Lower Criminal Courts: The Perils of Procedure

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CRIMINAL LAW

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Impartial administration of the law cannot make inequitable laws fair. Nevertheless, the general consensus of those who write task force reports or otherwise contribute to the legal literature on criminal justice, is that the lower criminal courts in

Justice Harlan, however, was not fooled. In dissent he pointed out that: The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or . . . impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify crimes which the poor are more likely to commit than are the rich . . . . [The Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.' To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society.

Id. at 361-62 [latter emphasis added]. Justice Harlan evidently did not wish to see the inequity of law once again masked by an impartial criminal procedure.

* The author wishes to thank Anthony Chase, a third-year student at the Wayne State University Law School, who not only provided valuable assistance and direction in the preparation of this article, but who also has become a close personal friend. I would also like to note that as a compromise between the sometimes competing stylistic goals of clarity and the absence of sexism, I will use the masculine gender for all personal pronouns while recognizing that the feminine gender is equally appropriate.

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1 American legal theorist William Seagle makes this point quite clearly when he recalls Anatole France's familiar aphorism. The ideal of judicial impartiality requires alone that whatever laws there are be administered in an impartial manner. It does not require that the laws themselves be impartial. As Anatole France observed, the law with magnificent impartiality forbids the rich and the poor alike to steal a loaf of bread, or to sleep under the bridges. Thus the impartiality of the law simply masks the partiality of the laws, which reflect the configurations of power in the state, or are entirely composed of political ingredients. The impartial administration of an unjust law can no more make it a just law than the efficient enforcement of a bad law can make it a good law.


Seagle is quick to observe the ironic character of courtroom procedures designed to convey an impression of fairness while the laws administered in those courtrooms clearly favor different social groups and classes and inevitably bear the imprint of the structure of power in society. Judicial impartiality achieves a kind of fairness which is obviously untroubled by drastic inequity built into the content of the laws themselves.

Citing Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court ruled in 1963 that state criminal procedure denying benefit of counsel for an indigent's one and only appeal as of right violated the fourteenth amendment, arguing that "there can be no equal justic where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" Douglas v. California, 372 U.S. 333, 355 (1963). Thus by establishing an indigent's right to counsel on appeal, the Court presumably enhanced the impartial administration of justice.

2 See, e.g., Oliphant, Reflections on the Lower Court System; The Development of a Unique Clinical Misdemeanor and a Public Defender Program, 57 MINN. L. REV. 545 (1973). Oliphant notes that: Observers of the lower courts throughout this country agree that the lower courts are in miserable condition . . . . The appalling conditions have been the subject of numerous investigations, criticisms and dismay by government commissions and citizen task forces. For the most part, the findings and recommendations of investigators and critics have gone unheeded.

3 These critics of the criminal process, however, have not been the only ones to express their feelings on the subject of criminal justice. See President Hoover's address at the annual luncheon of the Associated Press (April 22, 1929): Every student of our law enforcement mechanism knows full well that it is in need of vigorous reorganization; that its procedure unduly favors the criminal; that our judiciary needs to be strengthened; that the method of assembling our juries needs revision; that justice must be more swift and sure. In our desire to be merciful the pendulum has swung

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in favor of the prisoner and far away from the protection of society. 


In his sharpest comments of the campaign on the law-and-order issue, Ronald Reagan said today that he would support legislation that would change “laws, precedents, procedures and rules of prosecution that are stacked on behalf of the criminal defendant.” The challenger for the Republican Presidential nomination said that the criminal justice system had failed the American public by imposing rules that sheltered criminals from prosecution...”If you want to know why crime proliferates in this nation, don’t look at the statistics on income and wealth; look at statistics on arrests, prosecutions, conviction and prison population.”

Fair law is really equivalent to equitable law which is not composed of political ingredients. See note 1 supra. But the present law, which is unfair, can be made to appear fair, and hence can give the illusion of fairness, by being administered impartially. The administrative apparatus which could at least make the law seem fair has not effectively performed that function in the American lower criminal courts. Because these courts have failed to administer adequately and impartially unjust laws, the lower criminal courts do not present even the illusion of fairness.

The importance of illusions is generally underrated. M. Ferro, The Great War, 1914–1918 xi (1973 English ed.):

In 1914 they had no doubts that the war would be short, that they would be home by Christmas crowned with victory. In Paris, London and Berlin they left singing and exuberant, ‘with flowers on their rifles.’ This elation is a factor in the origins of the war and of its after-taste, and deserves as much stress as the more strictly economic or political causes.

