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BEYOND INFORMAL JUSTICE

by

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BEYOND INFORMAL JUSTICE

Introduction

The debate about informal justice, de-regulation, and popular justice has run into stalemate. Once again, it seems, high hopes shared by both left and liberal reformers have been dashed, and not just because since the advent of the Reagan administration funds from the Law Enforcement Assistance Administration for the Neighbourhood Justice Programme have dried up. Academic criticism and negative evaluation has created 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. This chorus is occasionally punctuated by an attenuated left wing squeak of hope that by some dialectical feat a "genuinely" human and popular form of justice may emerge in spite of all from this newly identified diabolical situation (eg. Abel, 1982; Hofrichter, 1982; Santos, 1980; Spitzer, 1982).[1]

This paper is an attempt to make that squeak a little stronger. I argue that the pessimism arises from a failure to distinguish between types of informal justice in a theoretically adequate way. When all modes of adjudication other than the formal and professional are conceptually conflated the failures from a working class standpoint are bound to outweigh the successes. Not only does this lead to pessimism and nihilism: it makes it impossible both to learn from the mistakes and to identify a direction for future efforts.

The argument here has the following form: in the next section the already established criticisms of informal justice institutions are briefly reviewed, and some additional ones put forward; following that the general requirements for a more adequate theory in this area are specified; the final and most substantial sections of the article

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deal with professionalised justice and three main types of informal justice which can be empirically identified and theoretically established; the nature of the relationship between the types is then considered. In conclusion it is argued that the identification of these types establishes provisional criteria of progress.

Before proceeding one further qualification is necessary. The discussion is intended to illuminate questions of informalism in advanced capitalist societies. Some of the points made may have a bearing on related problems in post colonial societies or in socialist societies, but these are not my central point of reference here, for theoretical reasons (see below) as well as practical ones.

The Critique of Informalism in Advanced Capitalist Societies

Critics of informal justice argue that it is unnecessary, that it has failed, that it is sinister, and that it is impossible. Let us consider these points in turn.

Felstiner (1974) taking issue with Danzig (1973) and also although not explicitly with Christie (1977) argues that in complex and technically advanced societies people typically deal with their problems and resolve their disputes by avoidance or by lumping it. Thus elaborate, semi-official agencies of the type proposed by Danzig are neither necessary nor appropriate. On the other side Danzig and Lowy have argued (1975) and Merry in particular (1979) has demonstrated that avoidance is emotionally and financially expensive for working class people in the United States.

This discussion was inconclusive, since improvements to either formal or informal systems or the abandonment of both could be argued from it. In the same way the argument that informal justice is a failure in its own terms points to no clear alternative. This second critique arose from evaluations of U.S. neighbourhood justice programmes (e.g. Tomasic 1980; Felstiner and Williams 1980) and

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consumer protection agencies (Nader, 1980), following earlier criticisms of the "unmet need" approach (e.g. Morris, 1977; Tunc, 1981). Selections from both arguments can be found in Tomasic and Feeley, 1982. It had been hoped that neighbourhood justice would be cheap, would express community values, be socially integrative, non coercive, and individually therapeutic. The model was the post-colonial African community moot (Danzig, 1973; Christie, 1977). In the event it was found that informal justice could cost more in time and money than formal adjudication, that its practitioners were middle class and expressed professional values, that neither the issues raised nor the clients of the centres were representative, courts tending to off load family matters and (other) "trivia", and clients being disproportionately black and/or female. Moreover, the fact that most referrals came from other social control agencies, as well as the class of the mediators, meant that the system was coercive, while any potentially therapeutic results to be derived from a refereed face to face encounter were lost because the procedure did not allow for such confrontations.

A number of other studies have discussed the co-optation or capture of agencies of informal justice either by various groups of professionals or by what Thompson (1983) has called a professional laity - a group of experienced lay people of proven reliability from the standpoint of those who established the tribunal or other adjudicative agency. Frost and Howard (1977) and Hetzler (1982) have demonstrated an alliance between chairpeople and professionals in various welfare tribunals in the U.K. and Sweden, which effectively inhibits participation by other lay members. Blegvad has made a similar point in relation to consumer tribunals in Denmark (Blegvad, 1983; see also Eisenstein, 1979). Dickens (1983) has pointed to the secondary role played by lay members of industrial tribunals in Britain, compared with their legally qualified chairpeople. This is in marked contrast

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to the French system where, however, some attempts at co-optation have recently occured (Napier, 1979; Rogowski, 1984).

Chairpeople are frequently appointed by or with the approval of the agency upon whose actions the tribunal will adjudicate, and carry the political advantages in the setting accruing to their role. Those recognised (probably by the agency to be adjudicated) as experts have ideological advantages best described as a legitimacy bonus. Thus even where lay members are regular participants they are at a structural disadvantage.

Like the neighbourhood justice centres, these agencies too fail to fulfill their own objectives as at least one official report (Franks, 1957) has pointed out. The voice of the person in the street is not heard, the criteria of adjudication are either professional or class biased, and the "informality" of the hearing itself exists only in comparison with the ritual of a high court. Private rules of procedure, evidence, and entitlement are inevitably substituted for the public ones which are waived.

Proposed solutions to these problems range from reaction (re-professionalisation), through reformist measures (representation by non-lawyers; legal aid to "litigants"), to despair. This lack of guidance towards an alternative results from the lack of a theory which goes beyond the structure of the specific institution(s) under discussion, a theory with adequate conceptual links with a general theory of social structure. Only such a general theory can give adequate guidance as to how desired changes may be achieved, and only such a general theory will contain within it a political morality and the concepts necessary for realising its vision. This is the familiar problem of the limitations of middle range theorising, and the neighbourhood justice studies in the U.S. and the lay justice studies in Europe have willy nilly shared these failings, whatever the practical and political intentions of their authors.

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None the less these studies have considerable value precisely because by and large they are informed by a concern for the clients of these institutions and have been carried out from their standpoint. The negative demonstration that from the standpoint of clients these agencies do not work may not have been sufficient in pointing to an alternative direction, but it has demonstrated the need, both practically and theoretically, for alternative formulations.

The third argument, that informalism is sinister, has various levels of complexity. Mathiesen (1980) and Sousa Santos (1980) for example, develop their analyses from complex attempts to re-formulate the place of law in the modern capitalist state, whereas Abel (1981; 1982), Garth (1982), Hofrichter (1982), Scull (1982), Wahrhaftig (1982), and Winkler (undated), either presume a neo-marxist theory of the state, or regard states per se as dangerous. The arguments, however, are similar; not only has the state encouraged informal justice in order to solve its own political legitimacy or fiscal crises, but in so doing it has co-opted voluntary groups and deeply penetrated the social structure, taking over and transforming common sense evaluations and traditional patterns of relationships. Thus the apparent off-loading of state functions is a disguised form of state expansion. The processes are variously characterised as absorption (Mathiesen), or the substitution of bureaucracy for rhetoric or violence (Santos). Some other authors (e.g. Winkler) see the process as a one-off response to a crisis of capitalism, requiring solutions of low cost and high legitimacy. Mathiesen and Hofrichter see the developments as part of a long term change in the structure of the late capitalist state; Santos sees bureaucracy as one among a range of control resources available to late capitalism, and one which is likely to be used wherever the shifting periphery of conflict and challenge may be located in a specific historical conjuncture. While Mathiesen and Santos in their larger theories create a space for political action, the other

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contributions to the "informalism is sinister" school of thought adopt an instrumentalist position in which the question addressed by the analysis is "how do these institutional arrangements serve the needs of capital/the state?" When the question is posed in this way positive answers as to what might be achieved are impossible, as is any elaboration of the theory of the state itself, about which it is presumed we know already.

With the same exceptions, these arguments can be characterised as a form of socialist idealism, that is, they present a theoretical discussion of capitalism from which informalisation movements are somehow derived, even deduced. No one attempts to use the by now considerable range of materials about these movements to construct a theory.

At the other extreme, but still within the paradigm of the sinister, are discussions which like that of Wahraftig (1982) develop classifications purely in terms of a common sense understanding of the case material. While these are undoubtedly more illuminating than discussions which conflate all types of informalism, they encounter the problems of middle range theorising discussed above in relation to the "failed in its own terms" school.

In sum, the majority of writers who have seen informalism as sinister have been unable, because of the limitations of their own theoretical position, to formulate any alternative. A defensive formalism, following Thompson (1975) becomes the only conceivable tactic. As indicated, Mathiesen and Santos are exceptions in that the concepts they use to identify and distinguish informal structures can be integrally related to their theories of the total social structure. Thus for these authors it is only certain types of informalism which are sinister. Their relative success in making these distinctions and elaborations has profoundly influenced my own position.

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Fourthly and finally there are those critiques of informalism which argue that it is impossible, that informal justice is, in the context of advanced capitalist societies, a contradiction in terms. Once again, scholars of the "impossibility" school can be divided into two groups. First there are those who have contributed to the transferability debate set in train by the arguments of Danzig and Christie (1973 and 1977 respectively, op.cit) that the western world would benefit from the importation of African models of judicial decision making. Merry effectively concluded this debate in 1982, demonstrating that the argument was based on a romantic idealisation of pre-capitalist (but non-feudal) forms. Contrary to this idealised view, mediation in such societies is typically influenced by high status people appointed to the role, it is coercive in that there are strong sanctions against breaches in agreements reached, and it depends on patterns of continuing relationships which do not exist in the capitalist industrialised world. There thus exists an adequate empirical account of the falsity of the premises of the U.S. neighbourhood justice movement.

In Europe informalism has not shared the anthropological premise, although it has shared the objectives. There have been warnings about transferability, albeit from historical (Dawson, 1960) perspectives, or as between advanced capitalist societies (Blankenberg and Reifner, 1981). None the less Marshall (1984) offers a strong case for increased "informalism" in British criminal cases. Both versions, however, are vulnerable to the theoretical attack which argues that informal law cannot be law. As early as 1926 Pashukanis argued that the concept of law, like the concept of commodity, should be historically specific in its derivation (Beirne and Sharlet, 1980). This plainly has relevance for the debate about transferability of institutions between different modes of production, discussed above. Moreover, Pashukanis' extended argument that law can be definitively conceived in terms of the way it constitutes individuals as subjects

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has been elaborated in America by Medcalf (1978), and in France by Edelman (1979), who attempts a synthesis of Pashukanis' argument with an Althusserian (1969; 1971) theory of the interpellation of the subject. These arguments show that law is fundamentally and inevitably destructive of collectivities, so that the use of legal means to reinforce community or neighbourhood ties involves a contradiction.

Thus informal law is a contradiction in terms, at least as far as the working class is concerned. In so far as it is law it is destructive of collectivity, the only source of countervailing power to capital. In so far as it is not so destructive, that is, in so far as it constitutes its subjects in non-individual ways, then this informal procedure is not law. It must be some other form of justice or of social control, depending again on a class perspective.

Towards a theory of collective justice

Implicit in this critique has been the notion of what a more adequate and appropriate theory of collective justice would look like (Cain and Finch, 1981). Since the discussion depends upon secondary sources not all the criteria argued for in Cain and Finch apply. However, four criteria can be established.

