resources to support their institutionalization. In the early 1970s, the federal government (Department of Justice, Law Enforcement Assistance Association) sponsored several demonstration projects, such as the Columbus Night Prosecutor's Program and the Dorchester Urban Court, which were designed to expedite the handling of minor civil and criminal disputes between people who knew one another (see Felstiner and Williams, 1980; Harrington, 1985: 74–77; Hofrichter, 1987: 96–100). It was not until after the American Bar Association's 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice that members of the Justice Department during President Carter's Administration established three Neighborhood Justice Centers to serve as national models for the advancement of this reform. The American Bar Association's Committee on Dispute Resolution was a primary actor in the Congressional battle to secure political support for community mediation, which resulted in substituting a community mediation bill (i.e., Dispute Resolution Act, S. 957 and H.R. 2863, 97th Cong., 1st Sess., 1980) for a bill supporting consumer rights (i.e., Consumer Controversies Resolution Act, H.R. 2965, 95th Cong., 1st Sess., 1977) (see Harrington, 1985: 77–86). And since the first round of experimentation with neighborhood justice centers (McGillis and Mullen, 1977), only the American Bar Association's Committee has received federal funding for organizing community dispute resolution programs. The Multi-Door Courthouse, which screens and refers minor criminal and civil complaints to mediation programs appended to the courts, is an example of the most recent program development within this project

(Goldberg, Green, and Sander, 1985; Roehl, 1986).¹¹ It is similar to nearly two thirds of the 350 community mediation programs that now exist across the United States (Ray, 1986).

The use of community justice and consensual justice as symbolic resources by the personal growth project is more similar to what we found in our study of the service delivery project than the social transformation project. Voluntary participation in mediation is viewed as enhancing the development of an individual's capacity to take responsibility for his or her problems and work out consensual agreements with others. But as in the service delivery project, court referrals are not seen as necessarily impinging on consensual justice as long as the parties agree to participate in mediation. This ideological project does not promise that mediation will change power relations or transform communities, it only attempts to make people happier where they are. Its significance as an ideological project within the community mediation movement is, in part, apparent in the persistent use of satisfaction as a measure of success and the enduring belief that if people feel good afterward, the process is a success.

The Children's Hearings Project in Cambridge, Massachusetts, one of the programs we studied, is an example of this ideological project. Social workers in this private nonprofit program seek to enhance the conflict management skills of parents and children in situations of ongoing battles and to decriminalize status offenses, but they are not particularly interested in improving court efficiency or in transforming the community life from which these families come (Merry, 1987). Community ties are not as central to the personal growth project as they are to the social transformation project or the service delivery project. Projects such as the Children's Hearings Project, however, identify their program with community justice in the sense that they see mediation as one way of using citizens to handle status offender rather than the courts. Mediation is also viewed as developing personal skills that can be resources for individuals in community settings, such as schools and neighborhoods.

It appears that the degree to which voluntary participation plays a role in structuring community mediation programs (i.e., determines how programs get their cases), varies in each ideological project. Moreover, the ideological significance of voluntary participation (i.e., the weight it carries in mobilizing symbols such as community justice and consensual justice) generally has also changed over time. Since the mid-1980s the meaning of "voluntary participation" has been shifting and the symbol of "consensual justice" is being reinterpreted. The meaning of the term consent in

¹¹ The National Institute for Dispute Resolution, which is supported by private foundations, funds the Multi-Door Courthouse along with the U.S. Department of Justice. NIDR also funds special projects, such as curriculum reform in law schools and mandatory court-ordered arbitration programs.

mediation is being transformed by institutional constraints and by the interplay of ideological projects.