“Fairness” can have a considerable variety of referents within the structure of the criminal justice system. For example:

(1) It can describe the proper relationship between the criminal defendant and the State. See, e.g., Justice Cardozo’s majority opinion in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934):

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Despite over half a century of criticism and proposals, remarkably little in the way of change

(2) It can describe the proper balance between the State and the general class of criminal defendants as a whole. See, e.g., Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 YALE L.J. 1149 (1960):

In criminal cases, the accused may get relief, not so much out of concern for him or for the ‘truth,’ but because he is strategically located, and motivated, to call the attention of the courts to excesses in the administration of criminal justice. The underlying premise is that of a social utilitarianism. If the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not.

(3) It can describe the proper balance between the procedural safeguards afforded one group of criminal defendants as against another group of criminal defendants. See Wald, Poverty and Criminal Justice, THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 139 (1967):

The great majority of those accused of crime in this country are poor. The system of criminal justice under which they are judged is rooted in certain ideals: that arrest can only be for cause; that defendants, presumed innocent until shown guilty, are entitled to pretrial freedom to aid in their own defense; that a guilty plea should be voluntary; that the allegations of wrongdoing must be submitted to the truthfinding light of the adversary system; that the sentence should be based on the gravity of the crime, yet tempered by the rehabilitative potential of the defendant; that, after rehabilitation, the offender should be accepted back into the community. To the extent, however, that the system works less fairly for the poor man than for the affluent, the ideal is flawed.

(4) In an “adversary system,” it can describe the proper relationship between the courtroom agents who share in determining the defendant’s fate. See Bazelon, The Defective Assistance of Counsel, 42 U. CIN. L. REV. 1, 6 (1973):

The American Bar Association’s Project on Minimum Standards for Criminal Justice used the metaphor of the three-legged stool to depict the criminal justice system—justice balanced on a tripod consisting of the trial judge, the prosecutor, and the defense counsel. If any one of those three is shorter, or weaker, than the other two, there is an imbalance that can result in injustice. Chief Justice Burger, who chaired the ABA project, stated not long ago that the most common cause of imbalance and injustice in the system is the weakness of defense counsel.

A Committee Report to the Third Annual Meeting of the American Law Institute suggested: “If the defendant is financially able to employ counsel he can have as many as he desires, while in some states the prosecuting attorney alone must conduct the prosecution and special counsel cannot appear.” Defects in Criminal Justice, 11 ABA J. 297, 298 (1925).

(5) Rather than describing a relation within the structure of criminal procedure, “fairness” may present a
in the day-to-day operations of the lower criminal courts has been accomplished. This article will examine lower court problems from perspectives which differ from those employed in the past. Instead of presenting a catalogue of lower court ills, this article will seek to develop a conceptual framework for further analysis of these courts. Addressed here are three interrelated topics: the theory underlying the recommendations of lower court reform movements; the contrast between judicial theory and practice in the operation of the lower criminal courts; and non-adversarial forms of criminal procedure as a possible new approach to the problems of the lower courts. This article will argue that the problems of the lower criminal courts are not likely to be solved without analyzing the incidence and impact of lower court reform movements, focusing on the vast, although not always apparent, dichotomy between judicial theory and practice in these courts, and recognizing the risks implicit in the development of non-adversarial forms of criminal procedure proposed as a solution to the current crisis in the criminal courts.

**Investigations Without Results**

America's lower criminal courts have proved virtually impervious to any attempt at principled reform. Frequent investigations have concluded that these courts have failed to deal justly and fairly with those who theoretically would be reformed by their contact with the criminal justice system. Although each investigation, report, or study was clearly the product of its own moment, time, and author, similar conclusions concerning lower court operations were reached regardless of the purpose of the publication or the nature of the authorship. Despite the apparent unanimity of criticism, little or no change in the operation of the lower courts has occurred.

In the wake of these repeated but seemingly ineffective criticisms, a conference was held by the University of Virginia Law School during the spring of 1969, the specific purpose of which was to address the problems of America's lower criminal courts. In attendance were some of the foremost legal scholars who had previously investigated and reported on lower court reforms, as well as the younger generation of scholars who were just beginning to take up the cause. Francis Allen

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8 Paulsen, Foreword, in C. Whitebread, supra note 7, at viii: "The concern which lay behind the production of this book and the conference which produced it is best understood by recalling two lines (slightly altered) from Longfellow's A Psalm of Life: "Tell me not, in mournful numbers/ Law is but an empty dream.'"
9 Throughout the article the positions of specific theorists writing on the lower criminal courts are in each case developed about as far in the text as they can be. For example, the arguments of Francis Allen, Samuel Dash, John Robertson and others summarized or quoted in the text exhaust the content of their positions on the lower courts, though in other areas of law they may have extended their analyses somewhat further. The effort is made here to situate various reforms theorists within the general waves of historical interest in reform and this may shed light on their theoretical positions, but to associate individuals any more closely with historical moments than has been attempted would probably inaccurately portray the determinants of the positions taken.
10 A list of the conference participants can be found in C. Whitebread, supra note 7, at xxiii to xxv.
opened his address to this conference by citing an article written almost twenty years earlier by Samuel Dash, who was also present at the conference. Dash had pointed out in 1951 that the scandalous condition of the municipal courts was virtually identical to that recorded by the Illinois Crime Survey of 1928. Allen recalled Dash's discouragement:

There were the same problems of numbers, the same absence of dignity and decorum, the same lack of competence and integrity in court personnel—in short, the same failure of justice and efficiency that had evoked disquiet in the early 1930's. Almost two more decades have now elapsed since Professor Dash published his piece. If modern descriptions of the administration of justice in small-crimes courts are to be believed, little, if any, improvement has occurred in many urban communities.

