

CHAPTER I

COURTS AS
PERFORMANCES:
DOMESTIC VIOLENCE
HEARINGS IN
A HAWAII'
FAMILY COURT'

Sally Engle Merry

"But she deserved to be hit," argued the man wearing sandals and a faded T-shirt. "You should see the way she takes care of our children."

"There is no excuse for violence. I don't care what she does," replied the judge, a middle-aged white man wearing a black robe sitting behind a large desk. "That is the law of Hawaii. You may not hit your wife. That is all there is to it." After a little more argument, the judge imposed a temporary restraining order on him, enjoining him from seeing the woman. At the same time he required the husband to participate in a six-month reeducation program for men who batter women. If the husband violates this order, he will face serious criminal penalties.

In a single morning, this judge heard eight other requests for restraining orders from women and men in the Family Court of Hilo, Hawaii. Hilo is a small town of about 35,000, the center of an old sugar plantation industry and the county seat of the island of Hawaii. The people seeking help from the court come from diverse ethnic backgrounds, including white, Filipino, Hawaiian, Portuguese, Japanese, and Puerto Rican. Several of the batterers argued that their violence was appropriate punishment for the women. The judge's stance was the same in every case: battering is never deserved. His position parallels the view advocated by the local battered women's shelter and its program for retraining men who batter, called Alternatives to Violence. The judge has served on the board of directors of

the shelter and shares the **feminist** politics of its founders. He comes to the bench after a long period as a legal services attorney.

This paper **argues** that **court** hearings serve as critical sites for the creation and imposition of **cultural** meanings. Lower courts address day-to-day social problems and conflicts, rendering interpretations of them in terms of a **particular** "legal sensibility" enshrined in the judicial **forum** (Geertz 1983). **Lower** criminal and family courts **produce** cultural meanings by interpreting the experiences of the people who bring their problems there. As these problems are named, discussed, and settled, new **cultural** meanings are imposed on them. Moreover, **courts** signal how **seriously they regard** an offense by deciding whether or not to impose a **penalty** and, if so, how severe a penalty. For example, **courts** can present **new definitions** of **wife** battering and **male** entitlement to violence against women. Ultimately these new ways of framing violent incidents contribute to **redefining** cultural notions of masculinity and femininity.

Court hearings are highly **ritualized events**. Consequently, the interpretations they provide gain saliency from **the** authority and **legitimacy** the **court** is able to convey. **The** procedures, personnel, and organization of the court itself enact a drama which conveys messages about social hierarchy, authority, and order (Arno 1985). Features of class, gender, and race add in subtle **but** significant ways to the authority of the **judge** and **court** personnel. If judges belong to the dominant racial **group** and speak with the accent of educated people, as they do in my example, these **features** of social **hierarchy** contribute to the authority of their pronouncements.

In the public performances provided **by** the courts, rules are bent, folded, and applied to the **quotidian** realm of social **life**. Events are redefined in legal terms; relationships are **measured** against the rules for such persons, and violence is threatened or imposed. These performances reinterpret **daily** social life and at the same **time**, **generally include** normative statements by **authoritatively endowed** actors, such as **judges** and clerks, which **specify** appropriate behavior. **They** have a **quality** of theater for the audiences — a theater of the state endowed with coercive power. The audiences for these performances are the parties themselves and their social networks, **those** who watch court **proceedings**, and the **wider public** to whom **the** deliberations and outcomes are reported. **The audience** also includes the judges, attorneys, and other **court** officials themselves. In the domestic violence hearings I observed, the audience **includes** participants and advocates from the battered women's shelter and **Alternatives** to Violence program, a **closely knit** group of **women's advocates** which clearly shares

information about what happens in court. Such performances, over time, may reshape legal **consciousness** and redefine social rules and norms.' Of course, audiences respond with differing levels of awe and respect to this ritual (Merry 1990).

Court performances rely on specialized costumes (robes, suits and ties), demarcation of space (public space, lawyer's space, **judge's** raised bench), specialized **language**, and the presence of gatekeepers, in the form of bailiffs or court officers, who move the uninitiated and uninformed around the complex, socially demarcated spaces of the courtroom, telling them where to sit, where to stand, how to **behave**, and whether or not **they** are permitted to speak or to read a newspaper. The shape of this **ritual** demarcation of space, costume, and language **suggests** an affinity more to religion than to a **play**. Although the ritualized role of **courts** has long **been** noted, I am less interested in how ritual enhances the power of the court than in how the ritualized decision-making events of the court and the penalties they impose **change** the way people **understand themselves** and **their rights and obligations**.

Of course, the interpretations of events and persons constructed in legal definitions have consequences (**see** Silbey and Sarat 1987). The interpretations they provide can lead to imprisonment, fines, restriction of activities, or payments of **debts**, among many other consequences. Law is a discourse which interprets **and** conveys meaning, but it is a discourse **with** force behind it. Its impact is not only in the realm of meaning.

The **cultural** messages being **produced** in any **particular** court reflect the practices and perspectives of the court officials. What is being **produced** is not simply **the dominant** ideology of the legal system, but a particular interpretation and enactment of that **ideology**. The cultural message bears some **relationship** to the ideology, **but** a filtered, derivative one. The central government typically passes laws and establishes **legal institutions** to promote a particular vision of **the** social order. In **that** sense, the courts impose the dominant **ideology embodied** in the law. **On the other hand**, **local working groups** develop their own ways of managing problems and imposing rules which are not necessarily congruent with the ideology of the center. **Consequently**, looking at courts in terms of cultural **production** leads to asking **questions** about **processes** of domination and resistance in the social field of the court, about the effect of court processes on **larger communities**, and about the **hegemonic** functions of **law** and the processes which **limit** it.' As **Thompson** comments, **courts** do not simply express the interests of the ruling classes but also enact the **practices** and conceptions of the

people who staff them and decide whom to finger and arrest, whom to prosecute, and whom to let go (1975).

