

MAKING SENSE OF THE LOWER COURTS¹

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The lower courts are a paradox. The limited jurisdiction courts are described as invisible, neglected by the bar, scholars and the citizenry, and at the same time as the only judicial experience for most who enter the court system. It is repeatedly suggested that they be done away with, but at the same time it is suggested that they perform vital functions at the juncture of several official hierarchies and systems. They are applauded for being flexible and informal, and chided for failing to fulfill the forms and techniques of due process. They are recognized to be responsive to local community situations and needs and criticized for their variability. They are second class citizens in the eyes of the bar and the judiciary but constitute the majority of our trial courts and hear ninety percent of the nation's criminal cases.

This article suggests a way of understanding these conflicting views of the lower courts. We can make sense of the contradictory attitudes if the lower courts are understood as institutions moderating the tensions between substantive and procedural justice. While the lower courts do not conform to the dominant model of the rule of law—adversarial due process with full protection of the rights of the disputants—their informality, flexibility, closeness to the parties, and diversity can provide responsive justice for the kinds of situations and cases these courts are asked to handle.

Despite repeated efforts at reform, the lower court problem has seemed intractable. The resistance to corrective change may be the result of superficial reforms; it may also be the result of the multiplicity of conflicting social, legal, and organizational demands to which the courts respond. The limited jurisdiction courts occupy a unique position at the boundaries of several social systems. They are the major point of access and do the lion's share of legal business in this country, and therefore tensions inherent in modern law may be presented in their most blatant form. The multiplicity of conflicting roles and masses of cases in the lower courts reflect a paradox between universalist and particularist values, between enforcement and responsiveness. Moreover, the tension between predictability, efficiency, precision, and accountability in the mass of cases versus equity, grace, elegance, and responsiveness in individual cases is not unique to the lower courts. Certainly, recognition of the conflict between functional and substantive rationality is not new (Durkheim, 1893; 1964; Weber, 1922;1954; Pound, 1906; Wilson,

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1967; Nonet and Selznick, 1978). If one takes a larger perspective on the rule of law in modern society, as a system of increasingly rational and formal solutions to dispute and conflict, it is possible to view the lower courts as a forum for moderating conflicting tensions within the law.

Criticisms of the Lower Courts

In nearly every decade for the past seventy years, we have seen renewed warnings about the condition of the nation's lower courts. They are diverse, often isolated, although accessible, and economical. More often than not, they operate with inferior or inadequate resources, with less qualified personnel, and without effective scrutiny. They are said to neither conform to the rule of law, nor to perform needed social functions of controlling crime or resolving social and legal disputes (Pound, 1906; Hughes, 1919; Pound and Frankfurter, 1922; Baltimore Criminal Justice Commission, 1923; National Commission on Law Observance and Enforcement, 1931; Dash, 1951; President's Commission on Law Enforcement and Administration of Justice, 1967; Bing and Rosenfeld, 1970; Whitebread, 1970; Downie, 1971; U. S. National Commission on Criminal Justice Standards and Goals, 1973).

The most often repeated criticisms, however, focus upon the disjunction between the ideal of the rule of law and the practices in these courts. The most basic criticism is that within these courts there is very limited adversarial process, the result of which is an attenuation of the due process rights of defendants (Dash, 1951; Allen, 1970; Enker, 1970; Pye, 1970). The lower courts emphasize rapid case processing and volume control, outcome rather than process. It has sometimes been referred to as mechanical rote-processing. The diminished impact of formal due process results in gross inequalities of power between the defendant and the state, thus exacerbating the alienation of citizens whose allegiance to orderly processes of social change is already wavering. Observers report that judicial arbitrariness is common, that noncompliance with rules, haphazard administration, racial discrimination, corruption, and nonfeasance are pervasive.