Despite Allen's urge for improvement, the Virginia conference accomplished little. The conference was just one in a long line of meetings, reports, and articles where discussion of procedural reform was the order of the day. By taking another verbal tour of the assembly line of the lower courts, and by discussing the retooling of that assembly line, the conference participants ignored the real issue. Instead of merely voicing complaints, the participants should have been asking themselves, "Why are we here again?" or "Why have repeated investigations of the municipal courts not led to solutions?" These questions would have directed them to an examination of the history of reform and to a demand for action.

A chronological list of some of the more critical and important studies of the lower criminal courts suggests that the interest in the subject of "mass production" justice has not been constant, but has appeared and receded over seventy-five years, rising and falling with the tides of national concern over the effectiveness and credibility of American institutions in general. At least three waves of interest are discernible. The first, Roscoe Pound's confrontation with the issues of urban criminal justice, corresponded roughly to the period of political reform known as the Progressive Era. The second wave of investigations clustered around the years 1929-31 and appeared during a time of particular anxiety over the spread of criminal communities and a time of rapid, if not immediately understood, disintegration of national confidence in social stability. Finally, the heavy concentration of interest in the lower criminal courts' failure to achieve an image of fairness, in spite of the expansion of procedural rights for criminal defendants at an unprecedented pace during the 1960's, arose as a third wave at a critical moment of tension and discord in the larger society.

journalistic accounts of the crises in the lower courts because such commentary would not be directed initially at leaders in the political and legal communities, but rather to isolated or undifferentiated sectors of the general reading population.

American historian James Weinstein argues that much of the impetus for the reform movements which characterized Progressivism came from sophisticated and concerned business and political leaders, fearful of a decline in social stability. This contrasts with the view that businessmen and institutions were necessarily the targets of reform sentiment.

J. Weinstein, The Corporate Ideal in the Liberal State: 1900-1918, 3 (1968):

Underlying all, or most, of the new politics of these years was an awareness on the part of the more sophisticated business and political leaders that the social order could be stabilized only if it moved in the direction of general social concern and social responsibility. Dissatisfaction with the increasing polarization of American society and with the apparent decline in the influence of some social classes created a climate for change.


See D. Halberstam, The Best and the Brightest (1972); J. Heath, Decade of Disillusionment: The Kennedy-Johnson Years (1975); A. Kendrick, The Wound Within: America in the Vietnam
A theoretical explanation for this apparent relationship between social instability and lower court criticism seems clear. It is frequently noted that the lower criminal courts are the most significant—and sometimes only—point of contact which most Americans will have with the criminal justice system. Thus, during periods of national social instability, it is possible that some focus is given to the lower criminal courts because they become more heavily relied upon to demonstrate the availability of justice within the existing structure of social values and arrangements. The courts’ failure to do so at such times would seem to present an enhanced threat to the survival of the legal system among others.

Consistent with this theory, it is thus not surprising that Francis Allen concluded his 1969 address at the Virginia conference with the warning that:

[A]t a time when allegiances to orderly processes of social change are waver ing and hanging in the balance, concern for the decency of the law and its enforcement becomes a matter of vital practical importance. Few institutions have done more to impair the good reputation of the law and to drain its moral authority than the small-crimes courts in many large cities.

Similarly, in the preface to his important contribution to the exposure of municipal court procedures, John Robertson suggests that:

[T]he lower court system continues to churn up people and cases, providing further evidence for Chief Justice Hughes’ often quoted statement on the importance of lower courts—a statement im-

What is most interesting about these views is the extent to which they are wrong. The Republic has remained healthy in spite of the lower courts’ unchanged treatment of the poor and ignorant. Certainly, the abuse of the poor and underprivileged by the courts has not produced a class of revolutionaries, as Mr. Justice Hughes may have predicted. Indeed, the “immigrant’s ignorance of our ways and language” may have actually created a stumbling block to the political organization of America’s industrial workers and the development of a kind of social movement which would have justified Hughes’ sense of alarm.