Specifically, community mediation programs without close court connections or well-developed court referral systems have experienced low caseloads (DuBow, 1986). Even programs that rely on police, prosecutors, and judges for referrals, such as most of the service delivery and personal growth programs, have had relatively high rates of defendant no-shows, which usually means the respondent has refused to participate in a mediation hearing after the judicial system referred the case to mediation (Harrington, 1984). Leaders in the service delivery project have begun to rethink the role of voluntary participation in the mediation movement, as a result of the low caseloads in mediation programs. They are now calling for the establishment of greater incentives for participation in mediation (National Institute for Dispute Resolution and the Department of Justice, 1984). The incentives that have been proposed and established in a number of jurisdictions make mediation mandatory for certain types of cases.¹² Some jurisdictions have legislation making mediation mandatory in certain cases or judicial rules specifying which cases must be mediated before entering the courts (Freedman, 1984). Even programs that have been most reluctant to accept referrals from the judicial system, such as those associated with the social transformation project, occasionally take cases from the courts. For example, a program in New England modeled after Community Boards reluctantly accepted court referrals after it was unable to attract enough cases directly.

Thus the symbol of consensual justice is being reinterpreted as community mediation programs are being reorganized. Leading proponents of the service delivery project, such as law professors Goldberg, Green, and Sander, claim that while mandatory mediation might require disputants to go to mediation, the *process* itself is consensual and noncoercive (1985: 490). The term consensus is being redefined from a voluntary decision to participate to a consensual decision-making process where participation has been mandated. Consent by the parties still plays an important role in mobilizing support for community mediation, but now it is talked about as embedded in the mediation interaction and decision-making process and not necessary at the point of referral to a mediation program. The diversity among ideological projects is mediated through this redefinition of the shared symbol of consensual justice.

The symbol of community justice, however, has not been fundamentally redefined by actors in the movement as a result of the

¹² The movement to make mediation mandatory has received considerable legislative support in areas such as divorce and custody disputes (see Fineman, 1988) and civil settlement conferences (see Provine and Seron, 1987).

shift toward mandatory mediation. For the service delivery and personal growth projects, closer ties to courts, which result from institutionalizing mandatory provisions, do not fundamentally transform how they have interpreted and mobilized the symbol of community justice in the past. The restructuring of referrals, however, may affect the ability of the social transformation project to sustain its funding and retain its own ideological identity. The social transformation version of community mediation has not gotten a significant portion of government or private foundation funding compared to the service delivery project (Harrington, 1986), but it has served as an important symbolic resource for the reform movement. The material resources and organizational support for the service delivery project are far greater. This project has had the political and financial backing of Democrats and Republicans in the U.S. Department of Justice, the American Bar Association, the American Arbitration Association, and the National Institute for Dispute Resolution.

The reconceptualization of consensual justice produced by the shift toward mandatory incentives does not, however, fundamentally alter the way in which these three ideological projects conceptualize the mediation process—the forms of interaction during mediation. All three projects shared the view that mediation is a consensual process because the parties must agree to the outcome.¹³ Consensus on the nature of the mediation process itself has made it possible to mobilize support for community mediation with popular but ambiguous and contested symbols such as community and consensus. What is *not* ideologically contested in the reform movement—the nature of the mediation process—is a symbolic resource used to mobilize support for ideologically diverse projects.¹⁴ To summarize, the interplay of these projects might be

¹³ Much has been written on the conceptualization of mediation. Nader (1984), for example, argues that binary oppositions are frequently employed in the conception of mediation by its advocates and it is defined by contrasting it with a particular view of how law intervenes in social conflict. Courts are portrayed as formal rather than informal, adversarial rather than cooperative, remote rather than accessible, slow rather than fast, cumbersome and expensive rather than efficient and cost-effective. The problems that are appropriate for mediation are also defined in terms of binary oppositions. Mediation handles interpersonal problems, not those between strangers. It deals with people who have ongoing relationships, not those involved in impersonal transactions. The problems are primarily social rather than legal in substance, concerned with social interactions rather than property, and minor rather than major. By defining a range of problems that the legal system confronts as inappropriate for courts, the reform movement, in our view, creates a constituency for itself.