The lack of review and accountability of the lower court judges makes their lack of formal due process that much more salient. Several observers have suggested that the availability of trial de novo (in 51% of the lower courts) not only insulates them from observation and review, but is abused by judges so as to be costly and penalizing to the defendant who asserts this right (Bing and Rosenfeld, 1970; Cratsley, 1970). Moreover, recourse to appeal on the record, available in the remaining 49% of the lower courts, is apparently not sufficient to create adequate review of routine court activities. In a 1979 survey of the lower court judges attending the National Judicial College, few judges considered themselves scrutinized by appeal mechanisms or by colleagues. Most often, the judges report, they feel that the most effective or persistent scrutiny is provided by the presence of the public in court (Silbey, 1979: II,3b).

Studies of the lower criminal justice system have also focused upon the perceived inability of the lower courts to encourage respect for the legal system (Twentieth Century Fund, 1976: 13; Pound and Frankfurter, 1922). This has been a persistent theme in the court reform literature during this century (Alfini, 1980). Because the courts do not deal effectively with defendants who come before them, and because their processes are so irregular that they do not appear to do justice, they encourage disrespect for law (President's Commission, 1967: 29). Thus, the notion persists that the lower courts indirectly exacerbate the crime problem.

While some criticize these courts as insensitive to due process, others charge that they are too formal — a place removed from the community where problems are too narrowly focused and dockets are too crowded to provide adequate opportunity for resolution of minor personal disputes and social grievances. There has emerged a movement to draw cases out of the courts into community based dispute resolution centers. Here, the formality of the court ostensibly is replaced by the informality of the neighborhood, the principles of law with general considerations of morality and shared responsibility, win/lose outcomes with compromises, and the coercion and authority of the court with informal social pressures of the community (McGillis and Mullen, 1977; Merry, 1979).

Indeed it appears to many commentators that our court "crisis" can be characterized in terms of an overload not simply in the volume of cases, but an overload in the volume of burdens; that is, the kinds of problems, demands and functions which the courts are asked to serve. Citizen expectations for legal solutions, and what can be achieved through law, are escalating. Legal mechanisms are regarded as both appropriate and expedient for a host of issues formerly within the sphere of private action (Ehrlich, 1976; Barton, 1975; Manning, 1977; Rifkind, 1976; Forer, 1975). It is not unexpected, therefore, that the courts generally, and the lower courts in particular, will be criticized. In attempting to do too many jobs, they appear to be doing no job well.

Recent suggestions for reform reflect two different perspectives on the lower courts. These dissimilar viewpoints mirror the constantly re-emerging dichotomy between formal due process and flexible responsiveness. On the one hand, reforms are proposed that would rationalize the justice system, to make it efficient and "productive", and consistent with ideals of adversarial adjudication and due process (Hofrichter, 1977). Other suggestions for reform spring from a desire to make courts less oppressive, less bureaucratic, more accessible and, from this vantage, more effective mechanisms for resolving disputes and social grievances (Danzig, 1973; Fisher, 1975; Nader and Singer, 1976; Sander, 1976; American Bar Association, 1976; Bell, 1978; Cratsley, 1978).

Explaining the Lower Courts

The conflicting demands within and upon the courts have been reflected in competing conceptions of what courts ought to do. Herbert Packer has modeled these assumptions in terms of a set of crime control values and a set of due process/rule of law values for the criminal justice system (1968). Griffith has offered an alternative model based upon principles of consensus, and the rehabilitative functions possible within the adjudicative process itself, analogous to the kinds of punishment that inhere in family discipline (1971). And, Kenneth Dolbeare has suggested that conceptions of the role of courts ought to take account of the critical political functions that courts perform. They sit at the juncture of both the legal and political systems and therefore bear an extraordinary burden for monitoring and channeling demands for social change (1967). Indeed, Robertson (1974) suggests that because the courts are members of several organizational systems — legal, social, political, and judicial—they must often respond to incompatible demands. The courts process traditional demands for social service and rehabilitation, and for redistribution of social and political costs and benefits. They also perform generalized order maintenance functions and respond to demands for organizational self-maintenance of the judicial hierarchy as well as the self-maintenance of the lower courts themselves.²