Local practices for handling problems are influenced by the law but also by local conditions. Courts consist of people who decide whether or not to do anything about a problem, what to call the problem, and what kind of people the plaintiff and the defendants are. They make judgments about who is a troublemaker, who is a good person who has made a forgivable slip, which kinds of events are serious and which are trivial, and what principles of justice are most important. Yngvesson, for example, compares various court clerks in two Massachusetts towns showing how they differ in their modes of case interpretation and case handling (1993). She shows that clerks differ significantly in how they handle cases depending on their background, training, and standing in the community. Local court officials decide how to weigh conflicting stories, how far to allow a case to progress, and when to eject it from the court. In the United States, as is common elsewhere, these officials are political people, aware that the larger community is watching them and paying their salaries (see also Merry 1990). Many are appointed by political leaders and keep their jobs only on the sufferance of these leaders.

The dramatic nature of criminal court trials has long been recognized and discussed, although rarely in terms of the way it contributes to changes in legal consciousness or in definitions of relationships. Anthropologists of law have in the past considered conflict situations as opportunities to identify underlying normative codes. In his analysis of Trobriand law, for example, Malinowski provides vivid illustrations of public moments of confrontation which reveal conflicts among laws. The dramatic story of a nighttime shouting match which leads to the exile of a chief's favored son illustrates the conflict between principles of matrilineal descent and paternal affection (1972:100–105). Working in a similar tradition, Llewellyn and Hoebel develop the concept of the "trouble case"—the dramatic moment in which a concrete problem is subjected to the law—to reveal the content of Cheyenne law (1941). Victor Turner named the moment in which contradictory social principles erupt into conflict the social drama, similarly viewing this moment as one in which social norms are laid bare (1957). Gluckman used the analysis of a conflict and its surrounding social relationships, the extended case method, to reveal social structures (1955).

Thurman Arnold, commenting on American government in the early twentieth century, also emphasizes the dramatic role of criminal courts, but he used this analysis to make a somewhat different point (1935).

He focuses on the way these dramatic events convey cultural messages about the values of the government, about the dignity of the state as enforcer of law, and about the dignity of the individual despite his background as a criminal or opponent of the state (1935:130). Criminal courts are public ceremonial enactments of dearly held values concerning the right of all people to a fair trial and the power of the state to enforce laws. Yet, because there are so many conflicting laws and ways of guaranteeing fair trials, courts are places of contest between contradictory principles.

More recently, scholars have examined the relationship between criminal trials as dramatic events and their role in maintaining or challenging the power of particular social classes. As E. P. Thompson and his collaborators demonstrate in their examination of eighteenth-century British legal history, courts clearly worked to support the power of the dominant classes and to quash, often harshly, challenges to their power and property mounted by their inferiors (1975; Hay 1975). In one account of trials in this period, Douglas Hay argues that the courts maintained their legitimacy through dramatic performances in which they displayed not only their majesty but also their mercy, sternly sentencing then magnanimously pardoning convicted felons at the last moment (1975). Yet these courts did, from time to time, convict the privileged and protect the weak. Indeed, both Thompson and Hay note that the power of the courts to buttress the authority of elites depended on their appearance of fairness and justice and their willingness to apply the same rules to the powerful. Thus, these historians recognize the dramatic nature of trials but, instead of seeing them only as contributing to the maintenance of the power of dominant groups, they see trials as ways in which the ruling class casts an aura of legitimacy and fairness on its sometimes capricious and harsh rule.

None of these scholars addresses the question of how this ritualized processing of problems changes the way people think about their problems or about themselves. The analysis of dispute transformation developed by Lynn Mather and Barbara Yngvesson is valuable here; it highlights the way meanings are created in judicial hearings (1980:81; see also Yngvesson 1988, 1993). Disputing, they argue, can be viewed as a bargaining process "in which the object of the dispute and the normative framework to be applied are negotiated as the dispute proceeds" (1980:81:818). Thus, the meanings of conflict are not fixed but negotiated between disputants and judicial third parties. Disputes are typically "rephrased," reformulated into some kind of a public discourse (ibid.:777). The most common rephrasing is narrowing the dispute into conventional categories of action and event,

but disputes may also be expanded in terms of a new framework outside existing categories for events and relationships (*ibid.*:778).

Third parties such as judges and court clerks play a crucial role in this rephrasing, although they may do so subtly rather than by announcing their power to decide. For example, they may construe the facts so that the outcome follows logically from their description of the situation. **Mather** and Yngvesson emphasize the importance of audiences such as judicial third parties in rephrasing disputes: those endowed with legitimacy by the state have particular power to rephrase disputes (*ibid.*).

COURT PERFORMANCES IN CONTEXTS OF LEGAL PLURALISM

In legally plural environments, the role of courts in creating systems of meaning takes on particular significance. Under these conditions, local courts are one mechanism for introducing a new cultural system to a community with distinctive values and rules. When one legal system is that of a politically dominant power superimposed over a second legal system of politically subordinate peoples, as is the case in colonial situations or the incorporation of indigenous peoples into a nation-state, the local courts take on a critical role in both social control and cultural transformation. Court performances introduce the cultural practices of the dominant group to the subordinate group as they impose new regulations and conceptions of social relationships. In their public ritual performances, courts operating in situations of cultural diversity and unequal power tend to apply the rules of one group to other groups. These performances demonstrate the procedures of the dominant order, demand compliance with it, and illustrate through both the imposition of laws and their enactment in the daily life of subordinate peoples, the ways it applies to everyday life. Thus, court performances are one way of expanding the hegemony of the law. Not **only** are ideas articulated but they are superimposed on everyday life in front of an audience of relatives, neighbors, and friends.

Yet members of subordinate groups frequently mobilize aspects of the introduced legal system to challenge both old and new hierarchies of power (see, *e.g.*, Thompson 1975; Chanock 1985; Matsuda 1988). Moreover, local judges and court officers occupy an intermediate position in the structure of power, linked both to the subordinate group and to the dominant group. In understanding what kinds of cultural messages courts provide in situations of legal **pluralism** when the legal

spheres are of sharply different power, it is critical to examine the performances of local court judges, persons whom, as **Mather** and Yngvesson point out, have a uniquely powerful role to play in transforming the meaning of disputes. They represent an intermediate locus of power, imposing the legal system of the dominant group yet responsive to the political pressures and cultural systems of the subordinate groups. Examining the culturally productive role of courts in legally plural situations highlights the role of local officials who interpret and impose the law created by the state.