In the first place theory must be objective, by which it is meant that the internal relationships between the concepts must be consistent and logical and therefore open to scrutiny and criticism. This is another way of saying first that the place and standing of the concepts is given by and in the theory, and secondly that their ontological status is theoretically given.

However, while a concept can only exist within knowledge it is also argued that the material world has and must have a role to play in concept and theory construction. This achieved by the constitution of "inert objects" (Cain and Finch, 1981) or "experiences" (Thompson, 1978) as data - a process which itself involves

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theoretical/ideological "recognition". At a second stage these data are conceived and incorporated in a more elaborated theory.

Because of the element of the material in theory construction all theories are historically specific; not only are they inevitably thought from a specific historical site, but they incorporate data which must and should change with time. It is no longer novel to point out (perhaps Gramsci was the first to make this explicit?) that truth, as a timeless and ideal category, is not a proper objective for materialist theory.

As an alternative to truth, theorists as disparate as Althusser (1976) and Habermas (1978; see also Keat, 1981) among others have substituted use value to the clients of the theory as a validity criterion. This recognises that knowledges are not absolute, that they are the political and perhaps purposeful products of groups of knowers and that while knowledge can never be true it can, in a standpoint specific way, be adjudged to be correct.[2]

What is important, however, if the first criterion of theoretical objectivity is also to be met, is that the standpoints themselves are theorised as they present themselves and, if one is developing a practical politics, as they are re-constituted in terms of that theorisation. For the purposes of adequate theory, therefore, not any group or movement can present itself as a standpoint, in a nominalist way. The relationship of that group with other categories of the theory must also be established. The theory may of course be internally transformed as a result of this process: this seems one likely consequence of the development of the women's movement for the theory of class for example; but whether this occurs or not, the place of the standpoint within the theory must be given before fully adequate, standpoint specific, decisions about the correctness of a theory or argument or analysis can be made.

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Knowledge then must be constructed from a standpoint which exists within its own theory as well as concretely. Otherwise a fully objective theory cannot be developed.

Finally, if a theory is to be material it cannot be constructed out of ideas alone (point 2 above), nor can it seek to constrain the future. These again are familiar points, namely that materialist theories cannot be produced simply by the elaboration of theoretical categories, even marxist ones, and that materialist theories, while they must be useful for their clients - i.e. point a direction for future action - cannot provide fixed blue prints for a changing history.

In sum, the classification developed below will attempt to adhere to the following interrelated principles: (1) the categories will be elaborated in such a way that they integrally relate to an existing theory (objectivity); (2) "data", i.e. in this case secondary source materials about actual informal justice institutions, will be incorporated into the theory (historical specificity); (3) the theory will be elaborated from the standpoint of a theorised, or theorisable, collectivity (historical specificity again, and basis for validity claims); (4) a direction of advance will be integral to the formulation (integrity of political morality).

Types of adjudication: a materialist approach

If these criteria are accepted it becomes necessary to proceed in a certain way. First it will be necessary to establish distinctions in terms of the class of clients or intended clients of the agencies, or more precisely, in terms of the class categories in terms of which intended clients are conceived or constituted by the service providers. These class categories must be re-theorised in such a way that they form part of a general theory of social class, which itself is integral to a general theory of social structure. It will instantly be seen that quasi-class categories such as "rich - poor" or

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"privileged - underprivileged" relate to one dimensional conceptions of class, such as that of Weber (1978) or Black (1976), and form part of a theory of capitalism which gives theoretical primacy to equally uni-dimensional market relations. On the other hand, conceptions of class which emphasise qualitative distinctions, as between house people, the unemployed, productive workers, service workers etc. relate to discontinuous and historically specific conceptions of class, such as that of Braverman (1974), Marx (1951), Poulantzas (1975) or Wright (1978; 1979). These conceptions form part of a theory of society and capitalism which gives theoretical primacy to productive relations. The later set of distinctions are used in this essay not just because of personal predilection, although that exists, but also because the first set do not account for differences between various agencies -they do not do the theoretical work that is required of them. This is because almost all the agencies discussed would claim that their purpose was to help "the poor" who are their prospective clients.

There are difficulties for both approaches in taking account of complexities such as that introduced by racism or sexism. It is argued here that a theory emphasising qualitative rather than purely quantitative distinctions is better able to elaborate appropriate categories for such complexities introduced materially at the ideological or political level. Indeed, the interventions of ideology and politics in the structuring and re-structuring even of white male class categories have long been recognised.

Secondly, the data: when Marx attempted, so briefly, to give an indication of how a class-free (or proletarian?) future would look he analysed the short existence of the Paris Commune (1969). Within materialist theory new institutions cannot be fantasized or imagined, idealist fashion. Rather we have in mind the forms of exploitation and oppression which are given by our theorised experience. We therefore know the Other, that which we oppose. And we proceed not by reversing

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the institutions of the other, but by experimentation with ways of overcoming the forms of oppression which we know. We construct, that is, pre-figurative institutions.[3]

The task of the theorist working from a working class standpoint, therefore, is to notice these pre-figurative institutions where they emerge, and to identify their salient features. The aim is to make the concrete direction of progress that little bit more clear for other groups of people making similar attempts to overcome their experiences of oppression. It is therefore necessary to identify success stories, from a class standpoint. It is in the nature of these success stories that they will encounter problems, attract opposition, and be, in the main, short lived (see below pp.). Yet the fleeting histories must be caught and inscribed in our political theory if we are to advance.[4]

Thirdly there is the question of standpoint. A fully correct theorist will speak from within the site. Others must preserve their organic links with the collectivity - the class - from whose standpoint they claim to speak as best they may. But enough has already been said about standpoints (p.9). The discussion demands one further elaboration here, its validity depends on its usefulness for the working class and/or women, and/or black people and their allies in this area of struggle. (Gramsci's term "subaltern classes" is used when the argument holds for all these categories).

Fourthly, the emergent theory must indicate a direction of advance. It does this by distinguishing and theorising the relevant features of the success stories so that people can learn from each other. As always, the evaluation of the direction implied will be from the standpoint of the working class, and in terms of their acceptance of its validity.

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Collective Justice: some success stories

Our limited knowledge of collective justice is derived from scattered historical and contemporary sources. Typically this has been repressed knowledge as Foucault has argued in both his discussion of repressive justice (1978) and in his discussion of popular justice (1980), as well as in his analysis of the intellectuals (1977). There were the "Knights of Labour" trade union courts in early 20th Century U.S.A. (Garlock, 1982); there were the workers' offices in Weimar Germany (Reifner, 1982); in recent times in the United States we have seen the San Francisco Consumer Advice Agency (Wilson and Brydolf, 1980) and of course "The first law commune" (Lefcourt, 1971, pp. 310-326) and the civil rights and later poverty rights lawyers (Carlin, 1970; Cloward and Elman, 1970; Ginger, 1972; Handler, 1978; James, 1973). In Britain, the law centres movement is writing its own history in the form of its annual reports (see also Grace, 1984 and Stevens, 1986). In Portugal popular courts had a brief life after the Revolution of 1974 (Santos, 1979). We also know about post colonial people's courts in Brazil, Venezuela, and Chile (Ietswaart, 1973; Karst, 1973; Santos, 1980; Spence, 1982; Thome, 1981, 1984). Ten key features can be identified from an analysis of these agencies.

One last distinction is necessary, however, before this listing process can take place. Collective justice agencies exist in two modes, corresponding to what they seem to regard as their two tasks. These tasks can be identified as the maintenance of internal discipline (the defensive mode) and advancing the position of the collectivity they represent (the attacking or advancing mode). There are few examples in the literature of agencies which move between modes. The "Knights of Labour" courts described by Garlock were predominantly defensive, concerned primarily with questions of union solidarity and internal petty crime. Similarly the "barrio" courts discussed by Karst, Santos (1980) and Spence were concerned with the resolution of internal

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disputes between residents. More dramatically, Hillyard (1984) has described the popular justice of the Provisional IRA in Ulster. Quite clearly in the case of the "Knights of Labour" and the Provisional IRA the "advancing" mode was and is organisationally independent of the "defensive" structures. In the case of the "barrios" this distinction is less apparent since the same meetings might serve many purposes.

This raises a question about the British and North American institutions discussed here, for these are mainly legal services agencies with neither official status as nor unofficial claims to be courts. Yet it emerges from the analysis that they are indeed sites of judgement, sites at which a decision is taken not just about which party to an action to support but about who is deserving of support, about who is right in a moral and political sense, and in their own legal sense. For these agencies, as will be seen below, the question of who is adjudged to be right in a conventional legal sense is not decisive, and rarely more than an interim objective. Because they are agencies in the "advance" mode, self consciously seeking new and better ways of achieving their objectives, because they are not simply reacting to, mirroring, or inverting conventional practices, but functioning experimentally, they are the most promising source of a pre-figurative model.

In the discussion of the ten definitive characteristics identified below agencies in both modes are considered together unless otherwise indicated.

i) The first characteristic of collective justice agencies is that their class identification is open and explicit, and pre-exists specific events affecting clients. This is clearest in the case of the two union based agencies, and in the revolutionary courts of Portugal. The shanty town courts of Brazil and Chile claim a community rather than a class base, but the communities are homogeneous in class terms, and politically aware of their class position. The British Law Centres

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movement has also seen the local community as its client, but in Brent, for example class based organisations within the community (the local association of trades union delegates or Trades Council, the tenants' associations, black people's groups) form major clients as well as members of the management committee (Grace, 1984). Other centres (eg. Lambeth) have a policy of excluding certain types of client, for example, they will not act for a landlord in a dispute with a tenant.[5] Many have "closed door" policies, focusing on community rather than case-work problems. The limiting case with regard to this criterion is perhaps the San Francisco Consumer Agency, since consumers cannot be theorised as a class. For this agency class identification must be extrapolated from the actual class characteristics of its clients, and from the location of the agency in a working class area.

ii and iii) Secondly, (ii) the client is constituted (or seen) as a collective subject. This means that (iii) the "other side" in matters dealt with by the agency in its "advance " mode must necessarily be seen in class terms also. A collective subject cannot have an individualised, de-classed opponent. Both these characteristics of collective justice agencies derive logically and necessarily from their explicit class standpoint and purpose. As the Schwendingers (1978) have shown, these collective characteristics of subject and object are also found in feminist sites, such as rape crisis centres.