Several authors have suggested that rule enforcement has become the principal function of courts in more industrialized and developed societies. Friedman and Percival argue that the courts they studied became functionally less important to community dispute resolution with increasing socio-economic development. The proportion of cases which were devoted to administration, where courts seemed to certify solutions worked out (in private) seemed to increase with time.³ The court's role, on the other hand, in resolving real disputes seemed to diminish (Percival and Friedman, 1976).⁴

In the course of reporting on an observational study of a lower criminal court, Mileski (1971) suggests that this pattern is supported by anthropologi-

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2. Some of the literature on the juvenile courts reports similar observations. Robert Emerson writes that the juvenile court functions primarily as a mediating agent between children in "trouble" and available social services (1969). The courts have become, from Emerson's perspective, the official means not only for distributing facilities and services to those in need, but for generating the clientele necessary to justify the continued existence of welfare service agencies as well.
 3. One could possibly interpret plea bargaining in a similar vein, as a judicial certification of solutions worked out elsewhere (see Robinson, 1965; Rosett and Cressey, 1976).
 4. Richard Lempert suggests that we ought to be careful when we speak about the role of the courts in terms of the social functions they perform. He has pointed to the shifting senses in which we use the word "function" when talking about courts. In sociology, the term is quite clear. When we speak about the function of something, we are asking how that thing contributes to the viability of some institution, organization or system (e.g., Merton, 1968:78ff.) But "function" is also used, and often when speaking about courts, Lempert says, to refer to what courts do, to how they operate and act. "The question of what courts do is not unrelated to the question of what functions they serve. When courts stop doing something—e.g., settling disputes,—it is unlikely that they will continue to fill the correlative function (e.g., dispute resolution) for some larger system." (Lempert, 1978).

cal studies of small scale societies and that it is relevant to a discussion of the role of the lower courts. One characteristic of many preliterate societies is the fact that they are basically informal and nonbureaucratic; social control tends to occur in nonbureaucratized ways. Contemporary societies, on the other hand, are characterized primarily in terms of their bureaucratized systems of control. The differences can be identified in terms of the degree to which a society has developed functionally distinct specialized roles for rule enforcement and conflict resolution. Mileski suggests that the prevalence of a conflict resolution model of legal control in anthropological studies, and the prevalence of rule enforcement in sociological works, is really a reflection of the difference in the empirical cases studied.

The distinction between particularistic dispute resolution and universalistic rule enforcement is analytic. Aspects of each appear within any system. But conceptual schemes focusing on one or the other polar extreme serve to synthesize our knowledge about courts and have been the basis for much of our most fundamental understandings about the history and development of legal systems. Weber, Maine and Durkheim each based their work upon a notion of a progression from particularistic, ascriptive, status, and communal to universalist, achievement, contractual, and associational societies (Weber, 1922, 1954; Maine 1917; Durkheim, 1893; 1964). What appears from these works, and from the contemporary analyses of the functions of courts, is the consistent tension in modern society between a desire to free the individual from the oppressive, impersonal power of official bureaucracies (such as the courts and police) and a desire to formalize and generalize an individual's right to be treated individually.

While the functional approach directs attention to the external aspects of courts (their contribution to the societal whole), other scholars have been focusing upon the internal aspects of courts (what they are doing daily). Various approaches to analyzing lower court operations have been taken, including organizational theory (Lipetz, 1980) and versions of systems analysis (Feeley, 1979). Although some criticism has been levied against organizational theory as an explanatory tool for understanding courts (Sarat, 1978), some interesting observations about switching and channeling devices within the courts have come from these efforts.