The impact of a culturally distinct and dominant legal system is particularly powerful at the moment in which a problem or situation is subjected to the legal gaze and a decision rendered (see Yngvesson 1988). Part of this procedure includes some discussion of the problem. The problem is often reformulated into the terms of a new **legal ideology**, with new conceptions of relationships and persons (see Merry 1990). Insofar as this translation takes place in public arenas, such as courts, it serves a broader educative role, showing people how their problems can be interpreted in the new legal code and, at the same time, demonstrating that these interpretations lead to decisions with coercive consequences: to fines, prison terms, probation, supervision, and mandatory treatment programs.

Recognizing the capacity of local judicial forums to educate the public and to change behavior, political movements seeking to transform local social relationships often create new local courts. For example, the Cuban revolutionary government formed people's tribunals for public discussion of the new morality (see, *e.g.*, Salas 1983). The European colonization of Africa similarly employed local courts as settings in which to articulate and impose a new conceptual **world**.⁴

The distinct sets of laws of each group in a situation of legal pluralism incorporate differing conceptions about kinds of persons, about relationships, and about duties and responsibilities embedded in particular cultural systems. Each defines, for example, the responsibilities of women, the nature of the family, the obligations between masters and servants, and the terms of marriage and divorce. For example, Hawaiian laws passed in 1840 under the influence of New England missionaries specified that the business of women was to be at home and to tend their children. Hawaiian women, particularly chiefly women, had occupied a relatively autonomous and occasionally powerful position in the precontact period. Under the influence of the New England missionaries, who arrived in Hawaii beginning in 1820, women were redefined as more **subordinate** to men and excluded from participation in public life. At the same time, rape law changed from

a small payment of compensation to the victim to a substantial fine and period of imprisonment for the culprit (Nelligan 1983). The victim received no compensation.' Thus, in this legally plural situation, the laws began the work of redefining the nature of woman, in part through the way rapes were handled and the penalties imposed.

In fact, courts characteristically work within implicit categories of race and gender, categories which they may reproduce or challenge. As courts handle cases concerning assault, violence, neighborly behavior, family life, work, and leisure activities, they base their actions on persons raced and gendered, reproducing assumptions about people of different racial and gender identities. Mindie Lazarus-Black (1992, and this volume) provides an important analysis of the ways in which Antiguan laws during both the slavery era and the more recent period construct images of personhood and of kin ties. During the slavery period, laws about marriage helped to define distinct categories of persons: free, indentured, and slave, by establishing different marriage regulations (Lazarus-Black 1992). Laws about the collective responsibility of kin for the poor contributed to forming a kinship system relatively little connected with formal marriage but extensively involved in kin networks. The recent decision to eliminate bastardy as a distinct (and disabling) legal category in Antigua, a change produced by the rise to power of groups previously excluded from lawmaking, promises to work further changes in the kinship system and in the meaning of gender.

RECONSTITUTING GENDER IDENTITIES IN DOMESTIC VIOLENCE HEARINGS

Hearings about cases of wife battering provide one instance of the cultural production of the courts. Over the last decade, the courts in Hilo have developed an increasingly activist, feminist approach to spousal violence, encouraged by an energetic group of women who founded a shelter, developed a reeducation program for men who batter, and formed a support group for women (Rodriguez 1988). Many convicted batterers and men subject to restraining orders are mandated by the court to attend the anger management program.

Over the last ten years, there has been a sharp increase in the number of cases concerning domestic violence brought to the Family Court by victims seeking protective orders and to the criminal court by police and by victims for criminal prosecution. The former increase reflects changes in the willingness of victims (usually but not always women)

to turn to the court for help while the latter increase indicates that police are more energetic in making arrests, as are prosecutors in pressing charges. There has also been a significant strengthening of the laws concerning domestic violence, including increases in the penalties for spousal violence.

Although cases of domestic violence appear in the court record in Hilo from time to time during the nineteenth and early twentieth centuries as assault charges, in most instances it appears that such cases were brought to trial only when the violence was frequent and the injuries severe. The court has typically failed to prosecute these cases or has imposed a fine far less than that for adultery or selling liquor without a license. By the mid-1970s, one observes the beginnings of a change. The first law specifically addressed to domestic violence was passed in 1973 in Hawaii, but based on caseload figures and interviews, it had little effect.⁶ It was gradually strengthened during the 1980s.⁷

Thus, the legal response to domestic violence has shifted from an approach common in the 1970s of separating the parties and allowing them to cool off without further intervention to an increasingly severe penalty for the offender, both incarceration and mandatory treatment programs, and more extensive record keeping which isolates and identifies this problem in particular and labels the offender. This bureaucratic change signals not only that the problem is viewed as more serious, but also that it is separated out from the larger stream of assault cases and marked as different. Such record-keeping shifts, as the Oahu Task Force notes, increase the visibility of the action and shape consciousness about the offense and its frequency (Oahu Spouse Abuse Task Force [1986], quoted in Hawaii Island Spouse Abuse Task Force 1989: Appendix C—5).⁸

On the island of Hawai'i, the mobilization for a stronger legal approach occurred in the late 1970s as the newly established women's center confronted a surprisingly large demand for a shelter for battered women. A shelter was established in the early 1980s by a charismatic and effective woman who mobilized public awareness, fought resistance from those who declared the shelter hostile to men, and gathered significant support from private charities to continue its operation. She came originally from New York City and has been working on women's issues in Hilo for fifteen years. Many of the leaders of this program are white working-class women. The founder continued to press the legislature, at the time a liberal, Democratic body, for further protection for women. A new, autonomous Family Court was established in 1989 under a judge who had many years of experience as a

legal aid attorney seeking to get protection for battered women. This judge had worked closely with the shelter for many years and had served on its board.⁹ Since 1986 the courts have supported Alternatives to Violence, a training program for men who abuse their partners which focuses on learning to manage anger and on reshaping beliefs. The courts routinely require a significant proportion of the men accused of domestic violence to participate in this program and encourage their partners to attend a women's support group. Alternatives to Violence (ATV) is part of the shelter and comes out of the same political movement dedicated to protecting women. Leaders of the program say that their main concern is with women's safety, and that the training program for men is one way of increasing women's safety.