In the "defensive" mode the client remains a collective subject - the community, a class to be protected. The other side, when this community has been threatened, may be individualised, as may be the case when two community members are in conflict. These cases differ from conventional practice in their procedures and solutions (below), but also because the individual is conceived concretely and politically, as taking his or her identity from a discursively negotiable status, rather than abstractly. In formally abstract justice the individual

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disappears and only the rule and its privileged custodians and spokespeople remain. The individual of collective justice in its "defensive" mode is a being and a human.

iv) Fourth, if the objective is to advance a class then (a) long term and prophylactic solutions are required. The total situation should be prevented from occuring again: that particular experience of oppression must be eliminated for the class as a whole to be said to have made an advance. (b) This prophylactic function can be performed negatively, by requiring some action on the part of the opposing class, or positively, by education. Thus all the agencies, with the exception of the Latin American ones, produce newsletters, posters, have public meetings, and seek to involve clients in their work - in making decisions and in contributing to the agency's understanding of the options. The German agencies made a point of presenting archetypal case histories in their newsletters so that the class basis of the problems could be understandable more readily than if discussions were either theoretical or based on generalisations. Thus clients are brought to a fuller understanding of their own class position, and so of the political strategies necessary to counter the class oppression they experience.

v) Fifth, it again follows logically that the kind of evidence required for either negative or positive prevention; and for identifying the class character of the issues and the opponent, are different from the kinds of evidence required for adjudication in a narrower, individualised sense. Thus the workers in Germany found it necessary to conduct surveys of housing conditions, industrial injuries, and so on. Nearer home, Brent Law Centre has commissioned studies of shopping intentions and practices for use in a land use struggle. San Francisco C.A.A. made a point of aggregating individual complaints and testing products, so that particular producers could be identified as creating problems for their clients.

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vi) Sixth: all presenting problems are generalised empirically and/or theoretically. Particular instances of problems with the police, with landlords, with employers, with producers or retailers are analysed as well as aggregated to identify their class basis. This is how the correct "other side" is established.

vii) Since ideal solutions will be long term and prophylactic, as a result of modifying the structure of class relations in the area in question, the seventh characteristic must be that these agencies do not limit themselves to the use of established "courts" for possible solutions. This is because courts cannot offer changes in the structure of class relations, on however local a level, as a routine solution, although their decisions may under pressure or, in particular "test case" instances, affect the structure of those relations (Lazarson, 1982). Basically, even in aggregated actions courts do not recognise the same two opponents as collective justice agencies, so even apparently favourable decisions may leave the main problem untouched (Moore and Harris, 1976). And even if the solution is relevant, there are enforcement problems requiring continuous monitoring and continuous action on the part of the agency. Collective justice agencies do not see a court decision as the end of a process of problem solving, but as an occasional stage in that process. A good example here is provided by the San Francisco Consumer Agency, which found the manipulation of publicity and in extreme cases the tactic of picketing factories which produced faulty or dangerous products more effective in many instances than court actions.

Courts are therefore used in pragmatic and tactically useful ways. According to Pashukanis, this was what Lenin advised ("Lenin and the problem of Law" in Beirne and Sharlet, 1980). However, the classical theorists of the left have in general had rather little to say about the question.

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viii) The eighth characteristic of these agencies is of crucial importance in guaranteeing their continuing collective character. Workers in these agencies are accountable to the collectivity (class) they work for. They are not accountable primarily to their individual clients, to the organisation which employs them, to each other as an activist group, or to the state. This accountability guarantees that the collective justice agency remains organically linked, in Gramsci's sense (Gramsci, 1971) to the class it serves; that the intellectuals (again in Gramsci's broad sense of those who theorise the way forward for a class) who work there do not begin to follow the inner logic of their own ideas, or their established and habitual practices, and in so doing lose touch with the concrete demands and experiences of those from whose standpoint they claim to speak.

Accountability structures are institutionalised in a range of ways. Trades union electoral patterns and constitutional structures themselves vary, but accountability to the class via the trades union movement was the objective of the "Knights of Labour" (Garlock; 1982) and the workers' offices (Reifner, 1982). Community based agencies may elect officials, or accountability may be achieved by means of a management committee, as in Brent, which includes as its major constituent delegates from the various collective clients of the agency. S.F.C.A.A. tried to realise the objective by involving clients directly in decision making relevant to their own problem. Adequate accountability in practice is not always achieved by these agencies, but the objective and the attempt is there. The criterion by which collective justice judges itself is adequate representation of and accountability to the collectivity which it serves.

ix) This accountability structure is also the guarantee of the validity of the emergent theory of its practices which a collective justice agency develops. This is the ninth definitional characteristic of these agencies. The rules governing their decisions will be derived

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from a self critical (reflexive) moral and political theory which itself is in a continuous process of elaboration. The purpose of the theory is a guide to effective collective action via adequate analysis of problems and past practice. The objective is not to be able to predict a decision, but to achieve adequate theoristion of the problem and to devise an adequate strategy and tactics in the light of this. Adequacy is not an absolute criterion, but one which is decided, both from moment to moment by those working on the problem and in the longer term via the accountability structure, in the light of a particular historical constellation of forces.

x) Finally, collective justice agencies experiment with forms of internal democracy. These include de-specialisation of work (so that each person does his or her own typing, for example), randomising the allocation of cases so that the most pushy, often male, do not claim the most interesting ones, equal pay for all staff members, collective decision making in which all staff (both volunteer and paid) have an equal voice, and client involvement in decision making (Lefcourt, 1971; Stevens, 1980; Wilson and Brydolf, 1980).

It is difficult at first sight to see a logical necessity for relationships of this kind. Whereas the first nine characteristics are, on examination, integrally related to the explicit collective (class) identification of the agencies, the tenth characteristic of internal democracy is related rather adventitiously to this fundamental defining characteristic. It seems rather that it is separately derived from the moral-political theory which identifies democratic practice as a crucial means of overcoming - permanently - forms of repression and oppression which are part of a collective class experience. Thus the democracy of the internal practices of some, but not all, of these agencies is consistent with their more general philosophy, and presumably both internal and external tensions would arise were this not the case.

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A closer look, however, suggests that the logic of internal democracy may also be related to the accountability structure. Thus it becomes a necessary rather than a merely useful or correct mode of organisation for collective justice agencies. Sociology of organisation has over and over again demonstrated the blocking, filtering gate-keeping (at the least) powers of lower status members of organisations which are hierarchically ordered. Thus a hierarchic structure in which, for example, high status members were accountable to the collectivity for the practices of low status members, could not guarantee the overall objective, which is that each member of such an organisation should herself be an organic intellectual of the client collectivity. Democratic internal organisation recognises in its practices the close relationship between knowledges and powers, and seeks to maximise the accountability of both. This has not, however, been argued by any existing collective justice agency: rather the practice of internal democracy is justified as a good-in-itself (which it surely is), and as consistent with or an exemplar of the general direction of advance.

Interlude

The above ten features of collective justice can be used to distinguish this from other types, three of which can be identified from the available literature. These are professionalised justice, incorporated justice, and populist justice. As in the case of collective justice agencies themselves, there is a more-or-less element in the extent to which any particualr concrete agency fits the type, which is an abstraction from a diverse reality. Judges in many European countries, such as Italy and the F.R.G. for example, are employed by the state throughout their career, and are promoted through a bureaucratic hierarchy. In Holland there is a mixed judiciary, half the members being recruited from private practice and

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half being career judges. In France the profession retains greater control, over training at least. It therefore becomes a question of judgement - both academic and political - as to whether such a system should be characterised as professionalised or incorporated by the state, or whether in fact a fifth type should be elaborated to deal with it.

Before proceeding to these distinctions it is important to be clear about the purpose they are meant to serve. The argument is that they are a necessary part of both defensive and offensive strategy for the collective justice movement. Defensively the distinctions are important because the legitimacy of collective justice practices is often challenged by the simple polemical device of conflating all forms of justice which are not professionalised, and therefore creating the possibility of attributing the very obvious faults or failures of these other forms to collective justice itself. Moreover, as the penultimate section of this paper describes, collective justice agencies are always vulnerable, are always under pressure to dissolve themselves into one of the other types which are acceptable within the capitalist world. The distinctions developed here are intended to reveal the dangers inherent in such pressures, which are usually expressed as plausible arguments and tempting offers rather than coercion.

Offensively, apart from overcoming the depression resulting from these false analyses alluded to in the first section, the distinctions are important because they provide a temporary yard stick by which progress can be measured. If one or more of these characteristics is missing an agency can ask itself why this is so. This might reveal a problem with the structure, and a direction for the agency's advance; or it might reveal instead some special characteristic of the agency's work or of the concrete historical setting within which it functions, thereby explaining its a-typical structure or practices, and perhaps making it possible to elaborate the model

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which would assist other agencies with similar experiences. The diagram below sets out in simplified form the characteristics which typically distinguish these types of agencies.

(diagram here)

Professionalised Justice

It is important to establish the ideal type of professionalised justice for somewhat different reasons. It does, of course, serve to heighten the differences between collective justice and the more familiar form. This is necessary because professionalised justice is the form which monopolises the language of legitimacy. The discourse of justice is the discourse of professionalised justice, so that a demonstration that a collective justice agency deviates from this form may be sufficient in itself to cast doubt upon the legitimacy of that agency. It doesn't adhere to proper rules of evidence! It treats whole classes of people as culpable until remedial action has been successful! It argues that justice must be biased in favour of those it serves! How can this be justice, when we "know" that justice is something quite other! Let us then remind ourselves of this legitimate form of justice, and by contrasting it with collective justice reveal why its present structure and practices can never be fully adequate for subaltern class use.

i) The bourgeois class basis of professionalised justice is concealed. It is hidden by an undoubtedly considerable institutional autonomy. This being so, the bourgeois class basis of professionalised justice needs to be demonstrated rather than left at the level of assertion. On the other hand, this demonstration could be a project in itself, and is not, therefore, appropriate within the context of this paper. Three points from my own work will therefore be used to indicate the lines such a demonstration might take.

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A TYPOLOGY OF JUSTICE IN CAPITALIST SOCIETY

Characteristics \ Types	Collective justice	Professionalised justice	Incorporated justice: State	Incorporated justice: Capital	Populist justice
Class base	Explicit/capable of theoretical identification	Class basis concealed by occupational autonomy	Class basis concealed by experts/lay members	Apparent but denied	Class base concealed by economic/political disjunction/ideology of the whole.
Subject/client	Client constituted as collective class	Client constituted as individual subject with rights	Client constituted as individual subject	client constituted as indivudual subject	Totality manifested in agents
Object/"other side"	Opposing class(es)	Object constituted as individual opponent	Existence denied	Existence denied	Penal law: outsider/ non person. Otherwise aspect of the totality.
Objectives	Class advance (education) and defence (prophylaxis, individual rehabilitation)	Resolution of immediate issue/output of institutional forms for capital	Legitimation	Legitimation	Destruction of opposition/ elimination of conflict
Originating incidents	Generalised to identify class base	Narrowly defined/ de-classed	Generalised to personal characteristics /de-classed.	Narrowly defined/ de-classed.	Generalised in unpredictable ways.
Basis Decisions	Objective rules derived from emergent moral/political theory	Objective rules unrelated to other purposes	No public rules (possibly theoretically grounded)	No public rules	No objective rules
Evidence	Broad/theoretical criteria of relevance	Restricted by internal rules and definition of the incident.	Discretionary Broad re. subject Narrow re. object	Discretionary Narrow re. both subject & object	Broad and variable
Sites decision/ enforcement	Decision agency based/ enforcement anywhere	State authorised institutions	State authorised institutions	"Private" sites	Any setting
Accountability	To class subject (institutionalised mechanisms) Accountable specialists	To other practitioners	Hierarchic/"experts" non accountable	Hierarchic/ "experts" non accountable	To "totality". Effective accountability nil.
Internal organisation	Democratic: non hierarchic/non gendered	Collegial/segmented (some judiciaries are hierarchic)	Hierarchic/segmented	Hierarchic/ segmented	Hierarchy may be by-passed by discretion or spontaneous order.