The conflicting analyses of two recent studies of individual lower courts suggest that these courts differ not only in formal characteristics, and in the relative predominance of different social functions served, but also in terms of the outcomes and consequences of their procedures. Malcolm Feeley systematically investigated the handling of cases in New Haven's Court of Common Pleas (1979). His research shows that the primary sanctions in this court occur during pretrial processing rather than in sentencing. The sentences are relatively inconsequential, in terms of either jail or fine, compared to the costs incurred during case processing. He concludes that the process is the punishment. In contrast, John Ryan studied case processing in Columbus

Ohio's Municipal Court. He found that, unlike New Haven, in Columbus the outcome is the punishment (Ryan, 1980). Outcomes are costly and substantial in Columbus, and the processing costs relatively lower.

This emerging debate about whether the outcome or the criminal process itself is the punishment can be viewed as a somewhat narrow example of the need to adopt alternative analyses. The role of the lower courts needs to be considered within theoretical perspectives on the dilemmas and contradictions in social control systems generally. For example, from the defendant's perspective, the entire legal system can be regarded as a punishment, simply the most obvious form of social control. It is relatively inconsequential therefore whether the costs are located at one stage, or distributed throughout the process. From this perspective, one does not necessarily have to differentiate the legal battle from incarceration or fine in terms of the effect. Cyril Robinson has described just this in a discussion of arresting practices. "Arrest has thus become the ordinary mode of beginning a criminal prosecution. As a result, arrest is not a process preliminary to punishment; it frequently is the punishment where the lesser offender is concerned. The trial then becomes not the determiner of guilt or innocence but a procedure for release of the accused from the punishment previously meted out" (Robinson, 1967: 8).

Moderating the Tensions in Law

Each attempt to make sense of the attitudes toward the lower courts returns again to persistently diverse and conflicting views. We begin with paradoxes and dichotomies. To the extent that they are seen to produce fast and economical resolution, they predicate the need for more procedural formality. To the extent, however, that courts adhere to the formal rules of due process and rationalized justice, they predicate the need for other, less formal, judicial agencies. This has been a pattern throughout the history of western legal systems, a tension created by formal law and its circumvention due to immediate and empirical demands.

Because the tensions between substantive and procedural demands may be particularly ripe at the level of the lower courts, it is possible that the limited jurisdiction courts can provide a forum for moderating the conflicting tendencies within the law. If the lower courts have a distinctive capacity, perhaps it derives from just those attributes which have been criticized: their availability, informality, and diversity. The problems which have plagued these courts and raised the cry for their eradication may be the source of their justification and function. Their informality and availability make them particularly capable institutions for just such service.

Within patterns of modern legal development there have been persistent "tendencies favorable to the dilution of legal formalism" (Weber, 1954: 311). Both Roman and common law are replete with examples of the constant reworking of procedures and forms of law to accommodate circumstantial and practical demands in the face of increasing formalization. For example, the

Roman "praetor" functioned as the chief legal officer who formulated issues such that they had the character of a legal question, which was then heard by a lay judge. The system retained the limitation on what could be a relevant matter for judicial hearing and legal determination, but assigned the disposition of the case and consideration of its merits and effect to a member of the community, not a professional (Jolowicz, 1972). It removed lawyers from case disposition and perhaps from detailed case handling, which may exacerbate or distort dispute. The layering of the handling and resolution of disputes avoided serious intrusion and tyranny of the official system over the persons involved, by efforts to get to the heart of the question. At the same time it provided a mechanism for limiting and ordering the concerns appropriate for inclusion in the developing legal order. It created a mechanism for structuring social questions and demands for justice into legally relevant questions, but also provided for community based justice that was perhaps more responsive and somewhat less formal. Very early in English legal development, the chancellor performed gatekeeper functions similar to the Roman praetor. He was able to shape inchoate issues into judicial forms. By the fourteenth and fifteenth centuries, his shaping and defining techniques—the writs—were developed into an independent equity jurisdiction (Jackson, 1967).

In modern societies, the tendency toward what Weber called logical formal rationality has consistently vied with concerns for substantive justice. Obviously, some tensions inherent in a procedurally formal rational system of law arise from the inability to fit human behavior into neat and tidy categories; but they are particularly great in a system where democratic values and a participatory ethos prevail. The desire to "do justice" but have it done in a regular, procedurally correct way, according to the known, general, clear, consistent rules of law, characterizes the dilemma of western legal systems. It is perhaps the "crisis of liberal state" as one author has stated it (Balbus, 1973; Cf. Lowi, 1979). It has been characterized in the context of a 'bureaucracy problem' as a tension between equity and responsiveness (Wilson, 1967).