There are two distinct routes, one criminal and one civil, by which a case of domestic violence comes to the attention of the courts. A batterer can be arrested and charged with abuse of a household member in criminal court, an offense with a mandatory forty-eight-hour prison sentence. Civilly, a victim can file for a temporary protective order, generally called a temporary restraining order or TRO, from the Family Court.¹⁰ A person can apply for a TRO against any family member, whether or not he or she is living in the same household.¹¹ The victim goes to the probation office or a shelter and fills out an affidavit which is reviewed and signed by the judge. There must be a hearing within fifteen days. Since this is a civil action, the law does not provide an attorney for the person accused.

At the hearing, the Family Court judge reads the written account provided by the victim, asks the accused if he or she acknowledges the charge, and takes testimony if the accused denies all violence. If the accused accepts the charge or the evidence is persuasive, the judge issues a temporary restraining order for a period of months with a series of conditions. If there are no children and a desire on the part of both parties to separate, they are told to stay away from each other and have no further contact. If they have children but the victim wishes no contact, the judge will arrange visitation or custody for the children and specify no contact between the adults. If they wish to continue the relationship and to live together or to have contact, the judge will often send them to ATV, requiring either the accused or both parties to participate in the program and permit them contact on the condition that there is no violence. Any violation of the conditions of the protective order is a misdemeanor, punishable by a jail sentence of up to one year and/or a fine of two thousand dollars. The judge frequently schedules a review hearing in a month or two to monitor the situation, particularly for the contact restraining orders.

Table 1
Number of Temporary Restraining Order (TRO)
Cases in Family Court by Years¹

1985	250
1986	327
1987	355
1988	277
1989	289
1990	338
1991	359

¹Counts based on circuit court case files of miscellaneous family court cases; these numbers were produced by going through the files of miscellaneous cases looking for those concerning domestic violence. After 1990, domestic violence cases were catalogued separately.

The victims typically fill out the request for a TRO in the shelter or at ATV where workers are paid by the court to help them. Victims are almost always accompanied by a woman advocate from ATV. The man appears alone. Although there is always a man from the men's side of the ATV program present in the waiting area of the court and willing to talk to the men, the men are rarely interested in talking at that time. The ATV representative does not regularly talk to them at all until the judge tells them they must go to ATV and that they must talk to him. Thus, access to this process requires the initiative of the victim and her willingness to summon the accused to court.

The number of requests for TROs has increased dramatically since the early 1970s. Between 1971 and 1978, there were seven TROs issued in Hilo for domestic violence situations. By 1985, however, the year the new spouse abuse law went into effect, the numbers were much larger, as Table 1 indicates. These figures are only for cases from Hilo. I was unable to locate figures for the period from 1979, when the regulation providing for these protective orders in domestic situations came into effect, to 1985.

In sum, during the 1980s, victims of violence in the home were increasingly turning to the court for protection through temporary restraining orders. The number of batterers arrested and prosecuted in the criminal court has grown even faster. As the changing caseloads and the historical material suggest, people who are battered (mostly but not entirely women) are going to court for behavior which, twenty years ago, was taken for granted as a part of male authority.

My research assistant and I observed the domestic violence calendar

in the Hilo family court, which was held once a week, for nineteen weeks during the period from July 1991 to August 1992. This period gave rise to approximately 105 requests for a TRO. In most cases, the defendants were men and the victims were women. The women who bring these cases to the court are primarily young, in their twenties and thirties, and nonprofessional workers or nonworkers. Their ethnic identities are widely varied and reflective of the local population, including white, Portuguese, Filipino, Japanese, Hawaiian, Hawaiian/Chinese, and Puerto Rican individuals. Because of the high rate of intermarriage among these groups, the majority have multiple ethnicities. Most fall into the group labeled "local," a quasi-ethnic identity premised on birth and rearing on the island and marked most significantly by mastery of pidgin, a dialect of English which combines features of Hawaiian, Japanese, Filipino, and other local languages in vocabulary and syntax. A significant minority are people from the mainland following a wide variety of alternative lifestyles from born-again Christians to pioneer-survivalists and people aspiring to live off the land. A few support themselves by cultivating marijuana. Many of these men and women bring varying ideas about the acceptability and legitimacy of violence against women to the court hearing. Most of the people have low incomes, and the men often are not working. According to the judge, about forty percent of the women want to separate from the men and about sixty percent want to stay together without the violence.

Hearings are temporarily held in an office building near the courthouse for lack of space, but the ritual dimensions of a court are nevertheless reproduced. Parties wait outside in an open lobby area and are ushered into the courtroom by the bailiff when their case is called. Although they are scheduled for a particular time and the judge generally keeps to the schedule, sometimes they must wait. The judge sits behind a large desk wearing a black robe, flanked by a court clerk and assisted by his bailiff. The parties are assigned seats at two tables, one for the plaintiff and one for the defendant, and told by the bailiff where to sit. Children or other relatives accompanying the parties sit behind the parties. Lawyers are rarely present. Since this is a civil matter, there is no attorney appointed for the defendant. If the defendant wishes to hire one at his own expense, however, he is allowed to postpone the hearing until he can do so. When defendants hear that they have to pay for the lawyer themselves, most decide to forgo legal representation. Women plaintiffs are typically accompanied by women workers at the local shelter who have helped them to fill out the form and encouraged them to file for a temporary restraining order.

Although the hearings are private, the advocates from the community women's group are an important audience. Thus, despite the informality of the setting, the ritual fundamentals of costume and space are reproduced.

The Family Court judge's concerns are twofold: first, to stop the violence and, second, to protect the children involved. He endeavors to convey a clear message that violence is against the law and that it is bad for children. He defines his task as preventing the parties from killing each other rather than finding out what the underlying issues are. There is not enough time to handle the cases that way, and his objective is to prevent violence and threats and to protect any children in the family. He knows drugs and alcohol are involved but sees dealing with these problems as beyond his capacity for intervention. Any indication of violence or abuse against children elicits an immediate referral to Children's Protective Services.