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First, I have argued (Cain, 1979) that lawyers are the conceptive ideologists of the bourgeois class, and that this is the defining characteristic of the occupational group. This concept was arrived at after ethnographic work revealed that what most lawyers do for most clients is issue translation. By this concept is indicated the fact that lawyers have the task of conceiving and re-conceiving in more or less creative ways solutions to the problems with which their capitalist clients confront them. Thus lawyers thought of solutions to the problems of the protection of capital which were presented to them (types of stock and share holding) as now they create forms of ownership appropriate to the processes of increasing concentration and internationalisation of capital (unit trust companies for example). Thus actual and important structures and forms of organisation are created in ways thought by lawyers, managers, and executives, - in other words, by organic intellectuals of the capitalist class (Gramsci, 1971 p.3 ; Cain, 1979). The partial and apparent autonomy of law, however, means that the trans lation lawyers undertake in order to resolve these very real problems of a permanently emerging social order must be capable of being shown to be consistent with pre-existing legal forms and principles. This secures automatically the legitimacy of the new ideas/institutions. As Weber (1954, chap. 7) noted, although his explanation was different, it is predominantly capitalists who demand creative work from lawyers and as has been frequently demonstated (e.g. Auerbach, 1976) there is a marked correlation between the expansion of the legal profession and the rise of capitalism. The realisation that ideologies, forms of knowledge/ organisation/ power, have to be thought of, thought for the first time, explains this relationship.

Secondly, I have argued (1976) that the selection and socialisation processes of barristers in England and Wales are of a kind which secures the predominance of capitalist common sense within the

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judiciary by rendering the bar, especially those from whom judges are drawn, relatively immune to alternative common sense as well as highly inter-subjective internally. Thus once again although it is in fact the autonomy of the law, or its bearers, which secures the purity of its link with capital described above, it is this very same autonomy which is deployed discursively to underpin the opposite argument namely that of the neutrality of legal thought and personnel. (The same argument is used to justify the appointment of judges as chairpeople of important political committees: they are allegedly experts in neutrality! (Abel-Smith and Stevens, 1967; Morrison, 1973; Cain, 1976)).

Thirdly, recent work in first instance civil courts (Cain, 1983A 1983 B) reveals that where creative, conceptive ideological work is not usually required these elaborate structural devices are not used to secure the autonomy of the institution. Thus plaintiffs, mainly agents of state or private commodity capital, very directly shape the practices of the court both formally - because of the presumption of defendant liability contained in the default procedure, and informally because of the routinised nature of their relations with the court.

Thus, while political theorists have concerned themselves with securing democracy at the legislative level, and left sociologists have conversely been concerned to show that this does not exist, in its most secret and secreted places, in the knowledges which its institutional structures allow to speak and to which they give voice, professionalised justice can be said to be bourgeois. And it is its very autonomy - professionalism that by concealing this relation makes it possible.

ii) In systems of professionalised justice the client is constituted as an individual subject, in whose individuality and intact subjectivity consists his or her humanity. And just as the character-

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istics of professionalised justice reveal a logical consistency, so too do the characteristics of professionalised justice. For if human identity is carried in this inmost private place, then the notions both of equalising these separated identities for legally relevant purposes, and of achieving truth by abstracting these identities from their social situation, become possible (as they are not within a theory which sees humanness as given by social relations). Suffice it to say here that theorists as diverse in time and orientation as Pashukanis (Beirne and Sharlet, 1980) and Unger (1974) have made related points. Professionalised justice depends on an individualised notion of the subject - as - client.

iii) Professionalised justice also depends on, and constitutes, an individualised conception of the opponent, the individual subject as the model of what British practitioners call "the other side". Both parties are subjects at law in this conception, hence justice has no object other than itself.

iv) Fourth, solutions are usually characterised as one-off and short term. However, this is only the character they typically present to the litigant who is seeking a particular "application" of the rules, as in most contract and tort actions. It is also the character they present to working class litigants, hence the insistence of collective justice agencies on doing community work rather than case work (Carlin, 1970; Grace, 1983; Lefcourt, 1971; Reifner, 1982). Long term solutions leading to a re-structuring of relationships so as to prevent a recurrence of the problem, the oppressive activity cannot be delivered by the courts to the subaltern classes, because the structure of the discourse in terms of which judicial decisions are expressed is contradictory to an emergent collective common sense or theory. Moreover, the subaltern class(es) as the weaker party in terms of any current analysis will have continuously to struggle to guarantee effective enforcement of any relatively favourable court decision.

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And finally, of course, but it must be said, positive prophylaxis by means of education and organisation has no place whatever in the world of professionalised justice.

None the less, while in Britain the fair resolution of the immediate issue is seen as the task of the courts, in the United States the political nature of court decisions is recognised. However, these more political decisions are subject to the same discursively inscribed limitations, from a subaltern class standpoint.

On the other hand, solutions for the clients who generated the legal profession as their organically related intellectual workers are indeed prophylactic - the joint stock company (brought about by statute but with the help of lawyers) prevented major losses by small investors in the 18th century - and long term. This criterion, therefore, only distinguishes professionalised from collective justice if one adopts the standpoint of the subaltern classes, for whom even positive solutions are rarely prophylatic. In Britain, certainly, class successes are more likely to be acheived legislatively than in an adjudicative site.

v) Rules of evidence within professionnalised justice are strict and circumscribed. They serve to constitue a narrow, de-classed definition of the incident. Whereas collective justice searches for an analysis which will indicate the correct way of conceiving the class structure of the incident, its status as an example of a wider category of patterned events, professionalised justice insists upon the incident being dealt with in isolation (or at best in aggregated form) as an occasion complete in itself. It is important to realise that the rules of evidence are <u>active</u> in this respect. In legal theory the incident is pre-defined, exists in itself independently of these rules which simply state what information "about" the incident may be used. In the material world, on the contrary, it is the rules of evidence as they are used by lawyers which make the incident what it is, which set it up, which constitute it as an occasion without a relevant past, as unique, and as complete unto itself.[6] The rules of evidence guarantee the ostensibly a - political and a social

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character of professionalised justice. They therefore underpin the reality of its class charcter.

vi) The "other side" is constituted as an individual, and problems or incidents, as discussed above, are detached from their social relations and origins. Class considerations are not allowed, although in certain instances gender and race considerations are accepted as relevant. However, sexism and racism cannot be considered by professionalised justice unless the other side is consituted as an individual subject. Here perhaps more clearly than elsewhere it can be seen how this constitution of both "parties" as individual subjects itself innibits the possible formulation of theorised collective problems. Endemic or institutionalised racism cannot be thought in the context of an individualised "offender", even if the individualised subject of the other side is not a single person.

vii) The legitimate solutions in professional justice systems are those which are offered by the courts or those settlements which a court could support. Other means of persuading the other side are not allowed, or, if they take place (as in debt collecting), they are not recognised as existing. Innovative solutions are acceptable in only very limited cases, such as conditions of probation orders or, in Britain, "bindings over to keep the peace".

viii) Professionalised justice takes its name from this eighth characteristic, namely, the successful achievement of autonomy by an occupational group. Lawyers have successfully claimed a non-accountable status over large areas of their work. Even in the case of a career judiciary this may be so, with effective control being exercised by senior judges (Federico, 1976). Only a lawyer can decide whether another lawyer's conduct has breached the occupationally constructed ethical rules governing membership and practice. Lawyers set and mark their own entry examinations and control by informal means mobility within the occupation so that for example at the bar in Britain, the

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non deferential may find career advancement difficult (Cain, 1976) while women may be marginalised in gender specific work roles or segmented into lower status work areas (Boigeol, 1984). In the United States the bar has achieved considerable influence over appointments to the Supreme Court (Grossman, 1975).

The most striking feature of the occupation is the success of its autonomy claims, which have achieved such widespread legitimacy and recognition that, both common-sensically and academically (see e.g. Carr Saunders and Wilson, 1933) lawyers have been regarded as the archetypal professionals, have provided the model from which early nominalist/positivist sociologies constructed their concept of professionals (Johnson, 1972; Cain, 1979 op. cit.) and whose arguments other occupational groups seeking to expand control over their job situation imitated in order to justify their own would be autonomy e.g. special relationship with consumers of their skill, long training, esoteric knowledge, and so on.

As far as the legal occupation goes, the autonomy claims mean that the lawyer cannot be directed as to how his "professional" judgement should be exercised. Within the space of his or her relationship with the client, the lawyer is non-accountable except to the occupation itself. The collegial, non-hierarchic internal structure of the occupation reflects this ideology; assessement by peers is the practice, and even the formal courts in negligence matters rely heavily on the opinion of other workers in the same occupation. Typically, the organisation and administration of legal aid schemes reflects these autonomy claims (Zander, 1978, 1980; Zemans, 1979).

ix) The rules governing the decisions are, it is claimed, derived autonomously. This relates to the first characteristic, the fact that the class character of professionalised justice is concealed. However, the claimed autonomy is also a real structural constraint upon lawyers and their clients. It shapes the forms which discursive

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translations and conceptive ideological work can take, and ensures that the rules do work, that is, do set limits to deviant practices and in so doing establish some parity of form and practice between capitalist enterprises. The rules also work, that is, appear as fixed and autonomous, in relation to those people or legal persons who lack the resources to challenge or re-create them by means of the elaborate processes established precisely in order to maintain these autonomous appearances. Their side effect is to make the autonomy real! The fact that only a member of the occupational group can address or interpret the rules also secures their internal consistency of logical structure which is essential to both the reality and the appearance of the autonomy of the rules.

x) Finally, the internal organisation of the legal occuaption is collegial, as a result of the claim that hierarchic organisation and bureaucratic direction is impossible within the protected relationship with the client. Thus intra-occupational differences are those of status and of work segmentation rather than bureaucratic rank. On the other hand, ancillary workers in legal offices, whether legal executives or secretaries, are outside the collegial structure and can, therefore, be subjected to managerial direction. The position of assistants, younger qualified lawyers working in large law practices, is anomalous here. In terms of qualification they are members of the college with full status; in terms of the work place organisations they do not have the full status of partner, and are therefore structurally junior (Smigel, 1964). In practice their work can be directed, although the general relationship with the client could not be. As Smigel noted twenty years ago, the direction of change in the legal occupation is toward more bureaucratic structurea. The reasons for this, however, are beyond the analytic scope of this essay.

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Incorporated or "colonised" justice

Incorporated justice is a form which lacks both the reality and the appearance of autonomy, although parts of the rhetoric of professionalised justice may be retained. The name derives from the key characteristic , which is that this is a form of adjudication which has been taken over by or embodied within either an agency of capital itself or an agency of the state.