Therefore, the sense that is to be made of the limited jurisdiction courts lies in a reasoned acceptance of the tensions and dichotomies that lie within the institution, and the legal system. Within any legal system there are conflicting tendencies and propensities for working out the essential properties of the rule of law and functions of law. The tension between competing conceptions and competing functions is indeed the principal characteristic of the institution.

The lower or limited jurisdiction courts represent, *because of their unique position both at the point of access and as the forum for the major share of judicial business*, the tensions between substantive and procedural demands in its most blatant form. If the limited jurisdiction courts have a unique institutional capacity to provide effective resolution of the cases they handle, it derives from their placement at the entry points or boundaries of the

judicial system.⁵ They are dispersed throughout the nation and embedded within local communities. They are the place where all problems come that may require certification that someone do something forcefully about this "trouble".⁶

The lower courts are the place to which problems come before there is significant screening of those which are especially appropriate for formal adjudication. Because so much legal business takes place in these courts, the lower courts simply present the problem of legal pollution in its most exaggerated form. Thus it may appear that the processing of cases is gross, rote, and unmodulated by legal forms. They often function without a "praetor" who actually shapes legal issues. The key to understanding the role and capacity of the limited jurisdiction courts, is to look at them as the "official" gatekeepers, receivers, channels and transmitters of the raw material, cases and issues for the judicial system. They are the praetors for the higher courts.

Although these courts are often referred to as "minor" or "inferior," the social and legal problems reflected in their caseloads are not always simple (Yngvesson and Hennessey, 1975). They may be incapable of being formulated so that arguments and evidence can be presented clearly for one or the other side, or so that a single solution or issue can be identified. Problems of alcoholism, drug abuse and wife abuse are mixed with minor felonies, delinquency, mental illness, traffic violations and truancy. Consumer complaints merge with assaults, theft with family disorders. But in whatever form the problems arise, they are before the court because someone wants a solution that will be compulsory, legitimate and final.

But the boundary maintenance mechanisms of the lower courts appear not to be able to screen out unsuitable issues and conflicts from the legal system. Perhaps they are attempting to do too many jobs in society, and to do them to the detriment of the less affluent and poorer classes of society. Yet this cannot be so much a reflection upon the limited jurisdiction courts as upon the legal system as a whole. As boundaries or gatekeepers to a system, which is by its nature and total effect a multifunctional device, they reflect that diversity of purpose, function and uses (Silbey, 1979a). The tensions inherent in the legal system between social justice and social control, crime control and due process, rule enforcement and dispute resolution, substantive and procedural rationality, efficiency and responsiveness, are particularly ripe at the entry points to the system. In this sense, the lower courts may represent—within a

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5. The terminology of gatekeepers or boundaries is not meant to deny the legitimacy of the conceptualizations which place boundary maintenance in the community. In a society in which more and more problems become legal issues, it becomes increasingly difficult to determine or suggest boundaries for the legal system. Recent efforts to map disputing strategies point to a desire to locate the points of decision or transformation, and routing of disputes into legal issues. The metaphor of boundary or gatekeeper is not meant to suggest that the lower courts are the only screen for legal issues, but that they are necessarily one of the boundaries. When addressing problems within the *judicial* system of handling the work it is asked to do, the function of the lower courts as channeling and sifting devices becomes quite important.
 6. The concept of "trouble" as the heart of law is found in Llewellyn and Hoebel (1941).

system which tends toward formal rationality and toward generalized and universalistic principles of law—a forum for individualized, particularistic and responsive community based justice.