¹⁴ This particular conception of the mediation process de-emphasizes the state as others have noted (see Abel, 1981; Harrington, 1985; Hofrichter, 1987). But how is this seemingly political consensus produced by different ideological projects? Ironically, in an effort to minimize the state but draw on the organizational resources of the state, the national community mediation movement has produced a benign view of the state. The confluence of left-liberal and conservative political forces in the late 1970s was critical to the ideological production of community mediation. Former Chief Justice Burger of the United

described as a conflict over the particular meanings of ambiguous symbols (i.e., community justice and consensual justice) within a consensus on the nature of the mediation process.

B. The Selection of Mediators in Local Programs

At the local level, mediators replicate the various meanings of community expressed in the national reform movement. At the same time as they articulate these different conceptions of community they agree that the process is consensual, yet they pay little attention to the extent to which participation is voluntary. Instead, practicing mediators define consensual justice not in terms of voluntariness but in terms of neutrality and detachment by the third party. Mediators come to view neutrality as the central symbol of their practice. Through processes of training, selection, and differential use of mediators, mediation programs promote the mediator's conception of consensual justice as neutrality. Those who see mediation this way tend to participate more in doing mediation work. This winnowing process is similar in the three programs studied, despite their different orientations toward community justice. One program expresses the ideological project of social transformation, one that of service delivery, and one that of personal growth. All three deal primarily with family and neighborhood disputes. Nonetheless, all three programs address the ambiguities between the symbolic demands of community justice and consensual justice by focusing on the neutrality of the process.

A small fraction of the total pool of mediators in these three programs, handled a disproportionate number of cases. These mediators came to constitute an elite that, along with staff, defined good practice, evaluated other mediators, trained new mediators, and occasionally moved into staff positions themselves. In the personal growth program, which dealt with conflicts between parents and their teenage children over truancy, rebelliousness, and running away from home, eight of the forty-one mediators handled forty-seven percent of the cases.¹⁵ In the social transformation program, eight of the thirty-one mediators handled sixty-three percent of the cases. And in the service delivery program, ten of

State Supreme Court, leaders of national and local bar associations, legal academics, and community organizers from both sides of the political spectrum attacked the due-process revolution and called attention to the dangers of adversarial dispute processing for on-going relationships. The combination of these political forces makes for interesting strategic tensions within the reform movement. It also explains why the state is de-emphasized by the national reform. For the left-liberals, the state and concepts such as state power connote coercion and social control. Conservatives prefer a minimalist state.

¹⁵ These mediators were trained in two cohorts, 1 year apart. To control for the effect of experience, since the first cohort obviously had more time to increase the number of cases it heard, the total pool was separated into two cohorts. In the first group of mediators trained, 5 of 23 handled 50% of the cases; in the second group, trained a year later, 5 individuals handled 45% of the cases.

the twenty-six mediators were used often according to program staff, but the exact frequency of use in this program was not available. Each program also had a group of second-string mediators who were considered good but not the best, and a small group of marginal mediators viewed as questionable by staff.

The repeated use of a small group of mediators to handle approximately half of the cases suggests that these programs have what we call core mediators, people who mediate most often. Overall they tend to be more educated than the total mediator pool and are more likely to have professional backgrounds in law or the helping professions. In the personal growth project, the eight core mediators were fairly similar: six women, seven white and one black; seven had finished college and of these, five had advanced education, and all but one had worked in social work, law, or other human services.¹⁶ In the social transformation program, of the eight core mediators, three were women; four white and four black; six had finished college and of these, one had a doctorate and one a law degree, and four had worked in the helping professions or the law. In the service delivery program, the most frequently used mediators also tended to have college degrees, but were less concentrated in law and the helping professions.¹⁷

Mediators are asked to handle cases depending on staff assessments of their competence, their availability, and their reliability. Staff identify some mediators as "good" with family cases and skilled in cases with intense emotion, and others as capable of handling landlord/tenant problems, which involve financial negotiation. Mediators often acquire a reputation for skill with a particular kind of case. In addition, there are some mediators who are regarded as overall good and others overall poor. By and large, those viewed as skilled are invited to work far more often than those viewed as poor. Frequency of use is, therefore, one indicator of competence.