How one regards the latter form is a function of the theory of the state which one employs. This problem is simplified here because it is only forms of justice in capitalist society which are being examined, so that one can at least assume a capitalist form of the state.[7]

i) The class basis of this form of justice may be direct as well as overt. A good example is the Better Business Bureau (Eaton, 1980), a consumer organisation founded by a group of companies with a view to protecting their image as well as to resolving the "reasonable" grievances of consumers. More frequently, however, the state mediates the class relations, as in Britain, F.R.G., and Scandinavia in industrial relations tribunals, and in a range of agencies responsible for adjudicating the welfare state law (Blegvad, 1983; Farmer, 1974; Frost and Howard, 1977; Hetzler, 1982; cf also Abel-Smith and Stevens, 1967). Strempel (1983) has discussed a number of similarly incorporated agencies in Germany; see also Bierbrauer et al, 1978. In this latter, more typical, situation which also describes a number of semi- autonomous Federal Control agencies in the United States the class character of the justice delivered is disguised in two important ways which have come increasingly to displace the rhetoric of professionalised justice.

The first of these complex mediations of the power of capital was discussed briefly in the introductory section. This involves the use of experts. Public, or usually state, recognition as an

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expert in a field accord the entitlement to self legitimating knowledge. One's judgements are valid because one has access to a knowledge which renders it impossible to make an invalid judgement, although a mistake, a false application of one's self legitimating knowledge may be possible. The position of the expert is closely related to but not isomorphic with the position of scientist. It is easier to have one's claims to expert status formally acknowledged if it can be argued that they are based on positivistic scientific knowledge, the self legitimating form of knowledge par excellence in the 20th Century. Non experts are more sceptical of claims based on experience - a problem faced by teachers, police officers, social workers among other occupational groups. Such workers may seek a more scientific theory of their jobs to underpin their claims to expert status.[8]

The scepticism is of course well founded, for all occupations generate self closing knowledges - the very reason why intellectuals must retain organic (institutionalised) relationships with those whom they seek to serve as a means of preventing such knowledge closures. The argument, therefore, is that there should be scepticism about scientific knowledge too, for all expert knowledges are spoken from a site in the social structure, which has been created and is maintained by a political process. It is correct to enquire of a scientific expert also whose knowledge does he or she speak, and on whose behalf.

In the context of incorporated justice, however, the knowledges of experts are presented as neutral and incontrovertible. Experts are used to present decisions as the outcome of non negotiable truth. Thus as Blegvad (1983) has shown, the trade experts in consumer affairs are seen as having direct access to a knowledge about whether claims in the dry cleaning industry, for example, are reasonable. And in Swedish pensions councils the official of the

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agency concerned is treated as having more "true" knowledge of the facts (Hetzler, 1982).

Sometimes this expert knowledge is treated not as a knowledge of facts but as a knowledge of policy. This was the case in the land use planning appeals in Northern Ireland discussed by Thompson (1982). This latter seems an acceptable use of experts, consistent with collective justice. It is therefore important to secure the distinction. When an expert presents herself as being most familiar with policy she is basing her claims to a better than average influence on decision making on privileged knowledge of a socially constructed reality, i.e. policy, by definition the outcome of a political decision. This is to admit that the knowledge, or the policy from which it derives, could be changed as a result of a political process. The knowledge is not foreclosed, therefore, but is open to scrutiny and debate. From the standpoint of democracy and collective justice, therefore, such ostensibly expert knowledges are acceptable.

This digression is intended to point up and emphasise the differences from other kinds of expert knowledge, where the claim to a larger than average share in decision making is based on a closed, allegedly true, knowledge, which is not open to debate. The political bases of knowledges of this kind are hidden and denied. Thus class based knowledge sneaks in covertly, while incorporated justice is able to present itself as neutral, science based, and value free.

The second complex mediation of incorporated justice results from the second typical legitimacy claim, namely, to represent the average preson, the man (sic) in the street, the reasonable lay person's view. It is from this second kind of legitimacy claim that the confusion with collective justice arises.

State run lay justice tribunals attempt to maintain the appearance of a state sponsored popular court by means of their powers of selection of personnel. But there is an endemic contradic-

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tion whenever a capitalist state presents itself directly as representing or indirectly as sponsoring, the collective totality, in this case by means of an allegedly representative selection of individuals. These contradictions can be listed, with the most important being mentioned first, but also most briefly.

A range of theories of the capitalist state from Engels' Origin of the Family (1970) on, have variously argued but universally agreed that the capitalist state represents itself, and must necessarily represent itself, as an abstraction serving the intrests of the total society, as an institution which is above or outside or which has means of resolving for the sake of the whole, class struggle in its various forms (see Jessop, 1983).

In order to achieve this representation endemic rifts in society must be denied, so no conception of classes as collectivities which are qualitatively and permanently different, and incapable of resolving/desolving into each other, could be tolerable or permitted. This need for denial explains the popularity of formulations which are consistent with a totalising state functions, i.e. continuous hierarchy of life chances conceptions of class, or interest group theories of politics.

Thus the most fundamental contradiction is that the state must first construct the totality which it claims to represent, and this construction is of course material/political as well as ideological. The state, and capital which requires and constitutes it, remains vulnerable, however, to alternative formulations which can be objects of struggle at all levels of structure, i.e. economic political/organisational, and ideological.

Once the mystique of the state is penetrated it can be seen as a set of interrelated institutions which collectively and separately are the ever changing outcome of class struggle. The forms and practices of the agencies which constitute the state are constituted by

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different constellations of class forces but, in capitalist society, the state as a whole is dominated by the various, often competing, segments and fractions of capital itself. This changes as, and only as, the balance of economic/political/ideological powers in the society is changed by political practice.

This formulation means that the precise constellation of class forces in any particular agency of incorporated justice will vary, and each will require a separate analysis. However, some abstractions can be made from the studies so far carried out, and these reveal the contradictions peculiar to incorporated justice institutions as well as some of their other characteristic features.

Frequently the mediation of the class basis of incorporated justice agencies is effected through a lay chairperson. There are ample studies which demonstrate an alliance between chairpeople and experts in arriving at decisions (e.g. Frost and Howard, 1977; Dahl, 1984; Hetzler, 1982). Four points thus need to be made.

First, chairpeople are often appointed by a state agency, often too the one whose activities they are supposed to adjudicate.[9]

Secondly, they are appointed as lay people in the very specific sense in which the state deploys this term; they are lay in the sense that they are not qualified lawyers nor currently employed as experts in the field to be adjudged. (Retired experts, apparently, can pass as laity, cf. Thompson, 1982). Because they are lay in this sense it becomes possible for the state to claim that they represent the people, the person in the street etc. At the same time they are in fact chosen from a very limited pool of eligible people who have been tried, tested, and approved by various agents and agencies within either the state or the direct institutions of capital (Thompson, 1982). Similar arguments have been put in relation to the lay magistracy in Britain, although the courts in which they adjudicate are not informal in the usual sense of the term (Bankowski and Mungham, 1976;

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Bankowski, 1983) other members of these agencies are variously appointed, but the chair will usually have a substantial say in the matter, and the other arguments as to lack of representativeness apply.

Thirdly, as discussed above in relation to experts, members of lay tribunals who are neither chairpeople nor have expert status are typically passive. This applies also to trades union representatives, who may come to the conclusion that in order to keep their legitimacy going - and to get re-appointed on the grounds that they are reasonable - they should fight only exceptional cases, and express their position in terms of the dominant discourse. Thus ordinary lay members rarely offer a contrary view, but limit their participation to making statements in support of the opinion of the chair or experts or officials (Blegvad, 1983; Dickens, 1983; Hetzler, 1982). Therefore even if a representative panel, in a class cross-sectional sense, were constructed, the opinions expressed would not carry equal weight. Certain knowledges would still be regarded as more authentic and legitimate than others; and the organisational structure (role of chair) and even the seating arrangements (Hetzler, 1982) would effectively if unofficially give the state control over possible deviant interpretations and decisions.

Fourth, there is the historical evidence that these agencies have been created in and through continuously waxing and waning class struggle (Carson, 1981; Marx, 1954 chap. 10 Section 6; Phillips, 1977; Vogler, 1984). This struggle was and is about, for example, what kinds of form magistrates courts (as well as other state agencies) will have; not simply about which class would run a pre-existing institution with a fixed form. When the adjudicative agencies of the welfare state were established in Britain it was the intention of the Labour Party (the then Government) to create a genuinely popular form of adjudication. That this did not occur may partly have resulted from the fact that the processes wherby popular justice can be subverted were at

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that time less well understood on the left: but more important than this theoretical failure was the political struggle concerning the structure of the new agencies - the main protagonists being the trades unions, lawyers, various associations of capital and employers, and state officials (Abel-Smith and Stevens, 1967; Colwill, 1984; Gough, 1979). What was different about this struggle from the 18th Century and 19th Century struggles for the control of the magistracy was that it took place within and was therefore mediated and ultimately controlled by the state. The incorporation of these bodies as part of the state apparatus should therefore come as no surprise. But although the outcome of these struggles was the structure just described, it was by no means the inevitable outcome and, indeed, continues in the debates about expanded legal aid, about legal versus informed lay representation, and so on.

ii) The other characteristics of incorporated forms of justice can be dealt with rather more briefly.

Clients of the agencies - those seeking justice, or, in our language the subjects of it - are constituted as individuals, sometimes with particualr rights and always with particualr grievances.

iii) The existence of opponents in the cases is frequently denied, for the opponent is usually the agency itself, and to recognise it as an opponent would be to recognise, willy nilly, the clients of the agency as a single category of people; a collecitivity if not a class, and certainly not as a set of isolated individuals with particular grievances or claims. Thus incorporated justice typically denies the existence of its object. And in extreme cases, merging on the populist form, this denial makes possible a complete inversion of the subject and object of justice. In such cases the agency itself appears as subject and the client/subject as the victim or accused - effectively the object. The broad nature of the evidence about the client which is regarded as relevant, and the way the originating incident is characterised, make this

inversion

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possible (see iv and v below).

iv) This individualisation of the client and denial of the opponent means that the incident itself which gives rise to the judgement situation can only be constituted in a limited number of ways. Two or three theories of the origin of such incidents are possible. One is that there has been a well intentioned mistake by a junior employee; another is that there has been a malign mistake by such a low level employee, but that he or she is an a-typical example of employees in general whose example may or may not have been followed (the rotten apple theory); another is that the client did not put the initial case well enough, clearly enough etc. (blaming the victim). Such arguments allow these agencies to grant a minority (Frost and Howard, 1977) of claims, without conceding that there is any fundamental problem with the defendant agency (as it should surely be from a collective standpoint) itself.

When claims are being denied it is typical to displace and deny the originating incident altogether, so that the client of the agency is seen as having been unreasonable, as having, that is, made a "normal" event into an incident.

This is discursively necessary because as there could be only one conceivable opponent (if any opponent were admitted) so a decision that someone else was responsible is not possible. The decision must be either that there was an error on the part of the agency's staff, that the client/victim misunderstood and that no incident in fact took place, or a combination of these, such as an argument that the demeanour of the client contributed to the agency's error.

v) Justice agencies which have been incorporated tend to demand two types of evidence, and again this requirement is related to the other characteristics of incorporated justice. As regards the alleged incident rather strict rules may well be applied, although (as in the

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Danish dry cleaning instance, Blegvad, 1983) there are occasions when expert testimony may be invoked. None the less, evidence is customarily admitted only about the single incident under discussion. No broad review of product reliability or officials' practices could be introduced as evidence relevant to the matter in hand.