It is clear that the lower courts provide a different kind of justice from general jurisdiction courts. Much of the work of the lower courts is rule bound in much the same way and extent as general jurisdiction courts, but simply involves lesser crimes, smaller amounts of money or specialized matters or persons. But much of the work of these courts cannot be fit into the classical model of courts. The lower courts are more particularistic, empirical, individualized and responsive to local communities. The work of the "higher" courts, on the other hand, is procedurally regular, more generalized, more rule bound and therefore more consistent with our conventional notions of the rule of law. But does this mean that the lower courts are less legal and less legitimate; and that there is no room within the conception of a rule of law for such courts?

Weber suggested an answer to this question when he described the English justices of the peace as providing a kind of Khadi justice. America's lower courts have also been described as providing Khadi justice (Levin, 1977: 100; Robertson, 1974)—justice that is antithetical to logical formal rationality and is somehow less than adequately proper justice. But Weber attached no such stigma to irrational forms of law. "The courts of the justices of the peace which dealt with daily troubles and misdemeanors of the masses were informal and represented Khadi justice to an extent completely unknown on the continent" (Weber, 1954: 230). They provided a kind of substantive, irrational, empirical justice inconsistent, Weber says, with capitalist interests in procedurally regular and predictable adjudication. *They offered a kind of safety valve against formalism.*

"In Khadi justice, there are no 'rational' bases of 'judgment' at all, and in the pure form of empirical justice we do not find such rational bases, at least in the sense that we are using the term" (Weber, 1954: 351). Weber used the term "rational" in several senses: as an ordered, structured relationship between means and ends, and as a system of highly general legal norms. It went beyond being simply reasonable. Khadi justice is understood as being irrational because it is blatantly empirical decisionmaking, particularistic and not part of an ordered scheme; but it may nevertheless be reasonable in that it flows from a due exercise of reason and judgment. Trubek writes that substantively irrational decisions, characteristic of Khadi justice, "apply observable criteria . . . based on concrete ethical and practical considerations of the specific cases. It is possible to understand these decisions after the fact, but unless a system of precedent arises, it is difficult to generalize from the concrete cases" (1972: 729). Research on the lower courts reveals, however, that while a system of highly formal and general precedent does not describe decision-making practices, the processes are not disordered or unreasonable (Mileski, 1971; Cratsley, 1978).

Not all legal systems operate the same way, and within any real system there are aspects of different types of law. The adversary system in this country has merged within it aspects of formal rationality and concerns for substantive morality, for both equity and responsiveness, for doing justice for the individual and yet for having like cases treated the same. Because of its substantive concerns with democratic principles, it contains aspects of substantively irrational "democratic" law, such as the jury, and even procedurally irrational aspects, such as oaths. Thus, the rule of law, as it has developed in western culture, does not bind us to only one way of decision-making or even one form of adjudication. The suggestion that courts can provide alternative styles of adjudication and justice, within the framework of the rule of law, raises critical questions about our fundamental understanding of the role of law in society.

Our understanding of courts, and particularly of limited jurisdiction courts as a distinct adjudicative forum, needs to be placed within an unabashed affirmation of the most elemental notion of law as the regularization of the use of force and provision of authoritative compulsory remedies in a society (Bobbio, 1965; Olivecrona, 1959; Ross, 1958; Seagle, 1941, 1971; Holmes, 1917; 1941). By the rule of law we mean something more general than the specific legal rules of a particular time, or class, more than the particular procedures of some court or culture (e.g., Thompson, 1975: 258-269). The rule of law, in its most essential features, is the systematized use of communally sanctioned force employed to handle disputes, grievances, or "trouble". Within the rule of law, as a regularization of the use of force, there lies the possibility of a variety of forms and styles of adjudication. Varieties and kinds of legal systems can be distinguished depending upon the explicitness and rationality of both the substance and procedures of those regulations of the use of force. But in all legal systems, and especially in liberal democratic ones, tensions arise between substantive and procedural considerations.