The judge generally resists the efforts the aggressor makes to reframe the problem as one of mutual fault or responsibility. If the aggressor (usually, but not always, a man) attempts to justify his blows on the basis of the misbehavior of the other person, whether because the person has had an affair with someone else or failed to take care of the house or children well, the judge will hear him out but not excuse the violence. If both parties have filed complaints against each other, the judge refuses to issue both, only issuing an order against the primary aggressor, usually the man. When men start complaining that their women drink, take care of the children poorly, have affairs with other men, or get angry and hit them, he cuts them off. He asks if that is why they are here, and when the man meekly answers, "No," the judge reiterates that they are here because the man has hit the woman and that it is wrong and against the law. As one man put it, "You just make me the bad guy. It's her too." The judge's response is that the men need to learn to control their anger for the sake of the children and for the example they provide their children. If the man insists that his wife needs counseling too, the judge may agree, but he reiterates that the reason they are there is that the man has abused her and that that is against the law and is bad for the children.

The following case illustrates the active role the judge plays in framing the problem and resisting the effort of the man to place blame upon the woman.

Both parties in this case are of Filipino ancestry and in their twenties. They are not married, but they have a baby. They speak the local pidgin version of English. The man is working. The woman was brought to the court by the shelter workers. The following account is based on

my notes, since I did not tape-record the session. It is not a verbatim dialogue, and it does not reflect "local" speech.

Judge: Can you understand English? Do you want a lawyer?

Man: I can't afford a lawyer.

Judge: Is what she says in this paper true?

Man: (silence)

(The judge has both parties sworn as witnesses.)

Judge: What happened?

Judge (to plaintiff, reading *from* the application): You say you came home from work, he was jealous, started hitting you, dragging you around by the hair. You are pregnant.

Woman: Yes. I'm not fooling around.

Judge (to man): You have read this statement. Did you do what she says?

Man: I did hit her. But I came home, I saw her panties on the floor with sperm in them. The doctor said I'm not fertile. So how come she's pregnant? So I hit her.

Judge: Whether or not she is fooling around, you have no right to hit her, drag her by the hair, especially when she is pregnant. Are we in court because you think she is fooling around?

Man: No.

Judge: If you are upset about her fooling around, you need to talk to someone, or to seek counseling. (To plaintiff) What kind of restraining order do you want? Do you want to see him or not?

Woman: I want to have contact with him but to live away from him. I want him to go to the counseling program for violence.

Man: I want a family that lives together.

Judge: This is not the right way to do it. You have to learn not to hit when you get angry and frustrated. I am going to send you to a counseling program to learn how to handle your violence. Do you agree?

Man: I guess so.

(The judge discusses and arranges visitation for the *child*.)

Judge: This is the order of the court: Do not hit her or pull her hair, I don't care what she does. It is not right and it is against the law. I want you to go to the counseling program, to pay for the program, and to finish it. If you don't go, the case will go to the prosecutor and you will be prosecuted for contempt of court.

The man replies that he doesn't know if he can go to the program. The judge responds that he should work out the details with the

program staff, and if he violates this order, he will get up to one year in jail, a fine of two thousand dollars, or both.

Thus, the judge actively **reframes** the problem; what had seemed to be a question of mutual responsibility and fault becomes an illegal and unacceptable form of behavior which is never warranted. This is his typical approach to this kind of case. He is, I think, unusual in his commitment to handling domestic violence **firmly**.¹²

The judge believes that the major impact of his rulings falls on the women rather than the men. It is, of course, unrealistic to expect that this new stance from the court will quickly change cultural biases concerning male entitlement to violence. There are some indications, however, that, through the social networks surrounding these court appearances, women are hearing a new message about their obligation to accept violence. The following case was heard in the district court (the lower criminal court) in a proceeding and courtroom which are much more formal than those of the Family Court and are open to the general public. It demonstrates the way women who have heard the new message about violence mobilize that message in court contexts. The **wife/witness** expresses **her** position in language reminiscent of that of the Family Court judge and the women's shelter. She has had contact with both in the past. She received a restraining order in Family Court in June 1991, which was extended to March 1992. (The hearing took place in January 1992.) Her friend and neighbor who testified for her worked with the shelter and was a member of the **ATV** women's support group. It is likely that the wife was able to resist the defense effort to blame her for the violence she suffered because of these experiences. It is, of course, impossible to separate the impact of the messages communicated by the court from the roles of the shelter and **ATV** program in changing people's consciousness. But the court's pronouncements have the added weight of the legitimacy of the state and the force of penalties behind them.

A man is charged with abuse of a family or household member, burglary, and assault in the third degree. This is a preliminary hearing on the burglary charge, which is a felony. His wife, who no longer lives with him, is the principal witness against him. The defendant is from Tonga, the wife a "local" person in accent, although she is white. The case is handled by a prosecutor and a public defender. Both are whites without local accents, as is the judge. Aside from these people and other court clerks and bailiffs, I am the only person in the audience. The neighbor testifying on the wife's behalf waits outside. Since I was unable to tape-record, the following dialogue is based on my notes,

as was the previous one. It again fails to reproduce the local speech. The names are pseudonyms.

Jane **Marinpa**, the wife, is the first witness. She is a large woman wearing a loose house dress and appears to be of middle age. She says she is married to the defendant, **Louri**, and had lived with him, but **that** they have been separated for a year. She is a tenant in an apartment house where she pays rent and has lived for five years. She describes the incident as follows:

Witness: It was **9:00 AM** and I was laying on the futon, waiting for my son to come back from Kalapana. I waited to see if he would use the key to unlock the door. Then I looked through the peephole and I saw the defendant. I thought it was best to call up on the restraining order. Then the door flew open and my husband was standing there. He said he was here for the kids. He punched my nose, then my face, and he threw me on the floor, my head was aching. He hit me with a closed fist. He ripped off my shirt and underwear. (She cries.) I ran out the door to my sister's apartment downstairs. I called the police and went to the hospital in an ambulance. My neighbor had already called the police, and they came within three minutes after I left to go to my sister's.