However, it is difficult for staff to evaluate mediators when staff members do not attend mediation sessions. And all three programs resisted establishing explicit procedures for evaluating the quality of mediation skills. One common measure of competence is reaching an agreement, but there are other, far more subtle measures: shouting heard from the room, length of time to reach an agreement, and apparent satisfaction of the parties at the

¹⁶ The top 5 in the second cohort were quite similar: 3 were women; all were white; 4 had advanced education; and 2 were lawyers, 1 a social worker, and 2 community workers.

¹⁷ Although this observation appears to contradict the findings of other research, such as Pipkin and Rifkin (1984), the more professional group of mediators in the social transformation program may reflect differences between the towns where these programs are located. There are a higher proportion of professionals with advanced education in the town where the social transformation program is located compared to the town where the service delivery program is located.

end. Staff rely on two other sources of information as well. In all three programs, training involves intensive role playing under the watchful eyes of trainers and staff. Apparent lack of ability or inappropriate stance is quickly noted and discussed. Second, in programs using two or more mediators to hear a case (e.g., the service delivery and personal growth), mediators sometimes comment to staff on the performance of the other mediator.

Mediators are themselves aware that not everyone is asked to mediate cases and that some people are asked more frequently. Many of the mediators interviewed¹⁸ interpreted the frequency of selection as an assessment of ability and skill. They thought that those asked often were good and those asked rarely were poor. Those rarely invited felt unappreciated and after a while, usually dropped out.

Those who mediated most often not only honed their skills through practice, but also became recognized as skillful by other mediators. Frequent mediation serves as a subtle index of competence and prestige. Moreover, those core mediators frequently become trainers themselves for subsequent cohorts of trainees, enhancing their status as people who can articulate and identify good mediation practice. The core mediators were also the ones invited to lead training programs for new mediators, to write training manuals, to take over staff functions, and ultimately to move into staff positions.

Core mediators also exercise considerable influence over defining good mediation practice, in identifying which recruits seem promising, and in selecting who is invited to mediate and how often. Replication rather than innovation is the dominant theme in all three programs, but core mediators and staff are more likely to reinterpret mediation ideology and adapt it to their circumstances than other mediators, who simply reproduce the ideology.

As they speak of their practices, its purposes and value, all mediators express the distinct ideology of their program. At the same time, they describe the experience in the mediation process itself in similar ways. They all emphasize the importance of communication between parties, listening for the parties' definitions of the problem, and helping them arrive at settlements rather than suggesting or imposing their own settlements. But these themes appear more clearly in the discussions of core mediators, along with a firmer commitment to withholding judgments of the parties and their situation. Mediators who push too hard for settlement are marked down; those who are more delicate and subtle in their probing questions and who focus on the communication between parties are more highly valued. Examples of how core mediators

¹⁸ Ten of 31 mediators were interviewed in the social transformation program, 16 of about 40 (including later trainees) in the service delivery program, and 21 of 41 in the personal growth program.

from all three programs speak of their practices illustrate the ideological differences between programs, along with the similarities in the mediators' views of the process itself. These examples also illustrate the kinds of people that are core mediators.

Core mediators from the social transformation program discuss their political orientations, but also emphasize the importance of communication and withholding judgment in mediation. For example, one core mediator in the social transformation program is a thirty-six-year-old black man with a Ph.D. in clinical psychology who does management training for a management consulting firm and has lived in the neighborhood for twelve years. He hopes that mediation will lead to social change. If it were used on a broad basis, he believes that it might, but now he says mediation is far from the norm. He worked for the youth services division of the state in the early 1970s and after observing what he calls widespread discrimination against juveniles in court, he believes there should be alternatives, such as mediation. In his description of the mediation process, he applies the principles of his professional practice to his goal of neighborhood building:

I look for peoples' concerns, the reasons why this issue is important to each of them, and try to create an environment where they feel safe enough to articulate that concern. I do this by being open and nonjudgmental, by genuinely listening to their feelings, and letting them feel that their feelings have been heard and trying to get the other party to hear them. I focus on trying to get the other party to hear what is behind the other's manifest position. If they do hear this concern, it is relatively easy to come up with an agreement. In one case, for example, between a tenant and a sublessee, the real concerns had nothing to do with the resolution. I suspected there were other concerns when they went over the list of damages [which the tenant charged against the people who had sublet the apartment] and they could agree on all the big money issues but not on any of the small ones.

He says that in conflicts between tenants, the parties tend to attribute things to each other that are really projections of themselves: "They blow things up and really need just to talk to each other in order to get over that." He says people fight because

they have some feeling that their concerns are not being heard, and therefore a feeling of being abused. Conflicts are resolved when people become better listeners to each other and hear about other's real concerns.

He says he tries not to make value judgments about the parties in the mediation session:

I generally do not, but I am not rigid. I could [talk about my values] if it would be useful, if it could help the person see other alternatives, but I use it sparingly. I did do it when I got desperate in one case where a tenant refused to move out of an apartment owned by her ex-boyfriend but

also refused to pay rent, but I just alluded to it. I said to the tenant, "You're not offering very much." But that was the closest I wanted to come to being directive, to making a value judgment.

A second mediator in the social transformation program, a twenty-six-year-old white man with an Ivy League college degree working for public television, describes himself as having a socialist, left-wing Jewish background. He was attracted to mediation as a way to give people a sense of entitlement, of control over their lives and their disputes, of empowerment, which goes along with his political philosophy. He emphasizes talking as little as possible as a strategy and keeping the parties talking to each other, while providing a minimum of advice and intervention, including a minimum of caucusing. This mediator talks about the importance of open communication between the parties as the way to resolve differences. He stresses that if the parties could really talk to each other, they would be able to resolve their differences. He says that the courts are overly bureaucratized, confusing, prejudiced, inhuman, and alienating. He made no references to helping the courts, only to helping the community and the disputants.

A third mediator in the social transformation program, a white woman in her twenties, said she was interested in mediation because she is concerned with feminist issues, with empowering women, with women "owning the things that happen in their lives." She had done community legal education in VISTA and was interested in getting people to advocate for themselves. She was looking for a "genuinely" community program, not one "run by academics who come and go." She sees the program as a form of community organizing, or something that could lead to community organizing. She said she is not interested in helping the courts, although she believes the program does this more than it benefits the community.

In the service delivery program, located in the courthouse with some staff working part-time in the probation office, mediators and staff emphasize their contribution to the smooth functioning of the court. One core mediator, a fifty-year-old white woman, heard about mediation through her husband, who was a letter carrier involved in union negotiations. She was primarily a homemaker, working part-time at the local newspaper office taking ads. She said "courts are inefficient and not good for personal problems, but that mediation is definitely not a replacement for courts." Problems, such as alcoholism, mental illness, and those involving stubborn people require court.

She describes the process as bringing people together who are very upset over their problems to help them understand and see each other's point of view. She talks about "difficulty in communicating with each other" as the "basic problem" in all the cases she hears. She says that "the parties can discuss their problem ration-

ally with the mediator and hear each other talking.” She thinks that the public sessions (with both parties in the room together) are the strongest part of the process, the most effective, although the private sessions (with each party alone) are often therapeutic to the person himself. She describes her strategy as a mediator in the following terms:

Make eye contact with the parties, speak calmly and rationally to them. This often calms them down. Don't take the role of the inquisitor, don't ask too many questions, but listen carefully. If they won't settle, I use the agent of reality approach, pointing out that unless they can reach an agreement, they will have to go to court.

If they refuse to settle at the end of the case, she tells them that in mediation they can decide for themselves, but if they go to court the judge will tell them what to do and they will have to do it. She says she knows when she has done a “good job” because the people “leave happy, seem to like the whole idea of mediation, thank the mediators and shake their hands.”