To the extent that the treatment of the predominantly poor class of criminal defendants in America’s lower courts has depended upon their capacity to respond to injustice at the hands of the courts in an organized and politically threatening way, it becomes less surprising that decades of lower court investigations have proved to have had so little effect. An essential aspect of poverty is that the
individual who finds himself in that economic situation is also the person in the worst possible social position to do anything about it. The allegiance of the poor to "orderly processes of social change" may in fact represent an entirely marginal factor in any determination of whether it is politically imperative to narrow in a dramatic way the gap between the claims of justice and the performance of the lower criminal courts. The lesson learned over the years since Justice Hughes' remarks about the relation between law and the social system may well be that the poor are infinitely expendable and that indifference to their experience of justice in the lower criminal courts is in no significant way incompatible with sustaining the legal system or the social structure of which it is a part. And, being a petty criminal, which is only a more specific way of being poor, in no way enhances one's ability to put effective pressure on the institutions—including the courts—which shape one's life.27

Beyond the best intentions of reform movement leaders, the lower criminal courts have steadfastly

Marx and Engels did not, however, accept the bourgeoisie's own estimation of the threat to "society" represented by the criminal. The criminal career and the "delinquent solution," however much enforced by the harsh necessities of capitalism, are not in effect forms of political rebellion against the existing order but a more or less reactionary accommodation to them. The professional criminal, like all other men, "enters into definite relations that are ... independent of their will"; he joins the ranks of the lumpenproletariat. Like it or not, a specific class position is forced upon him. The romanticization of crime, the recognition in the criminal of a rebel "alienated" from society, is, for Marxism, a dangerous political ideology. It leads inevitably, since the "criminal" is an individualist abstraction of a class position, to the estimation of the lumpenproletariat as a revolutionary force.

Hirst, Marx and Engels on Law, Crime and Morality in CRITICAL CRIMINOLOGY 218 (I. Taylor, P. Walton, J. Young, eds. 1975). Thus the clear impression: even the Marxists don't seem to like criminals.

Offering specific illustrations from their abundant research into modern social history, both Eric Hobsbawm and George Rude conclude that the distinction between radicals, communards, and political mobs on the one hand, and outlaws, bandits or criminals on the other, can usually be drawn quite sharply.

Hobsbawm, a prolific historian of 19th and 20th century social movements, observes that:

There is no evidence that the flourishing underworld of Paris provided revolutionary militants or sympathizers in the French revolutions of the eighteenth and nineteenth century, though in 1871 the prostitutes were strongly Communard; but as a class they were victims of exploitation rather than criminals. The criminal bandit gangs which infested the French and Rhineland countryside in the 1870s were not revolutionary phenomena, but symptoms of social disorder. The underworld enters the history of revolutions only insofar as the classes dangereuses are mixed up with the classes laborieuses, mainly in certain quarters of the cities, and because rebels and insurgents are often treated by the authorities as criminals and outlaws, but in principle the distinction is clear.

Rude further suggests that:

Historians have ... assumed that the "mobs" that rioted were of this species and were of necessity drawn from "criminal elements," the slum population, or from "the inhabitants of the dangerous districts ... who were always ready for pillage." Yet this was not the case. Rioters were certainly drawn from what Henry Fielding termed "the Mob" and they tended to be wage-earners rather than self-employed craftsmen, peddlars or small proprietors, but they were rarely criminals, vagrants or the poorest of the poor, and in so far as any parts of the metropolis may be said to have been more riotous than others, they were the City, the Strand, South-

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26 See text accompanying note 21 supra.
27 It goes without saying that those in power have never particularly liked small-time criminals: thieves and con-artists, pimps and prostitutes, drunks and drug-users, people who make too much noise or sleep quietly but in the doorways of banks; in short, the kind of criminal who invariably lives in the heart of America's great cities and inevitably spends a certain number of days (and nights) each year waiting in the "bullpens" of the misdemeanor courts. Many law students do not appear to like them very much either. See Stevenko, Attitudes on Legal Representation of Accused Persons, 2 AMER. CRIM. L.Q. 101 (1964). This characteristic feeling of contempt for the lower-class criminal is well expressed by the respectable Girondist Deputy, Monsieur Duperret in P. Weiss, MARAT/SADE 77 (1969):

Duperret: ... And who has he got on his side
Pickpockets layabouts parasites
who loiter in the boulevards
[indignation among the onlookers]
and hang around the cafes
Cucurucu: Wish we could
Duperret: Released prisoners
escaped lunatics
[famult and whistling]
Does he want to rule our country
with these

Upper-class expressions of contempt and anxiety in relation to encounters with petty-criminals do not, however, reveal the actual extent to which this criminal element threatens "society" (i.e., the social structure). Marx and Engels, for example, viewed criminal careers basically in terms of accommodation to the dominant system and not as forms of political rebellion. Indeed, one writer suggests that romanticism surrounding criminal acts leads to the illusion that criminals can become effective revolutionary militants and thus is antithetical to Marxian theory.
resisted reform. Juxtaposing the successful resistance to reform by the lower courts and the apparent fluctuations of interest in the problem with the political character of those groups most prominently victimized by the criminal process points to a fruitful line of inquiry. The juxtaposition indicates that the failure of reform to take hold cannot be traced to the lack of goodwill or the stupidity of responsible officials, but that it may find its roots in the fundamental conflict of social and political interests. It further suggests that a prerequisite to meaningful change in the lower courts is the abandonment of those premises which, while legal in form, have proven inadequate in the past.