Public Defender: How long were you married?

Witness: Three years this past October. I lived in an apartment for five years, then we moved to a bigger apartment and he moved in and was added onto the lease with me. He lives somewhere else now.

Public Defender: You are not formally divorced?

Witness: He was going to try to control his anger, but he has a lot of affairs; he made no effort. Plus, I wanted to wait for the birth of our second child.

(She has two children, aged 2 1/2 and 9 months, who are living with her but **Louri** is the father. She indicates clearly her ambivalence about leaving the man *who* is the father of her children and who not so long ago was the man she loved and married. She expresses a commonly felt desire not to give up on the *man*.)

Public Defender: You've had marital problems?

Witness: No. Abuse problems, physical and psychological.

Public Defender: **He's** had affairs?

Witness: Yes, I saw it with my own eyes. And I've had to leave my job to take care of my children.

Questions to both parties establish that she had called her husband and asked him to come take care of the children for the evening,

expecting to be back by **2:00 AM**. When she failed to return by early morning, he called her sister to come up and take care of the children while he left. She came home somewhat later and was lying down when he returned at **9:00 AM**. When the public defender asks if she had gone out the night before, she responds angrily, "Don't I have a right to go out for my thirty-third birthday? He attacked me. It was unprovoked. I don't see what my going out has to do with it."

The public defender points out that the restraining order forbids **Louri** from abusing or threatening his wife, but it does not require him to stay away from her. Both the friend/neighbor and the police officer who arrived at the scene testify that there was hitting and discuss the severity of the injuries. The public defender explores with Jane the extent of her injuries — she says she had a concussion — and asks about her alcohol consumption the night before the incident.

The story from the defense side is somewhat different. **Louri** is from Tonga and has an interpreter because his English is limited, although Jane does not speak Tongan and the court personnel tell me his English is adequate. No one translated the testimony of his wife to him. He says he is twenty-six years old. He came to take care of the children because she called him, but when she didn't return by **5:00 AM** he called her sister to come take care of the kids and left. He returned at **7:30 AM** to check on the children, he says, and finding only the sister there, left again. At **9:00 AM** he returned again to check on the children. The translator interprets his description of his actions as follows:

Translator: He knock ten minutes, heard kids crying, not sure anyone there, so he broke into the house. When he opened the door, she was lying on the floor, passed out. He said he was going to take the babies, then she pushed him and told him to get out of the house. She said she had a restraining order, was going to call the police. Then he punched her. He was worrying about the babies.

Prosecutor: Was she passed out?

Louri: She sat up when I kicked open the door.

In summing up the case, the prosecutor says that it is clear that this is a burglary, and that the evidence of injury is sufficient to charge the defendant with abuse of a household member. The public defender argues that **Louri** entered the apartment with force but only to see if the children were all right, because he heard crying babies. He acknowledges that there was abuse of a household member, but argues

that this would be better handled without the burglary charge in the first degree.

The judge concludes that, based on inferences from the testimony and the means of access used by Mr. **Marinpa**, that there is probable cause for burglary in the first degree and he will bind him over for further proceedings. He will also bind him over on the abuse charge and the assault charge for a hearing in circuit court.

The interesting feature of the case was the fierce resistance mounted by Mrs. **Marinpa** to defense insinuations that she was responsible for the assault because she went out, stayed out late, and did some drinking. She says very clearly that it doesn't matter what she does or where she goes because an assault on her is never justified. The defense attorney is clearly trying to construe the situation in such a way that breaking down the door was reasonable paternal concern for crying children who were poorly cared for by their mother who was passed out drunk. This argument is used to justify the assault on the door, if not the assault on the woman. It is interesting to me that Jane **Marinpa** repeats the argument used by the Family Court judge to defend herself in this hearing. The defense strategy, on the other hand, relies on older conceptions of justifiable violence, an idea which, at least in this case, in front of the court personnel and me, did not carry the day. I find in the testimony delivered by the wife clear indications of a new understanding of women's right not to be hit, phrased in a way reflective of the philosophy of ATV and the women's shelter. Here, this language is reinforced by the court, while the alternative view—that men are justified in engaging in violence when women misbehave—loses out.

Although the audience was small, several others testified and were aware of the outcome: a police officer, the neighbor, (who will carry news of the decision back to her friends at ATV), and a friend of the husband. Although no one from the **general** public was present, the audience of friends and neighbors who will hear about this case is substantial. It seems highly probable that this **legal** event will have an impact on the way women and men in this community think about their right to exercise violence against each other.

Buttressing this message is the class composition of the court. The judge and the attorneys are all Caucasians who speak standard English. The court clerks are all Japanese Americans, as is the police officer. The parties are locals, speaking pidgin English. Thus, the court performance is strengthened by the power accorded class, education, and race. Court performances join the effect of the statements made by the judge, the class power of the judge and the attorneys, the ritualized expression of state power in the courtroom, and the coercive power

of the outcome in constructing an event which conveys messages about personhood and violence, messages which, from time to time, may reshape the way people think about themselves. Although the courts have placed priority on the maintenance of marriage and patriarchal authority in the past, the current understanding privileges protection of the female body at the expense of marriage and patriarchal authority.

CONCLUSION: COURT PERFORMANCES AND THE PROBLEM OF HEGEMONY

Given the perspective developed in this paper, the question of the hegemony of law becomes an intriguing one. If law is part of the cultural world, if it shapes consciousness, and if its form is reflective of the interests of those who have the means to shape statutes, render decisions, and determine which rules to enforce—then it must contribute to this group's power. Law, here, has the ability to transform class-based edicts and principles into **common sense**. But, subjugated peoples have themselves seized the law, in a variety of ways, to advance their own interests. In this example, an activist group of women, and a supportive **judge**, have introduced new laws and constructed a judicial performance which enacts ideas about violence and **gender** that differ sharply from the previous norm. Although some forms of male violence against women have always been condemned, there has clearly been an assumption in the past that misbehavior on the part of women justifies violence which is interpreted as discipline. Women have taken the law and used it to combat patriarchal authority.