How does this impinge upon the experience of a litigant in the court room? In all cases, an individual appears because he is demanding something or someone is demanding something of him.⁷ The relationship is always adversarial. Even if the litigant agrees to waive certain rights, theoretical adversariness sets limits to the proceeding, especially in terms of either litigant's right to present evidence (Cf. Fuller, 1960). This is crucial and elemental. On the basis of the evidence presented, a decision is to be made through established forms and processes. This is the litigant's interest in the matter—the guarantee of participation in a politically independent, modern rational system. But the litigant is hurting in some way and has a need, and a desire, to have the pain mended.

However, the public also has an interest in generalizing the solution to this

7. Of course, the litigant may be a private individual or the state. The hurt or pain of a litigant can be personal or social (Cf. Durkheim, 1964).

litigant's problem, of providing a universally or communally available remedy. Problems are resolved in an enormous variety of ways, only one of which we recognize as law. Bohannon described the difference between informal modes of settling disputes and this legal way, in terms of a process of re-institutionalization of the norms and solutions arrived at in more informal methods (1965; 1968). The legal system provides a means for redoing, so to speak, and generalizing, what is culturally and informally developed. The price of law, as a re-institutionalization of socially arrived at solutions, is that the solutions to particular problems be based only upon the evidence and proof that can be presented through those institutional forms and procedures, and not upon the personal litigant's hurt. The solutions which the law provides, it can only provide through its own unique legal procedures. This is what E. P. Thompson (1975) was referring to when he wrote in a history of the Black Acts, of the English ruling class creating a remedy which allowed others to use it as well; that was the price the English gentry paid for their privilege to be free from the tyranny of the king.

There is also a public interest in mitigating the force of law. There is a social interest in seeing that, when a hurt is translated into a legal issue, the hurt gets taken care of too. There is the public interest in preventing the damages that flow from the accumulated personal hurts, such as alcoholism, drug abuse, child neglect, etc. Yet, the modern ethic of responsive justice with solutions tailored to fit individual problems, creates a paradox for the system (Cf. Nonet and Selznick, 1978). Within such a framework of individualized justice, emphasis is placed upon information and perspectives which are inconsistent with formal legal rationality, and adversarial due process.

For example, a defendant is charged with assault against his wife. He is recognized to be suffering from several conditions, (e.g. unemployment and alcoholism) which have caused serious strain to an otherwise stable and legally uneventful marriage and family. It is apparent to the probation staff that a job, and treatment or therapy for the alcoholic "symptoms", would take care of the family's problems. It does not however eradicate the fact that an assault was committed. The psychological "evidence", therapeutic diagnoses, and social history of the family are relevant to a just and equitable consideration of the case. However, these factors are uncomfortably out of place when they are tailored to the requirement of legal evidence, proof of guilt, and considerations of legal responsibility. Yet, they are the stuff of decision-making and adjudication in the lower courts.

The disposition of cases in the lower courts often involves a dialogue between complainant, prosecutor, defendant, counsel, social worker, probation officer, and judge about the "nature of the problem" and a reasonable solution. The nature of the problem is not the assault. That is simply the precipitant act which has mobilized this array of problem solvers. A recent survey of judges attending the National Judicial College has confirmed this observation (Silbey, 1979: II,3b). The judges reported that a variety of court

personnel participated in the suggestion of appropriate disposition of cases. This informal, almost collegial, decisionmaking is characteristic of the lower courts but inconsistent with expectations about legal process, to which we expect greater congruity in the general jurisdiction courts.

Thus, there is a distance between a litigant's conception of his trouble, hurt and pain, and the judge's ability, *within the law*, to deal with it. *This distance needs some modulation*. Moreover, there is a tendency in legal systems of increasing rationality to develop increasingly formal rules and procedures. This tendency leads to generalizations of instances of hurt which increase the distance between the litigant's hurt and the court's ability to remedy it. This is the tension that persists between legal formal rationality and substantive justice.

Conclusion

This article has been examining the role of the limited jurisdiction courts in America. Is the rule of law, as a bulwark against arbitrary and naked exercises of power and coercion, achieved solely through adversarial adjudication as we have developed it through the forms of due process?