As regards the characteristics of the client (or claimant), however, different evidential practices are involved. Here it becomes possible for the agency to examine a broad range of background characteristics in order to determine whether or not the claim is likely to be deserved. The record of past contacts with the agency, appearing like all records to represent facts, but in reality compiled by the agency in terms of their relevancies, and representing their construction of events, is an important factor in this characterological re-construction.

Thus incorporated justice agencies can be said in general to apply strict rules of evidence to the incident but broad, and largely implicit, rules to the client.

vi) Incorporated justice agencies do not claim to be an alternative to the standard forms of professionalised justice most typically found in capitalist societies. Rather they see themselves and are regarded, as complementary to the professionalised form. Thus it is quite possible for these agencies to maintain quite formal links with professionalised state courts. In the U.S.A. cases are referred to neighbourhood justice agencies by formal courts (Danzig, 1973; Tomasic, 1982), and this was built into the theory of these institutions, although the relation is also partly responsible for their failure to realise their objective. In Britain decisions of welfare tribunals may on specified grounds, be appealed in professionalised state courts. In West Germany certain informal adjudication settings have been established fully within the professionalised state court structure, as magistrates courts (and juvenile courts in particular)

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and county court arbitrations also are in the U.K. Other agencies run in parallel to professionalised state courts: the various consumer agencies such as the consumer council in Britain and the Better Business Bureau (Eaton, 1980) in the U.S.A., as well as the Danish consumer agency, adjudicate matters which fall within the jurisdiction of professionalised state courts, such as contract and tort questions. In most cases the professionalised court remains an alternative site in which the matter could be adjudicated - appeals on procedural grounds, for example, could usually be taken there. Some agencies, however, demand that the litigants agree in advance to abide by the decision of the agency, that is, not to re-open the substantive questions in another setting.

The general picture then of relations between incorporated justice agencies and professionalised state courts is one of reciprocal legitimation and lack of competition, with the P.S.C.'s being accorded senior place. This relation is the same whether the incorporated justice agency is in fact itself a state agency, or whether it has been incorporated directly by capital.

vii) Incorporated justice agencies have no prophylactic concerns but limit themselves to the resolution of the particular case. This is Nader's criticism of a range of consumer protection agencies in the U.S.A. (Nader, 1980) and also the criticism that the welfare rights advocates have made of the British tribunal system (cf. Brooke, 1979). What these critiques have often failed to recognise is the integrity of the discourse constituting these agencies. Prophylactic solutions could not make sense unless the meanings of "popularity" and "expertise" deployed were changed, with vast structural repercussions, unless clients were constituted as a collective and the opponent was recognised rather than denied, unless the incident itself were constituted as an example of a relationship rather than a uniquely caused occurence, unless a broader range of causal and theoretical evidence

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relevant to these prophylactic concerns were to be collected. All this would place the agencies in antagonistic - cum - instrumental relation with professionalised state courts, the legitimacy of whose practices would now be undermined. In other words, effective prevention is not discursively or politically possible for these agencies: it may, however, be rhetorically invoked.

While incorporated justice agencies are concerned to deal with presenting issues suggestions have also been made (e.g. Nader, 1980) that their purpose is in fact to legitimate their sponsoring organisation (the D.H.S.S., the store, even the professionalised court system if they are an off shoot of this). This interpretation is consistent with the researched practices of these agencies, but there is a danger in relying on it because a legitimating function can be abstracted from almost any set of practices. The abstractions I am trying to achieve in this paper are more particular, their purpose being to distinguish types in a theoretically and politically relevant way. Abstracting a legitimacy function, while doubtless insightful and interesting, does not advance this more particular project.

viii) Accountability poses few problems for these agencies. Staff are accountable to their employers within the framework of a bureaucratic hierarchy. Processing of cases is thus carried out by employees, often of the agency being investigated, although this is not necessarily the case.

The position of members of the adjudicative panels is more complex. Those representing organised interests such as trades unions may regard themselves as accountable to the sponsoring organisation; experts may consider themselves accountable to their occupational groups. But given the method of appointment and the sociology of the hearing process, discussed in i) above, objective accountability is to the agency which established the incorporated forum. Subjective feelings of accountability may give rise to personal tension, even

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some maverick decisions, but the trade union, the occupational group can rarely recall a member whom they did not appoint, and certainly they cannot appoint his or her substitute. Only the agency which incorporates the forum can make accountability bite in these ways.

ix) It is not possible to trace a general pattern in relation to the sources of the rules invoked and applied by these agencies. What is clear is that the rules to be applied are rarely public or known in advance, there is little autonomous elaboration of them and they are derived from notions of what is reasonable to which the personnel of the agencies subscribe. The most relevant personnel here are, as has been argued, the administrative staff who pre-process, construct, and filter the cases, who are direct employees of the incorporating agency, and the chairpeople, who may well directly incorporate class based notions of the reasonable, as Frost and Howard (1977) have argued. In these cases the whole elaborate structure may in fact disguise an almost entirely unmediated, non-autonomous form of class justice. Finally, certain categories of experts may claim an authoritative view in relation to what is reasonable, particularly in relation to client behaviour. In these last cases the rules governing the adjudication will be elaborated in quite another setting and in accordance with various (but specific in each case) sets of occupational criteria. Their class articulations are too complex to be elaborated here.

What is important from this analysis is that a particular and changing accomodation between these diverse sources of rules will be made in each agency. It may not be possible even to generalise across types of agency, given this structure. This explains why ethnographic studies in this area, while the only approach which could unearth the rules, at the same time have distressingly limited applicability. The structures are such that they generate very particular and localised rules. This of course makes it extra hard for a client or her adviser

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to know what arguments can most effectively be used.

When these nine characteristics are reviewed simultaneously it can be clearly seen that from a working class standpoint, while collective justice is the ideal, professionalised justice is greatly to be preferred to either variant of incorporated justice. In professionalised forms of adjudication the rules of evidence and the relatively public character of the substantive rules provide protections against the unmediated class justice which may be on offer in incorporated agencies.

x) The tenth characteristic is once again the internal structure of the agency. This, as noted in the discussion of accountability, is hierarchic and bureaucratic as far as the permanent secretariats of the agencies are concerned. Work roles are likely to be segmented by gender, with women doing typing and initial intake (reception) work. As indicated, the filtering work of the clerks plays a larger part in the processing of cases in incorporated agencies. (In professionalised justice pre-trial negotiations are carried out by "professionals"; in collective justice the aim is not to filter out cases but to collect all relevant examples). Thus middle class women in clerical and secretarial positions may have a considerable influence.

The adjudicators themselves are formally equal with the exception of the chairperson. This formal equality has already been seen to bear no relation to practice.

The hierarchic structures of organisation and accountability, with the elaborate blurring of both at the summit, may not be necessary forms of incorporated agencies, but they do reflect the essential ambiguity of these agencies which are both owned and free, part of the state (or of commerce) yet purportedly independent, agencies for self criticism and agencies for self defence, agencies, essentially, for state controlled lay justice.

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Populist Justice

The literature on populist forms of justice is sadly limited. Such as it is, it is of two broad types: there is the literature dealing with fascist legal theories and legal forms (e.g. Brosznat, 1981; Haley, 1982; Kirchheimer, 1940, 1969A, 1969B; Neumann, 1957; Poulantzas, 1974) and the even more scanty literature on contemporary societies (e.g. Hall, 1980; Ietswaart, 1982).

Populism can be characterised as a view of society as an organic whole constituted by separately and independently constituted individuals. At one level, the society alone creates the unity among these individuals; at another level the unity is constituted arbitrarily (i.e. non theoretically) by any identifying feature which the populace can be persuaded to regard as relevant. Skin colour, place of birth, "race", legal status (slaves, insane people versus the rest), "moral" behaviour, and political subjectivity have all been bases for distinguishing between in-laws and out-laws, members and Others.

Politically, attempts to resolve the paradox between separateness and organic interrelatedness take the form of referenda, emphasising the individuation prior to aglomeration/incorporation, or mass demonstrations of those claiming to be or to speak for the totality, emphasising organicism. As is clear, these forms merely represent and re-state the paradox. Another typical institutional feature is the organic, encompassing institution midway, in topographical terms, between individual and the state.

The theory of society as whole which underpins populist forms of justice (and other civic expressions) is therefore diametrically opposed to the theory upon which collective justice is based. The collective form, it will be recalled, depends on a theory of society as constituted by fundamentally separated groups whose unity in a social formation depends upon the nature of their separation. How then are these differences at the ideological level (and it may also be

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argued at an economic level, since these ideologies can be shown to have some correspondence with economic/political classes (Poulantzas, 1974)), manifested in the theory and practice of justice?

i) In populist forms of justice the class basis of adjudication is denied. Whether the residual professional courts are the forum, the police station, or the streets, the claim is made that the norms are those of the whole society on whose behalf the justice is being administered. This is different, however from the form of denial typical of either professional or incorporated justice. Populist justice does not claim to be a neutral adjudicator; rather it claims to be a true adjudicator. Truth, in this view, is not seen as standpoint specific, as in collective theories of knowledge (Gramsci, 1971 pp. 352, 408, 455; Cain and Finch, 1981) but as unproblematic.

As both Neumann and Kirchheimer (op. cit.) pointed out so forcefully, judgements are given in the name of collective morality, to which "adjudicators" invariably claim a hot line. In the German situation attempts were made to embody this claim in the jurisprudential theory, although the internal contradictions in these arguments ultimately proved irresoluble. More usually, however, the claims to legitiamcy on the basis of collective morality remain at the level of common sense.

Before these structures are analysed, however, social scientific analyses of the actual class base of these decisions should be presented. This appears to be even more complex than in the situations discussed so far. Moreover, the comparative base is more limited. What seems to be the case is that the class base is not apparent because there is a real disjunction between monopoly capital, which is the site of power, and its functionaries, drawn from the petit bourgeoisie, who achieve a quite considerable autonomy by monopolising key positions within the repressive state apparatuses. Poulantzas (1974) argues that this dominance also extends to ideological state apparatuses (trades

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unions, youth groups etc.), but that the specific ideologies of the petit bourgeoisie leave space for monopoly capital to function, in spite of the rhetoric of "status quo anti-capitalism" (ibid. p. 241) which was one of the elements in the German and Italian situation of the 1930's. This class base is disguised not just by the believed-in-rhetoric, the imaginary relations, of the participants, which constitute their practice, but also politically, by the fact that monopoly capital is no longer represented by a political party, and by a duality of structures within the state which undermines the apparatuses of the liberal state while remaining hidden. In the judicial field the relevant processes here are the creation of special courts, to deal largely with political offences, and the delegation of either general or specific penal powers to a range of organisations - the military, employers - or administrative agencies. Private law also bacame more arbitrary in certain areas; in both Japan and Germany relationships between creditors and small debtors were dealt with administratively, and titles to land in Germany and Italy apparently became less secure. Monopoly capital was able to achieve the certainty necessary for its adequate functioning by other means.

The precise structures which claimed to give voice to the truth in these circumstances are considered below.