Moreover, the capacity of the law to impose hegemonic categories of meaning is circumscribed by the role of intermediaries who stand between the law as conceived and administered at the top and ordinary people. Judges, attorneys, clerks, bailiffs, and police are critical cultural agents, reinterpreting this law in the light of local circumstances and local categories of personhood. These people filter and interpret the law and serve as core actors in imposing it. Thus, the law can serve as a mode of cultural transformation, but its capacity to do so depends on the ways it can mobilize local support and the implicit categories of race, class, and **gender** through which people and events are interpreted.

Yet, the fundamental categories of the law—property, the individual, the family, the obligations of contract—remain unchallenged. Women go to court to assert their **right** not to be hit, a right which belongs to them as individuals. While the right not to be hit no matter

what a woman does is a powerful and transformative idea, it does not encompass the totality of the relationship a woman has with a man whom she may love when he is not violent, on whom she often depends for support, and who is frequently the father of at least some of her children. Despite the complex emotional and economic connections a woman has with the man who abuses her, in court the relationship is viewed simply in terms of her right to protection. She is a legal individual, even though she is a socially connected person. And this individualism does not come under question. Courts can serve as a mode of resistance to social practices such as domestic violence, but such resistance must be framed in the terms of the law itself, allowing protest only within the hegemonic categories of the law.

Where does this leave the concept of hegemony? Is there, as Scott suggests, an authentic peasant who sees through the hegemony of the system imposed on him or her (1985)? I do not think there is any possible stance outside the system from which one can gain a "true" picture of the relations of domination and of the participation of the legal system in that domination. Nor is there a single hegemony. Instead of an overarching hegemony, there are hegemonies: parts of law that are more fundamental and unquestioned, parts which are becoming challenged, parts which authorize the dominant culture, parts which offer liberation to the subordinate. Law cannot be viewed as either hegemonic or not as a whole, but instead as incorporating contradictory discourses about equality, justice, persons. Some areas of social life are opening up to question, such as ideas about men's right to hit women, while others, such as the systems of gender and class inequality which create the totality of the situation confronting a poor woman with children whose main means of support is a man who batters her, are not.

Notes

1. My research was generously supported by a grant from the National Science Foundation, Anthropology Program and Law and Social Sciences Program, #SES 90-23397. I am grateful to Judge Ben Gaddis for allowing me to visit his court, for insightful conversations, and for thoughtful advice on this paper. Marilyn Brown provided valuable research assistance for the project. Susan Hirsch and Mindie Lazarus-Black provided helpful advice and suggestions for the paper. For the final shape of the paper, however, I alone am responsible.

2. In his recent book on Islamic law, Lawrence Rosen advocates a similar approach to the cultural analysis of law, but without attention to relations of power. He advocates looking at courts as locations for the reproduction of

culture and as shaped by their cultural context, in other words, "tacking back and forth between law and culture" (1989). He argues that courts serve to reproduce the cultural practices and categories of the surrounding society, but does not analyze them as locations for the production of culture in situations of cultural diversity and unequal power. He does not look at the relative power relations of the producers of the law and the consumer, nor at the relationship between the qadi in his local court and the higher levels of the legal system which provide some supervision and appeal from his decisions. Nevertheless, his emphasis on the cultural role of local courts is valuable in suggesting a revived anthropological focus on courts which can be extended to considering the role of local courts in situations of cultural domination.

3. As Joan Vincent's recent historical account of the development of political and legal anthropology indicates, legal anthropologists have not in the past taken this approach to understanding legal systems (1990). Originally, of course, legal anthropologists studied societies without courts, in which the central concern was "custom" or other informal, nonstate forms of social control. Much of the early work focused on "trouble cases," under Llewellyn and Hoebel's leadership, and was theoretically informed by the legal realism of the early twentieth century: by questions about the abstract principles within the law as well as the social causes of judges' decisions and the social effects of those decisions (Vincent 1990:242-52). Legal realists, she argues, located legal actions within a wider social world which changed in response to its actions. Legal realists such as Cardozo argued that judges were concerned not only with legal rules but also with assessing the social consequences of their decisions, an idea picked up by Llewellyn and introduced into the anthropology of law via his collaboration with Hoebel (Vincent 1990:244).

4. Chanock argues, in his study of colonization in Central Africa, that: "The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualizing relationships and powers and a weapon within African communities which were undergoing basic economic changes, many of which were interpreted and fought over by those involved in moral terms" (1985:4).

5. Peter Nelligan describes this transformation in his excellent work on the changing meanings of rape in Hawaii (1983). According to laws passed in 1835 and 1840, the victim of rape received thirty-five dollars and the judge fifteen dollars. When an internationally famous case in 1844 revealed the paltry punishment for rape under Hawaiian law, the government was embarrassed into passing more stringent legislation. In 1850, the penalty for rape was increased to a maximum fine of one thousand dollars and up to five years imprisonment, with no compensation provided to the victim (1983:91-93). Thus, as rape became redefined as a more serious offense under the influence of New England conceptions of the family (the 1850 legislation was based on a proposed code for Massachusetts), the status of women was simultaneously redefined as more subordinate and dependent on men. Rape became a damage to the woman's marriageability and, consequently, a more serious offense.

6. In Oahu, the major urban area of the state, of 103 spouse abuse cases between 1973 and 1979, only three resulted in conviction (Oahu Spouse Abuse Task Force [1986], quoted in Hawaii Island Spouse Abuse Task Force 1989: Appendix C-8). In 1984-1985, in contrast, there were forty-five convictions

for spouse abuse on Oahu and forty-one criminal contempt convictions for violation of spouse abuse protective orders (*ibid.*).