A second mediator in this service delivery program, a thirty-six-year-old white woman who worked for several years as a junior high school teacher, became involved in program administration and made some efforts to become a professional mediator as well. She has a master's degree in education. She is highly regarded in the program and mediates frequently. She describes mediation in relation to going to court:

But it should be a positive alternative. More people should know about it, it should be a bigger part of the whole justice system. It would lighten the caseload of the court. The court could be reserved for murder, big issues, drunk driving.

She says the mediation program needs its own office, more money for supplies and staff, more publicity, and it should expand into more areas. While she talks more about the relationship between her program and the court, she talks about the mediation process in terms similar to those used by core mediators in the social transformation program. For example, she says the “essence of the mediation process is being a good listener, sorting out what you hear”:

The mediator's role is to sort it out, reorganize it, and bring it back to the parties. They don't always think about what they say, they don't listen. It makes them feel good that they are being listened to. My techniques are first, stroking. People need a sympathetic ear, they are upset. Second, I am an agent of reality, saying, this is the way it is, this is reasonable, this is not. A good session is one in which both sides get a chance to be heard and there is an equitable agreement, with both happy with the agreement and it seems that the agreement is workable.

A “good” mediator is a person who is “able to listen, understands

human nature, who is sympathetic and can commiserate.” “With experience,” she says, “you learn what to ask, how to gain peoples’ confidence, and how to sort out the real issues from the others.” She says it is important to keep her values out of the process especially if the parties have values different from hers.

A core mediator in the personal growth program, a white female social worker in her early fifties, says that mediating patent children conflicts will help families develop new skills for managing conflict. She says it will encourage them to shift from fighting about their problems to talking them over. Her stance toward the mediation process is similar to that of mediators committed to the other ideological projects: “A good mediator is a person who can listen, suspend judgment, create a warm environment, encourage parties to express themselves, and remember and organize what people say.”

All six core mediators define neutrality as the essence of their role. Neutrality is a concept that serves as a symbolic resource for all three programs. Mediators interpret neutrality as the maintenance of what we might call a “detached stance,” empathy without acceptance of the values of others (see Kolb, 1985). As they speak of the process, core mediators say they attempt to suspend judgment while they probe and listen. Although they do have opinions about the people they see and about the kinds of solutions they expect will work, the mediators believe they should reserve judgment and not press for a solution. Moreover, the categories they do employ to classify persons and cases are typically drawn from the helping professions or the law and point to environmental stresses on communication rather than personal flaws. For example, a core mediator in the personal growth program talked about “acting-out adolescents” and “mothers who lack parenting skills” rather than “mean kids” and “lazy parents.”

One of the most common reasons mediators are *not* selected, according to the program staff, is that they categorize parties too quickly. Mediators who use categories of right and wrong, categories that classify on the basis of moral norms and that judge, are not selected from the pool of trained mediators and drift into the marginal category. For example, in one case a mediator in the service delivery program decided after the first twenty minutes that one of the parties was “crazy” and she must have thrown the rock the other party saw. This mediator was rated as poor by the staff in the program. A mediator who said, “I think you are being rude toward your neighbors by playing loud music all night” or “You really should stop drinking and take better care of your children,” was considered by program staff to be making inappropriate judgments.

Those mediators who are “quick to judge,” tend to be less highly regarded within all three programs than those who with-

hold judgment.¹⁹ Mediators who make judgments tend to hold values about family and neighborhood life that are more similar to the communities where the programs are located than those who suspend judgments. Precisely because of their participation and membership in the community, it is difficult for them to assume the required detachment. They find making these kinds of judgments, which are a normal part of daily social interaction, difficult to avoid. To these people, standards of family life and neighborly courtesy are important and self-evident. They find this stance unnatural, and move more quickly to consider situations in terms of the standards of reasonableness, morality, and good neighborliness, which they share.²⁰ Consequently, those mediators who are close to the community tend to be used less often in all of the programs we have studied, despite the program staff's strong commitment to involve community people.