LOST RIGHTS

Procedural changes have been recommended as a solution to the problems of the lower criminal courts for half a century. During the 1960's it appeared as though such procedural changes were finally taking place in the American criminal justice system as part of the "criminal law revolution." The "criminal law revolution" is generally recognized as a dramatic expansion of the rights of the criminally accused. Through constitutional interpretations, the appellate courts—principally the Supreme Court—created new standards for American criminal justice that trial courts in practice as part of the "criminal law revolution." Procedural changes have been recommended as a solution to the problems of the lower criminal courts for half a century. During the 1960's it appeared as though such procedural changes were finally taking place in the American criminal justice system as part of the "criminal law revolution." The "criminal law revolution" is generally recognized as a dramatic expansion of the rights of the criminally accused. Through constitutional interpretations, the appellate courts—principally the Supreme Court—created new standards for American criminal justice that trial courts in practice were expected to mirror. It is questionable, however, whether the "revolution" had any impact on the lower criminal courts, since the "revolution" hardly touched these courts and even where it did, the consequent changes were of much more limited scope than were anticipated.

A clear contrast exists between judicial theory and practice in the lower criminal courts. Ironically, the contrast appears to be the greatest in relation to that right which is generally considered to be the most important to persons accused of a crime—the right to counsel.

For example, Arnold Enker, while addressing the revolution, a frequent noted to have begun near the time when the right to counsel was recognized for all people charged with felonies. See Gideon v. Wainwright, 372 U.S. 335 (1963), and ended before the recognition of that same right for people charged with misdemeanors, Argersinger v. Hamlin, 407 U.S. 25 (1972).

"The assistance of counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 25, 31 (1972). Mr. Justice Sutherland, in Powell v. Alabama, 287 U.S. 45, 68-69 (1932), clearly explained the importance of the right.

The right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The right to counsel is no less important when counsel's knowledge and skills are used by the defendant who is pleading guilty. See D. Newman, CONVICTION 198 (1966).

The pervading theory is that providing defense counsel to defendants charged with misdemeanors will balance (or at least decrease the great imbalance) the power of the opposing parties in misdemeanor cases and will result in lower court procedures which more closely approximate the ideal of the adversary system. Those who share this view seem to take it for granted that the presence of defense attorneys and the increased formalization of the judicial process are inevitably the answer to the lower court problems. That something is missing in their shorthand solution is a central focus of the third section of this article. See notes 55-103 and accompanying text, infra. For another view that the assumed benefits to be derived from providing defense counsel in lower courts may not comport with reality, see, Junker, The Right to Counsel in Misdemeanor Cases, 43 WASH. L. REV. 685, 697-700 (1968).
the Virginia conference, pointed out that "the primary procedural issue in the lower courts concerns the provision of counsel to those unable to hire their own attorneys." Presumably, the issue was resolved three years later when the Supreme Court ruled in Argersinger v. Hamlin that the sixth amendment right to counsel should be extended to criminal defendants who risk being sentenced to jail in the misdemeanor courts. It is only partially correct, however, to say that the constitutional right to counsel has once again been "extended" because, in reality, it is more accurate to say that there has never been an attorney to represent most defendants who wanted or needed one. Neverthe-

less, relatively few writers have shown any interest in approaching the problem of the un counsel in the most useful perspective available: the trial court experience.

Most writing on the subject of the right to counsel engages in theorizing about the right without considering the possible discrepancies between theory and actual practice. Therefore, while the

which our system of criminal justice affords. The defendant's technical ignorance practically assures that he will not be the most effective advocate of his case. His dual role as defendant and advocate puts him in a position from which he will be unlikely to make an objective analysis of the impact and significance of the evidence presented against him. He lacks the legal training which will enable him to present his evidence completely and in a light most favorable to himself. Without counsel he will often be totally incapable of recognizing and effectively rebutting the evidence raised against him. The result is to practically ensure his conviction.

Several possible factors may explain why the defendant had no counsel. Except in a few instances, the county records do not reveal the reason. One possibility is that a defendant who can afford to retain counsel may prefer to represent himself. . . . The second factor is that counsel is not available at all. The present survey shows that counsel is not usually provided to indigent misdemeanor defendants in the state court systems.

A Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association, Equal Justice for the Accused 42 (1959): "Thus there exists great diversity in the practice of the several states and in many states a person can today be convicted of a non-capital offense in a trial in which, because of lack of money, he has been forced to defend himself" (hereinafter cited as Equal Justice for the Accused).