An even less tractable problem is offered by the on street forms of "summary justice" which Ietswaart (1982) contrasts with "popular justice" in pre-election Argentina.[10]

What could be the class base of what appears to be a manifestation of an under class - and popular -morality? We have two clues: one is the evidence of this and the other studies cited that the repressive state apparatuses, in this case the army, the police, are controlled by the petit bourgeoisie, and function largely independently from monopoly capital. The other is Ietswaart's sophisticated notion that on street justice, even if apparently supported by sections of

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the populace (although in Argentina this was not the case) represents "a rather extreme form of dissociation between instances of social reality and their authoritative verbal descriptions" (p. 161). As Hall (1980) has indicated, these manifestations are media controlled, frequently in their generation, and almost inevitably in their authoritative representation. The class bases of these forms of justice are therefore disguised by the mass media's typical presentation of itself as universal and authoritative, or in some cases neutral. Struggles over the control of the media themselves are another question and a longer story.

ii) The subject or client of populist justice is seen as the totality. The range of institutions claiming to speak for the whole of society or the good of society tends to proliferate in fascist regimes; but populist forms, as all of the other forms analytically distinguished here, can also be found in varying degrees in most contemporary social formations. The subject/client of populist justice presents itself as spokesperson or people for the organic unity.

iii) Conversely the "other side" in populist justice is conceived as an outsider, a non member, and therefore a threat to the organic unity and whether intentionally or not therefore an enemy of it. As indicated earlier, there is no theorisation of the Other but rather the random invocation and non rule governed application of negative definitions. The genesis of these definitions, and their availability within the discourse can be examined empirically in each specific case. Whereas in collective justice the other side is a theoretically (objectively) identified enemy, so that the risk of such an identification could be calculated in advance, the risk in the case of populist justice can be calculated only empirically, for example following a spate of attacks on black people. Populist justice is in this sense, therefore, fundamentally non-rational.

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iv and v) The incident giving rise to the judgement, in the populist form of justice, may not necessarily be known at the time, and may be unknowable in advance. In part this is a result of the integral unpredictability referred to above. In part this is a result of the attempt to police morality, which becomes in the end the policing of imputed subjective states such as , for example, having sympathy with the guerillas or the communists or being a nigger lover or.... Thus the originating incident may occur unbeknownst to the defendant or object of the justice! It is therefore inevitable that what counts as or is allowable as evidence varies from case to case. As in every form of justice, rules of evidence and relevance are established by those judging, here also the subjects of the justice: in this respect populist justice is closer to the two forms of incorporated justice analysed here than to either the collective or the professionalised form, for both of which types these rules can be identified theoretically/objectively. In populist justice what counts as evidence depends upon situational exigencies and the vagaries of the stereotype in use.

vi) Outcomes in populist justice are not institutionally restricted. They may include lynching or death mobs or ostracism or a range of less severe penalties. In private law, as we have seen, outcomes may be more benign than in the professionalised form, i.e. small debts may be absolved by discretion and administrative decision. What populist justice shares with both professionalised and incorporated forms is that outcomes depend on individualised characteristics, whether subjective (moral state/intention) or objective (what can she afford to pay). In a system of collective justice outcomes depend upon the social position of the individual, and the theorised or publicly/politically decided requirements of the class. Populist justice may be punitive in intent: such a purpose is impossible for collective justice which can only be instrumental in its objectives.

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vii) The above implies that the objective of populist justice in its pure form is to preserve the totality and re-integrate members within it while destroying the other. This is why populist penal forms have the ferocious quality so frequently observed. Populist justice is not intended to be prophylactic in the individual case. General deterrence of fear may, however, be an objective.

viii) Populist justice forms are not accountable. Indeed, the nature of the organisation/non organisation (see x below) renders this inevitable. The totality provides legitimation for these actions, but has no institutional expression which could render anyone answerable for his or her judgements. And while accontability exists within the hierarchic organisations of exceptional states, the discretionary space at the top - the leader - also ensures the ultimate non-accountability of judicial decisions to the legitimating populace. Populist justice, being founded on an organicist conception of the totality, is <u>incapable</u> of being accountable, either internally or externally, to its organisation or to its subject.

ix) The lack of rules or of a theory from which rules could systematically be derived has already been noted. Insofar as rules can be extrapolated from relatively consistent patterns of behaviour they are seen to be derived from the arbitrary stereotyping constitutive of organicist ideologies, and the public expressions of this in the media of mass communication. It is, perhaps, worth mentioning here that communication in a populist regime is necessarily "mass" as opposed to collective, since collectivities other than those which are conceived as sub-parts of the organism cannot be identified. In terms of populism's own theory of itself communication must be unstructured, expressing the view of the totality (although of course un-structure is not a possible concept within social theory). The theory of collective justice recognises that all communication is necessarily political (Foucault,

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1978; 1980), and thinks the politics of it in terms of a theory of structure. In contrast, therefore, rules under such a system are both overtly political and objective (theoretically grounded).

x) Populist justice has a restricted institutionalisation, with few permanent organisational roles. The structures of street justice are essentially fluid. In the closely related fascist forms there are hierarchies within repressive state apparatuses, although the summit of these hierarchies is constituted by a totally discretionary space. Thus the contradictory and dual nature of the class base of populist justice is reflected in the continuing contradictions between order and non-order.

Dynamic relations

Thus the class base of the judicial form, with the manner in which the class basis of justice is concealed, establishes the remaining characteristics not as necessary or inevitable, but as consistent. It is this conceptual consistency between the characteristics that makes it possible to claim that one has identified a specific type or form.

It is bourgeois legal theory which reduces the alternatives to professionalised justice to a single oppositional form. Discrimination in terms of the class base of these forms also makes it possible to choose between political strategies. Indeed, the diagram is intended to be capable of being used as a kind of check list, so that it can be readily seen how closely any particular agency approximates to the collective justice model. The respects in which would be collective justice agencies differ from the model will at least provide a basis for reflection, and a self aware decision as to whether change is necessary. More realistic and refined evaluation of strategy in relation to agencies of other types should also be possible. And most important, collective justice agencies will have the beginnings of an elaborated theory of themselves with which to resist attacks on their legitimacy

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and direction.

As suggested, empirically these four recognisable abstracted types of justice most frequently co-exist in capitalist society. The class struggle which continuously defines and re-defines the distinctions between them is a process which produces many forms, or at least elements of them, in any social formation. These complex struggles may be simplified for analytical purposes into conflicts over legitimacy and conflicts over resources.

At present in capitalist societies collective justice is the most unstable and vulnerable form. This is endemic in its pre-figurative character. A pre-figurative institution exists in advance of the class forces which could sustain its fully developed form, although of course its very existence pre-supposes a sufficient base of working class power. Secondly, pre-figurative institutions are necessarily experimental. As materialist theory denies both the possibility of conceiving blue-prints for the future and the adequacy of existing models, experimental structures attempting to express class interests and to formulate visions of how life might be are all that is possible. Thus pre-figurative institutions, or collective justice institutions in this case, lack a fully developed theory of their being. This renders them intellectually vulnerable. This is why an enterprise such as this one, an attempt to construct their concept, is also an attempt to contribute to their viability.

Collective justice forms are thus at risk of being professionalised, as a response to the legitimacy problem, or incorporated, as a response to the resource problem. Recent British examples illustrate this point (Royal Commission on Legal Services, 1980, ch. 8 esp.).

First a number of local authority and central government funded law centres and advice agencies have been urged or required to abandon collective work in favour of dealing with individual cases in a recognised "legal" way. This ideological attack is possible not

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only because of the resource dependence, but also because professionalised justice still has a monopoly of legitimacy in British society, largely as a result of the organised strength of practicing lawyers. Class theory lacks legitimacy in a society accustomed (until 1979) to consensus politics. Defences therefore have to be expressed in terms of help for the poor or underprivileged. However, these categories (the poor etc.) are not derived from a class theoretic analysis but from an analysis concerned with a continuous hierarchy of "life chances". There is thus a theoretical inconsistency in claims that the only way to help "the poor" is by collective action, for the necessity of a collective approach is derived from a theory of discontinuous and qualitatively different classes. The theoretical weakness in collective justice agencies' presentation of themselves enhances their ideological vulnerability. This difficulty will be exacerbated in any society with (1) a strongly organised profession and (2) a lack of left resistance to consensus politics. In this situation it is difficult for these pre-figurative agencies to present an acceptable account of themselves.

On the resource front, law centres in Britain are vulnerable to closure as the price of non-conformity. Three centres in Wandsworth, for example, were closed in 1981 when the local authority changed hands. But they are also - and this is more sinsiter - vulnerable to incorporation. The Royal Commission on Legal Services recommended precisely such an incorporation within the central state. Fortunately the Conservative government was not interested in developing this proposal. It is not clear how law centres, either collectively in the Law Centres Federation or individually, would have responded to this promise of a financially secure future.

In addition to these endemic risks, popular justice forms are vulnerable when they direcly challenge the existing state, presenting themselves as alternative authorities. Morrison (1975) has described how the rules of property developed by Canadian miners were overturned

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by the Mounted Police; the Portuguese forms described by Sousa Santos (1979) have been supplanted. On the other hand, if the state is weak or unstable these alternative sites may coexist with it over extended periods, as in Latin America.

Professionalised justice, as the dominant capitalist form, has few legitimacy and no resource problems. The main legitimacy challenge comes to it from the working class, and from collective justice forms, which respectively argue and demonstrate that professionalised justice is "out of touch" with working class norms and standards. Priestley (1962) gave perhaps the most cogent and witty account of this.[11] So far, however, there have been few signs that professionalised justice itself is either threatened by or capable of responding to this challenge.

However the main contribution of professionalised justice to the dynamic relations between these forms is an imperialist one, purporting to take over not only collective justice (which would be a retrogressive step) but also incorporated justice (which would be progressive). It is partly for this reason - the dependence of one's evaluation of an expansion of professionalised justice on a particular analysis - that it has been necessary to draw the distinctions presented here. When it is argued (Brooke, 1979; Frost and Howard, 1977; Reich, 1964) that clients of state forms of incorporated justice should be constituted as subjects with rights, that rules governing the decisions should be public and consistent and, thirdly, (only) capable of being argued by professional representatives, that other aspects of the discourse - characterisation of the originating incident, rules of evidence - be similarly accommodated to the "professional" legal model, then these changes should be encouraged, although the third is problematic because it supports the unnecessary monopoly position of a particualr occupational group. Professionalised justice is closer to the interests of subaltern classes than any incorporated

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form could be, since incorporated forms create a site for the direct penetration of dominant class norms.

Incorporated forms of justice are vulnerable to encroachment from each of the other three forms, as a result of their lack of a consistent legitimating ideology. On the other hand, the very fact of their incorporation indicates that as long as they continue to fulfill their objective they are not going to encounter resource difficulties.