The selection process is a site for the ideological production of "neutrality" in the form of a detached stance. People who easily adhere to it are chosen to mediate most often. The detached stance embodies a set of sociolegal meanings concerning the process of mediation *and* it is used in the organization (i.e., selection of mediators) of all three local programs. Thus, similar to the production of ideology in the reform movement, in the local programs what is *not* contested—mediator neutrality—is a symbolic resource for ideologically diverse programs. The process is defined as neutral and interpreted as requiring a detached stance. Only those who can achieve this stance are likely to become core mediators. Those who can, however, tend to be people with higher education and professional training for whom the detached stance is a learned professional demeanor and approach. Despite the efforts of local programs to have a variety of mediators from all ethnic, class, and educational backgrounds, the demand for neutral mediators and the detached stance tends to favor people with professional backgrounds. Ironically, it is the interest in providing neutral and detached mediators that facilitates the emergence of a core of mediators who are professionals.

III. CONCLUSIONS

This study illustrates the possibilities of an ideological mode of analysis for understanding sociolegal phenomena. The ideological perspective on mediation suggests that we examine not only the functions of ideology, but also how it is produced. Similar to the

¹⁹ These people become the marginal mediators who are infrequently used. Some who are quick to judge drop out during the training session and some leave in the initial weeks of practice.

²⁰ Education and professional experience differentiate between those who judge and those who withhold judgment. Moreover, those without backgrounds in the helping professions may not find the alternative categorizations provided by this field so available.

cultural analysis of disputing (Nader and Todd, 1978; Snyder, 1981; Engel, 1984; Yngvesson, 1985; Greenhouse, 1986), the way societies handle disputes is culturally constructed, and the meaning of disputes and of resolution varies greatly from one cultural framework to another. Anthropologists tend to treat ideology as a kind of culture—shared, public, and symbolic (Geertz, 1973). However some cultural analyses have not been attentive to the power inherent in the production and imposition of ideology (see Cohen, 1974; Comaroff and Comaroff, 1986).

Our research contributes to the study of law and social relations by focusing on sites of ideological production (i.e., the reform movement and local programs). We are not interested in ideology merely as a description of a cultural world—only as difference—but in how it is generated under certain conditions (i.e., the mobilization of resources in the reform movement and the selection of who will mediate cases). Within social fields, ideologies are produced and reproduced and may change over time (Comaroff, 1985; Comaroff and Comaroff, 1986). We have described how conceptions of the mediation process as consensual for the parties and detached for the mediator are produced in the interplay between ideologically diverse projects. We find that the focus on mediation as a “consensus” process is an ideology that unifies diverse projects within the community mediation movement. The ideology of mediator neutrality, produced within local programs, cuts across ideologically diverse programs. Thus, the ideology of the consensual process submerges the ideology of community justice.

While actors in the reform movement and staff and mediators within local programs have similar conceptions about mediation, not all projects benefit equally from the mobilization of these concepts. The service delivery and personal growth projects have interpreted and used ambiguous symbols, such as community justice and consensual justice, in ways that have enhanced their ability to garner material resources. These projects, on the one hand, have reinterpreted consensual justice to fit with the shift toward mandatory mediation and, on the other hand, have maintained an interpretation of community justice congruent with this organizational shift. In local programs, the process of filtering out bad mediators and selecting good mediators, who are then empowered to redefine practice, tends to draw in educated, professional people and eliminate those with close ties to the community who find the detached stance (i.e., the withholding of judgments about human behavior) unnatural. Those mediators who might clamor for close ties to the local community become peripheral. Marginalizing community-linked mediators smooths the transition to a reform agenda calling for mandatory provisions and closer connections to the courts. Therefore, to understand the making of community mediation from an ideological perspective is to be attentive to the

power inherent in the production and mobilization of symbolic resources.

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