Introduction, Sociology of Law 9, 10 (V. Aubert ed. 1969): "Since the precedents are primarily to be found in High Court decisions, these judgments constitute the universe from which empirical materials are drawn, while the actual practices of the lower courts and of administrative agencies with semi-judicial functions are left unmapped." See also Beaney, The Right to Counsel in The Rights of the Accused 147, 148 (S. Nagel ed. 1972): "Lofty judicial assertions of the extensive rights of an accused are juxtaposed with all-too-easy acceptances of waiver which minimize or thwart an accused's right in practice. . . . The landmark decisions tell us something about judicial attitudes but only hint at actual practices."
theoretical development of the right is well documented in the appellate reports, the history of the right in practice seems hardly to have been explored at all and probably cannot now be explored except through an exhaustive study of unevenly available—and often inaccurate—court records, supported by a massive oral history project to reconstruct the everyday functioning of America's criminal courts. The right to bring hired counsel to court is less important to most criminal defendants than the right to have counsel provided without cost after a showing of indigency. Yet, neither right exists if employing counsel, not one of having counsel provided by the Government.

See also EQUAL JUSTICE FOR THE ACCUSED, supra note 34, at 40: The right to the assistance of counsel, as we understand it today, has two elements: the right to retain counsel; and the right, in certain situations, to have counsel assigned. The first of these elements is now so generally accepted that it is considered axiomatic. Indeed, it is sometimes stated that the right of a defendant in a criminal case to retain counsel is an ancient English common-law right. This is not correct. In common-law systems it is a privilege of comparatively recent origin which was recognized in the New World before it was accorded in England. The privilege came to be accepted as a right even later.

40 "How can a prisoner 'make an intentional relinquishment or abandonment of a known right' if no one ever explains to him that he has such a right and what it means?" L. SILVERSTEIN, supra note 20, at 90.

41 To employ a "ground-floor level" of analysis within the context of this article is to focus attention upon the contrasting images one gets of how the judicial system works depending upon whether one is sitting in the audience of a noisy misdemeanor courtroom or is reading a casebook on criminal procedure in a comfortable law school library. Jerome Frank and the other legal realists made commonplace the insight that appellate case reports do not tell us all we might like to know about what determines specific legal outcomes. See J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949). The right to counsel analysis in the text, for example, reveals that it is impossible to measure the presence or absence of procedural rights without examining the experience of the process by those upon whom the system operates: the defendants themselves. A ground-floor analysis attempts to secure an account of the lower court process, not in terms of the process' reflection in a judge's legal argument, but rather from the perspective of the defendant (or at least a faithful courtroom observer, willing to try to listen and to watch as much as possible from the defendant's point of view). The law school casebook, conceived as a model of appropriate information about the legal process, obviously omits entirely the
level of analysis which may well suggest that the theory takes as its subject a right which does not exist in reality.\(^{42}\)

Conceptually, the analysis ought to begin with a separation of the defendant's knowledge of his rights prior to his contact with the criminal justice system from that "information" received in the defendant's experience (and certainly the defendant's perception of it). Thus a ground-floor level of analysis in this instance implies a picture of the lower courts in operation, as seen from the bottom up.

The approach need not, however, be confined in this way. The phrase itself is borrowed from Fernand Braudel, the French historian, who views quotidian experience of the material facts of life—food, climate, work, comfort, habit—as the ground-floor of history. See F. BRAUDEL, CAPITALISM AND MATERIAL LIFE, 1400–1800 (1973). As Robert Gordon suggests, see Gordon, infra note 42, the idea of a ground-floor level of analysis should not be given the appearance of presenting an ultimately empirical or undeniably hard scientific description of reality. What is critically different in this approach is the willingness demonstrated by the analyst to enlarge the methodological scope of inquiry beyond the traditional boundaries constructed by judges, law professors, and the traditional legal academic outlets. Stepping off the analytic elevator at the ground-floor and curiously surveying the terrain may produce remarkably interesting and unknown subjects for study. For example, John T. Noonan recently described the course of his research in the following terms: "As I reached what seemed to me the heart of law's dependence on history, however, I became increasingly conscious of the central place of the human person in any account of law. I also became increasingly conscious of the neglect of the person by legal casebooks, legal histories, and treaties of jurisprudence." J. NOONAN, PERSONS AND MASKS OF THE LAW vii (1976).

Ground-floor analyses are "radical" ones; "of or relating to the root," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).