The legitimacy problem for incorporated forms posed by collective justice results from the dual legitimation of these forms in terms of their "lay" element and their "expert" element. First, these two forms of legitimation cannot function simultaneously. There is thus an internal contradiction in the ideological structure which is itself a source of weakness. Yet both elements - the lay and the expert - are used to justify the departure from professionalised justice, the form, as has been stated, which undoubtedly carries highest legitimacy in contemporary western capitalist societies. The problem of the internal contradiction arises because of the scientific truth claims made by and particularly about experts. Because if there is a person who can directly divine the truth of a claim or a situation then there is no need for a court of adjudicators at all. Their only function could be to reinforce the truth, which is unnecessary, or to subvert it. On the other hand a decision by an expert alone is plainly not regarded as adequate. Many experts - planners, welfare officials - do not carry wide popular legitimacy. Therefore the present two tiered legitimacy structure is more effective. The incorporated justice agency claims legitimacy from the outside world by virtue of being "lay" or popular, while a pattern of acceptable decisions is legitimated internally, to the lay members, by virtue of being experts.

However this structurally useful device creates a second legitimacy problem, apart from that of internal consitency. It's lay members' claims to speak for a populace they in no way represent can very

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easily be rendered suspect. Thus the class base, the organisation, and the procedures of incorporated justice can be directly challenged by collective justice forms, which are a living demonstration of what "lay justice" might become. An analysis of the practice of these institutions also reveals and explains the typical subject-object inversion presented above, so that their legitimacy can be challenged on the grounds of blaming the victim.

The challenge to incorporated justice from the professionalised form has already been considered, and it has been argued that this challenge, as well as the collective one, should be encouraged. How then is incorporated justice vulnerable to the worst form of all, from a working class standpoint, namely populist justice?

As far as the distinction between populist justice - which can also be seen as fully incorporated -, and state or capital incorporated forms is concerned, while the class base is largely the same, it is concealed in different ways. These ideological differences affect the way subjects and objects of justice can be conceived. They also structure the nature of possible objectives, leading not just to differences in procedure but to dramatically different outcomes. Indeed the fact that in incorporated forms the constituted subject is effectively the victim, that there may be a subject-object inversion, is grounds for challenge. In populists forms, however, the victim in the matter is the object of the justice. And of course, the populist forms can therefore be far more punitive. These differences are constituted by and in part re-constitute the different political structures and balance of forces between the classes of the society. The conceptual consequences of the ideology could not be fully elaborated into a "form of justice" if there were organised class resistance on both ideological and political fronts, (for control of the ideological and repressive apparatuses whether public or private).

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Incorporated justice is, however, vulnerable to populist forms because from the point of view of the state and capital the legitimating lay element may mean that these agencies give unwelcome decisions. At least the possibility exists. The response to the challege from collective forms on even professionalised forms may then be a movement towards greater incorporation, and total control. This is the organisational (rather than the on-street) manifestation of populism at its anti democratic extreme.

The best historical example of precisely this series of shifts has been offered by Reifner (1982) in his powerful account of how Workers' Offices (collective justice forms) in pre-fascist Germany were first incorporated as government sponsored law-offices, and then finally absorbed into the fascist totality. This is why professionalised justice forms are essential to the working class at defensive moments in their struggle: they are resistant to incorporation without massive organisational and ideological re-structuring, as Thompson (1975) so forcefully pointed out.

Is the continuum a circle? Or what is the relationship between populist and collective forms? This essay has shown that they are not just diagramatically but also conceptually and politically poles apart. There seems to be no real risk of collectivism degenerating (from a class standpoint it is possible to use such an evaluative term) into populism. In the western world it has never happened, or ever been on the cards. And can populism become collective? It is of course extremely vulnerable to legitimacy challenges from both collective and professionalised forms. If these become sufficient then the structural rift between monopoly capital as financier and the petit bourgeoisie which controls the state may cause a dramatic lurch back towards professionalised forms. But here we are talking of a class struggle and the balance of class forces in particular situations, not of relations between abstracted justice types. And of course, both legitimacy and

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resource claims and deficits are effective only if political action makes them so. An analysis of this kind can provide some indicators of the directions for political action: it cannot substitute for it. And successful working class political action would render it obsolete, for like all material analyses, its truth-claims are temporally bounded.

Tail Note

This paper has not discussed forms of justice in most parts of the third world. China, or in Eastern Europe. And surely enough, quantitatively, has been said. None the less, a few comments may be in order.

First, the third world: it is noteworthy that models of adjudication in third world countries which have been recommended for importation have been pre-capitalist ones (Christie, 1977; Danzig, 1973) rather than those generated in the course of the on-going struggle against imperialism (Karst, 1973; Rojas, 1982; Sachs, 1980, Spence, 1983; Santos, 1979, 1980; Thome, 1979, 1981, 1984). As I and many others have already argued (Cain, 1982 and see p.) institutions cannot be transplanted from one mode of production to another without transformation. This notion was only ever possible because of a lack of an adequate concept of them or their process. Moreover, the premises of that discussion were empirically false since pre-capitalist justice forms were and are endemically unequal and heavily gendered (Merry, 1983, op. cit.).

The Latin American examples which we have, however, exemplify insitutions born out of struggle against imperialist capitalist forms. They can be accommodated within our pre-figurative model of collective justice.[12] Indeed, they fit almost exactly, although (1) a major difference, noted in the general discussion of collective forms, is that they are frequently concerned with internal co-ordination and defence rather than class advance; (2) their internal organisation depends

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on status hierarchies within the subject group. It may therefore appear less democratic, until one recalls that status (unlike class) is redeemable: this is the informally institutionalised basis of accountability. We can learn from these models too.

The models from "socialist" countries are so various that it is difficult to draw their lesson although Gordley (1975) has attempted to generalise. And apart from the variation, there is the major difference of the role of the party. This might involve expanding the presently diadic notion of incorporation by either the state or capital to include the possibility of incorporation by the party. And any attempt to analyse this from a working class standpoint would involve both a theory of the party and a detailed empirical knowledge of the state of these party-class relations in each of the societies in question. This paper is not the place to examine these questions. However, a number of other observations may be made.

In Cuba (Cantor, 1974), Maoist China (Brady, 1980, 1982; Hipkin, 1980) and Yugoslavia (Jambrek, 1983) there have been recent party sponsored attempts to make justice closer to the life of the people. (It is less confusing to reserve the term collective for the pre-figurative capitalist forms discussed here). In both China and Yugoslavia the risk to these forms is from a re-professionalisation. In China this seems to be associated with a change in class composition within the party and a wish to import capital; in Yugoslavia the pressure comes more directly from lawyers, but the direction of the outcome is less clear. In neither of these countries is a greater degree of incorporation - of any kind - proposed or apparent.

Social scientific data are available too about the Comrades' Courts in Bulgaria (Naumova, 1983), (pre Solidarity) Poland (Kurcewski and Frieske, 1978; Kurcewski, 1979), and about lay assessors in Hungary (Kulcsar, 1982). It seem that in these cases the party has a greater control of the adjudicative site, although the structural

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question of forging accountability to the communal subject remains important. The subject/object inversion characteristic of incorporated forms is therefore a danger here. All one can say, perhaps, is that incorporation by a party, and most particularly by one which is not organically related and accountable to the class it represents, would be no improvement on any other kind of incorporation, and one stage worse from a class standpoint than professionalised justice.

If this leaves us stuck for "finished" models we should remember how long it took for workable capitalist forms to emerge, that the first capitalist republic, for example, (Cromwell's) was scrapped as a failed experiment, and an impossible political form, and that there <u>are</u> unfinished models of a state which empowers the people (Hall, 1984) and of sites of judgment which transform justice without abandoning it as an impossible concept.

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Notes

(1) Santos elaborated his grounds for hope in an earlier (1979) paper.

(2) See also Cain and Finch (1980, 1981) and Keat (1981), for discussions of these kinds of positions.

(3) This discussion owes much in general terms, to Foucault's discussion of repressed histories and experiences. See Foucault (1977), pp. 205-217.

(4) And again, a general and permanent debt to Gramsci must be acknowledged here, in particular, of course, to his theory of knowledge (see Gramsci 1971), and within that in particular his theories of the intellectuals and of hegemony.

(5) Source: pilot research conducted in 1979 by the author, and financed by the Nuffield Foundation.

(6) Mc Barnet (1976, 1981) has revealed how legal rules, and in particular the discretionary spaces which they create, shape the work of police, prosecutors, and criminal courts. The same is true in private law (see Cain, 1979: report to the Nuffield Foundation on pilot study of County Courts, Appendix B).

(7) This form is not, of course, unproblematic. Jessop, (1983) provides the most useful summary of the debates in this area.

(8) Caroline Goodman-Jones has revealed the ambiguity of the status of experts when used as witnesses in a recent Ph. D. (University of Cambridge, 1984). Joel Eigen (University of Philadelphia) has documented the historical emergence of the psychological expert witness in English 18th and 19th century trials. Private communication.

(9) There are of course exceptions. As Napier (1979) and Kogowski (1984) show, some labour courts in particular resist incorporation of this kind. Most notably in France all adjudicators of the conseils des proud'hommes are elected directly by members of either trades unions or employers' organisations.

(10) Ietswaart's distinction here provided the seminal thought giving rise to this paper- a considerable debt which must be acknowledged.

(11) See Cain (1976, 1979, 1984) for discussions of why law necessarily has the form of a meta-discourse, and why it is structurally impossible for this discourse to originate in the working class.

(12) Legal aid models are not pre-figurative in the sense used here. They do not decide issues, but rather filter cases to professionalised agencies, see Johnson (1975), Lynch (1978).

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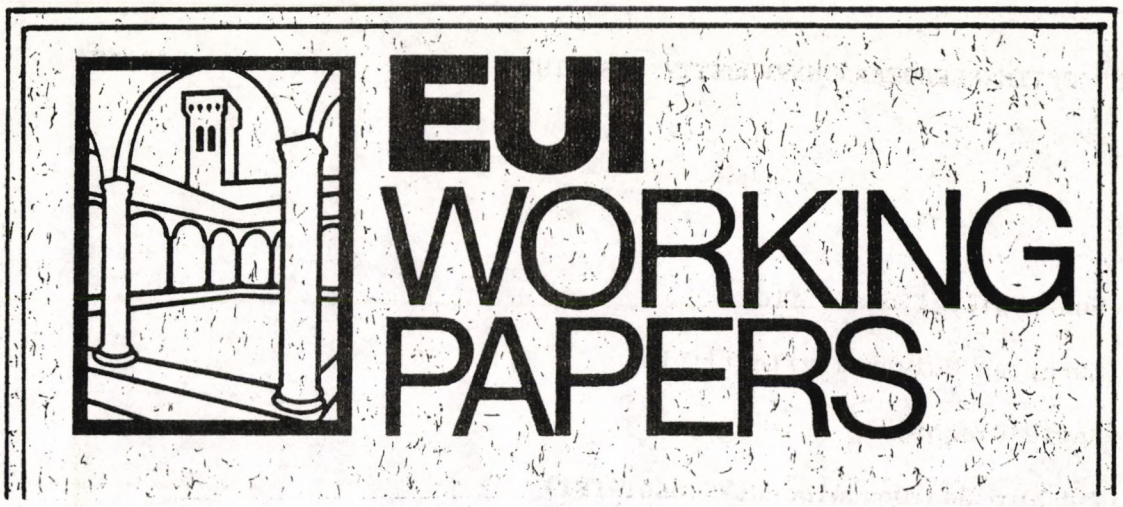

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