7. In 1985 the spouse abuse law was amended to provide a mandatory forty-eight-hour sentence for people convicted of abuse of a household member with a possible jail sentence of up to one year. The cooling-off period was increased from three hours to twelve (Act 143, Session Laws 1985:253). In 1986, the statute was amended to require the police to issue a written citation to abusive persons required to leave the premises for a cooling-off period (H.R.S. 1991 Commentary:66). The law in effect in 1991 allowed the police officer to require the person to leave the premises for a twenty-four-hour cooling-off period, to give a written warning citation, and to arrest a person who refuses to leave. An arrested person must post bail of \$250 for pretrial release. In addition to the forty-eight-hour jail sentence, convicted persons are "required to undergo any available domestic violence treatment and counseling program as ordered by the court," a provision in effect since 1985 (H.R.S. 1991:709-906 [4]). The law applies to household or family members: "spouses or former spouses, parents, children and persons jointly residing or formerly residing in the same dwelling unit* (H.R.S. 1985:709-906 [1]).

8. Susan Silbey has emphasized the importance of record-keeping procedures in understanding the processes by which law is enacted (1980:181).

9. The concern with domestic violence is a latecomer to the family court agenda, however. A report describing major conferences in 1972 and 1973 in which the family court idea was developed and promoted talks only about the needs of children and juveniles. Violence against women is never mentioned (1974).

10. A law providing for ex-parte temporary restraining orders for victims of domestic violence was passed in 1979 (Oahu Spouse Abuse Task Force [1986], quoted in Hawaii Island Spouse Abuse Task Force 1989:Appendix C-5).

11. The statute for domestic violence is in Chapter 586 of the Civil Family Law. Harm or threat of harm is sufficient reason for a temporary restraining order. Violation of a protective order is covered under Penal Code 709-906. Violation of the protective order means a mandatory minimum two days in jail for the convicted person.

12. I heard only one other judge in this calendar, who was much less stern about the unacceptability of violence in intimate relationships.

References

- Arno, Andrew. 1985. "Structural Communication and Control Communication: An Interactionist Perspective on Legal and Customary Procedures for Conflict Management." *American Anthropologist* 87:40-55.
- Arnold, Thurman W. 1935. *Symbols of Government*. New Haven: Yale University Press.
- Chanock, Martin. 1985. *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
- The Family Court: Its Goals and Role. A Summary Report of the Project: Community and Family Courts in Program Goal Planning. 1974. An LEAA Funded Project.
- Geertz, Clifford. 1983. *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.
- Gluckman, Max. 1955. *The Judicial Process among the Bnrotse of Northern Rhodesia*. Manchester: Manchester University Press.
- Hawaii Island Spouse Abuse Task Force. 1989. *A Report on Spouse Abuse in Hawaii County and Recommendations for Change*. Sponsored by Hawaii County Committee on the Status of Women. Typescript.
- Hay, Douglas. 1975. "Property, Authority, and the Criminal Law." In *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, by Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow. New York: Pantheon. 17-63.
- Lam, Maivan. 1985. "The Imposition of Anglo-American Land Tenure Law on Hawaiians." *Journal of Legal Pluralism* 23:103-29.
- Lazarus-Black, Mindie. 1992. "Bastardy, Gender Hierarchy, and the State: The Politics of Family Law Reform in Antigua and Barbuda." *Law and Society Review* 26(4): 863-901.
- Llewellyn, Karl, and E. Adamson Hoebel. 1941. *The Cheyenne Way*. Norman, Okla.: Oklahoma University Press.
- Malinowski, Bronislaw. 1972 [1926]. *Crime and Custom in Savage Society*. Totowa, N.J.: Littlefield, Adams.
- Mather, Lynn, and Barbara Yngvesson. 1980:181. "Language, Audience, and the Transformation of Disputes." *Law and Society Review* 15:775-822.
- Matsuda, Mari J. 1988. "Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness." *American Journal of Legal History* 32:16-41.
- Merry, Sally Engle. 1988. "Legal Pluralism: Review Essay." *Law and Society Review* 22(5): 869-96.
- . 1990. *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*. Chicago: University of Chicago Press.
- Meschievitz, Catherine S., and Marc Galanter. 1982. "In Search of Nyaya Panchayats: The Politics of a Moribund Institution." In *The Politics of Informal Justice*. Richard L. Abel, ed. New York: Academic Press. 2:47-81.
- Nelligan, Peter James. 1983. *Social Change and Rape Law in Hawaii*. Ph.D. dissertation, Dept. of Sociology, University of Hawaii.
- Rodriguez, Noelle Maria. 1988. "A Successful Feminist Shelter: A Case Study of the Family Crisis Shelter in Hawaii." *Journal of Applied Behavioral Science* 24:235-50.
- Rosen, Lawrence. 1989. *The Anthropology of Justice: Law as Culture in Islamic Society*. Cambridge: Cambridge University Press.
- Salas, Louis. 1983. "The Emergence and Decline of the Cuban Popular Tribunals." *Law and Society Review* 17:587-613.
- Scott, James. 1985. *Weapons of the Weak: Everyday Forms of Peasant Resistance*. New Haven: Yale University Press.
- Silbey, Susan S. 1980:181. "Case Processing: Consumer Protection in an Attorney General's Office." *Law and Society Review* 15:849-83.
- Silbey, Susan, and Austin Sarat. 1987. "Critical Traditions in Law and Society Research." *Law and Society Review* 21:165-74.
- Starr, June. 1989. "The Role of Turkish Secular Law in Changing the Lives of

Rural Muslim Women, 1950–1970." *Law and Society Review* 23:497–523.

Thompson, E. P. 1975. *Whigs and Hunters*. New York: Pantheon.

Tiruchelvam, Neelan. 1984. *The Ideology of Popular Justice in Sri Lanka: A Socio-Legal Inquiry*. New Delhi: Vikas Publishing House.

Turner, Victor. 1957. *Schism and Continuity in an African Society*. Manchester: Manchester University Press.

Vincent, Joan. 1990. *Anthropology and Politics: Visions, Traditions, and Trends*. Tucson: University of Arizona Press.

Yngvesson, Barbara. 1985. "Legal Ideology and Community Justice in the Clerk's Office." *Legal Studies Forum* 9:71–89.

———. 1988. "Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town." *Law and Society Review* 22:409–48.

———. 1993. *Virtuous Citizens, Disruptive Subjects: Conflict and Order in a New England Court*. New York: Routledge.