The standard picture of the lower courts as "rote mechanical processors of vast numbers of cases, engaged in strictly wholesale high volume business" (Ellington, 1979) is only partially correct. There is no question that many of the lower courts, perhaps most, have been correctly described by critics as providing bargain basement justice, an insult to our revered notions of the rule of law. "Traffic courts, the very model of rote processing of cases that have become 'nonjudicial' in everything but name" (Ellington, 1979) are the most readily apparent example. But it is also true that limited jurisdiction courts often effectively channel problems toward appropriate and available services and solutions. There is an entire domain of lower courts which are not traffic courts and whose business—the everyday disputes between citizens (misdemeanors and lesser felonies)—is not inappropriate for judicial attention; indeed, it is often the very stuff of life that demands a public remedy.

Citizens demand resolution of their troubles and the courts respond. Because the courts provide this responsiveness, people go there. But, the myriad of remedies and solutions which the courts provide to citizens' troubles appears chaotic because we want to understand what is legal about it. Those limited jurisdiction courts that ultimately provide therapy to an alcoholic, job training for the unemployed, and rehabilitation for a drug addict respond to problems rather than crimes. It appears that they go beyond narrowly assigned powers, beyond procedures and restraints which define their role (Cf. Fuller, 1963: 3), in fashioning individualized solutions to cases of grievance, trouble, or differences of interests and values. But, it is not a chaotic enterprise. People come to court because the courts respond to their trouble and respond by providing compulsory, often final, resolutions.

Different roles, concepts of justice and types of decisionmaking merge within individual offices and within any court. Obviously, activities which go beyond the procedural limitations characterized in standard models of adversarial adjudication create problems for the judicial system. Malcolm Feeley has stated them well. "By shifting roles within the same forum, no role can maintain legitimacy, and the morality of the entire process is undermined. Ironically, the impulse to do justice contributes to the feeling that justice is not being done. Such tensions are inevitable in any complex system of law, but they are particularly prominent in the lower criminal courts where the stakes are usually low and the desire for swift justice is high" (1979: 290).

Over the years, many solutions have been offered to "the lower court problem," from changing court procedures to doing away with the lower courts altogether. Today the major thrust is to direct disputes to alternative fora or redefine them as nonlegal through decriminalization. Yet, each solution carries its own limitations. Increasing decriminalization will reduce a certain amount of the court's calendar, but a large fraction of "petty", but complex, problems will remain. Alternative fora may succeed in resolving a host of disputes and grievances, but raise serious questions about the legitimacy of informal social pressures used through semi-public organs.

The need to have a ready means for dispute resolution is agreed upon. The complexity of social grievances, and disputes, is also appreciated. Whether it be the sources of alcoholism, drug abuse or familial instability, the problems which show up in the lower courts often do not allow of easy answers. And, Pound's (1906) warning about the consequences of allowing small injustices to fester in the body politic is also well heeded. But, somehow the courts are deemed inappropriate. There is an effort in current reform movements to avoid the damages from traditional legal solutions, from procedural regularity and formality. We want what the courts can offer in terms of regularity, generality, predictability, and equality of treatment, of judgments on the facts not of persons. We want that authoritative resolution of disputes without the price of distortion of complaint or hurt.

Thus, the lower court problem will not easily go away. The lower courts will continue to serve many disparate functions. That is the nature of the institution. If this is perceived to be a problem, it is a reflection of issues whose roots are only partially inherent in the legal system. The intimate relationship between formal rational law and the modern state (see Trubek, 1972) begs us to look beyond the legal system for a resolution of the lower court problem. It is clear that while the law operates by its own independent and characteristic logic, and therefore exhibits a certain degree of autonomy, it nevertheless inextricably reproduces the social order. The competing demands of accountability and review, equity, efficiency, and responsiveness are not the court's alone to resolve. Coping with the lower court problem therefore is inseparable from taking a larger perspective on the rule of law itself.

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