Disdain for a ground-floor level of analysis also appears to characterize the theory of contract law. Robert Gordon suggests that what distinguishes the "Behavioral Realist" contract law theorists from the dominant "Case Law" theorists is not that the behaviorists are more empirical in their research but rather that they define the scope of their research much more broadly than the case law contracts professors. "The difference," says Gordon, "is simply that Behaviorists refuse to limit their universe of investigation to cases." Thus the dominant theory of contract law tends to exclude a ground-floor level of analysis which might reveal the extent to which businessmen in practice utilize contract law, replace it, or even ignore it. The cases which reach litigation (and ultimately, case books) may not be typical of contractual relations at all. Arriving at a similar conclusion, Mark Tushnet points out that "purely legal materials" cannot show, "as businessmen's records could, the extent to which people took account of legal rules in their activities." See Gordon, Book Review 1974 Wis. L. Rev. 1216, 1220, 1222–23; Tushnet, Lumber and the Legal Process, 1972 Wis. L. Rev. 114, 122.

An example of how a ground-floor analysis of the lower courts would shed light on these issues may be shown by examination of the right to counsel. Judicial\(^{43}\) and professional\(^{44}\) standards as to notice and waiver of right to counsel are clear enough, yet frequently ignored in the lower criminal courts. Even when the standards are complied with, they may fail to secure the defendant's access to legal representation. Approaching the problem, not from the perspective of what procedure is most likely to place an effective waiver of right to counsel on the record, but rather from how the court can be assured that an indigent criminal defendant actually receives the services of an attorney, Lee Silverstein suggests:

[In] circumstances where the defendant is entitled to appointed counsel, he is entitled to have the appointment offered to him in an effective and intelligible way. The things that are said, the tone of voice, the atmosphere of the courtroom or other place where the offer is made, whether the defendant is given a written explanation of his rights or told orally, whether by the judge, the prosecutor, the defender, or a court official; all these matters and perhaps others affect the defendant's decision to accept the offer of counsel or to reject it.\(^{45}\)

\(^{42}\) Disdain for a ground-floor level of analysis also appears to characterize the theory of contract law. Robert Gordon suggests that what distinguishes the "Behavioral Realist" contract law theorists from the dominant "Case Law" theorists is not that the behaviorists are more empirical in their research but rather that they define the scope of their research much more broadly than the case law contracts professors. "The difference," says Gordon, "is simply that Behaviorists refuse to limit their universe of investigation to cases." Thus the dominant theory of contract law tends to exclude a ground-floor level of analysis which might reveal the extent to which businessmen in practice utilize contract law, replace it, or even ignore it. The cases which reach litigation (and ultimately, case books) may not be typical of contractual relations at all. Arriving at a similar conclusion, Mark Tushnet points out that "purely legal materials" cannot show, "as businessmen's records could, the extent to which people took account of legal rules in their activities." See Gordon, Book Review 1974 Wis. L. Rev. 1216, 1220, 1222–23; Tushnet, Lumber and the Legal Process, 1972 Wis. L. Rev. 114, 122.

\(^{43}\) The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.


\(^{45}\) L. Silverstein, supra note 20, at 89.
A variety of barriers may stand between the defendant and his sixth amendment right to counsel. The defendant may be unaware of his right simply because he was not informed of the right by the judge. Or, in a court where the judge’s introductory remarks are expected to serve as a mass notification of the various rights available to defendants with cases scheduled that day, a defendant may fail to be informed of his right to counsel simply because he is tardy in arriving at the courtroom or because he is still detained in the lock-up. Even when the defendant is present to hear his rights read, he may not necessarily understand them because (1) rights are read in English to those who do not understand English, (2) rights are read in English to those who do not know how to translate “legally relevant phrases,” (3) the accused is still under the influence of alcohol or drugs if he

For example, the following excerpts testify to the pervasiveness of these problems.

Those whose English is deficient are similarly at risk in making statements to the police or the courts. Until the ending of mass immigration into America after the First World War, there were a number of cases of Hungarian, Polish, Irish, Croat, Norwegian and other immigrants speaking little or no English being wrongly imprisoned partly because of misunderstandings or mistranslations during or before the trial. Today the chief problem lies with the Spanish-speaking Mexicans and Puerto Ricans.


In one case, the colloquy consisted of a single question by the judge, “Do you have any money?” and an answer, “Yes.” Another defendant was asked how much money he had in his pocket. He replied, “forty cents.” The judge, presumably in jest, told the defendant he “should hire a forty-cent lawyer.” Missing the joke, the Spanish-speaking accused was tried and convicted without a lawyer.


The second judge simply reads a notice of rights to all the defendants assembled in the courtroom. He reads the text at a speed and in a tone that makes it difficult to comprehend; his language is also probably beyond the comprehension of many of the defendants. In addition, the notice reads states that a defendant should “bring to the court’s attention” the fact of his indigency or desire for counsel, without specifying the time or manner appropriate for such a communication to the court. For most defendants, therefore, failure to request counsel is taken as an implicit waiver of the right.

S. KRANTZ, supra note 35, at 381.

Perhaps nothing so perfectly characterizes the defendant’s understanding of lower criminal court procedure than this partial colloquy cited in S. KRANTZ, supra note 35, at 410:

J: Do you have an attorney?
D: No.
J: You are charged with ———, a misdemeanor.
You may plead guilty, not guilty, no contest, or you may have a continuance to find an attorney.
D: (Silence) . . . .

“At least one Wisconsin judge asks the defendant, ‘What do I mean when I say right to counsel?’ He indicates that he often receives an answer which persuades him that the defendant does not really understand what is involved.” Remington, Defense of the Indigent in Wisconsin, 37 WIS. BAR BULL. 40, 46 (1964)

There was always the unmistakable impression that many of these people did not even hear the instructions, much less understand them. When the instructions were completed, the defendants were herded out of the courtroom to wait until their individual cases were called.

Even if the instructions were heard, can under-
When the defendant is informed of his right to counsel while standing before the judge among a large group of prisoners, he is less likely to ask questions of any kind than if he is individually notified of his rights.\footnote{Standing be presumed?} Although the instructions given may seem simple enough to someone with legal training, many of the people to whom they were directed may have had little formal education. They could not be expected to know the degree of importance attached to the right of counsel by the Supreme Court. At the time the instructions were given, some of the defendants may not have known the offense they were charged with, whether the offense was a felony or misdemeanor, or if the offense could be penalized by days in jail. Another factor contributing to the uncertainty of understanding must be the very real psychological pressures that prey on those accused of crime, especially if immersed in the bewildering criminal process for the first time.

Comment, The Effect of Argersinger, supra note 35, at 582. He [the indigent defendant] may not appreciate the advantages of having a lawyer, especially if it is his first experience in court. Indeed, he may not even understand that the word "counsel" means lawyer. From one Midwestern state came the report that certain defendants formerly thought "counsel" meant some sort of adviser like a family counselor. And the reporter from Idaho told of a prisoner who had waived "counsel" because he did not know that the word means lawyer. Some defendants are confused, even bewildered, when they are brought before a court, and are in no position to make a rational decision about whether they want counsel.

L. Silverstein, supra note 20, at 90.

\footnote{Mass warnings do little to dispel the possibilities for intimidation inherent in a busy nonfelony court...} Even the state courts that have condemned the practice of a mass warning recognize that the better procedure is to individualize the notice of right to counsel." S. Krantz, supra note 35, at 112.

Only half (51%) the defendants see the judge individually. Thus only half the defendants in the lower court engage in what fits the popular and even academic image of the judge-defendant confrontation. The remainder of the defendants see the judge only in conjunction with others. Sometimes the group is large; 15% of the total defendants face the judge with ten or more others alongside them. Most criminal defendants presumably commit their offenses alone and go on to receive their sanctions in the midst of strangers. Decisions as to dispositions may historically have become more individualized, but numerous encounters in contemporary lower courts are not.

Mileski, supra note 35, at 480.

See also Nutter, The Quality of Justice in Misdemeanor Arraignment Courts, 53 J. CRIM. L.C. & P.S. 215, 216 (1962), where it is reported that: "In Divisions 50, 58, and 59 [of the Los Angeles municipal arraignment courts] defendants are informed of their constitutional rights in crowds ranging in size from 100 to 300 defendants."

Frequently, defendants who are informed of their right to counsel are provided with such partial explanations of what that right entails that counsel is effectively denied.\footnote{Thus an ensemble of banal, everyday legal devices can circumvent the essential constitutional right to counsel, as recognized in the Argersinger decision. Such practices may reflect less of a coordinated strategy to thwart a Supreme Court ruling than a primary commitment to the reproduction of the judicial system as a bureaucratic structure. As Maureen Mileski points out:}

\footnote{The method of advising defendants of their right to counsel is somewhat different in the Harris County (Houston, Texas) Criminal Court. Appointment of counsel is not undertaken until the hearing of the jail docket. . . . No attempt is made to explain that there may be a difference in consequences if an attorney is appointed. Moreover, although defendants are informed that lawyers may be obtained, it is not made clear that the fee is paid by the county.}

\footnote{S. Krantz, supra note 35, at 110.}

In summary, although most defendants are advised of their right to counsel at some point in their interaction with the criminal justice system, it is infrequent that they are told of the consequences of this decision. In none of the observed cities was the defendant informed that, according to Argersinger, the absence of a lawyer without waiving the right to counsel precluded the possibility of his incarceration.

\footnote{Id. at 111.}

\footnote{[A]n accused person uninformed of his right to free counsel may be quite as imposed upon as one informed of a right he cannot exercise because of poverty."}

\footnote{Ellison, Assigned Counsel in Montana: The Law and the Practice, 26 MONT. L. REV. 1, 2 (1969).}

Of the three judges observed, Judge A's approach to providing counsel for indigents was at once the simplest and also the most unconstitutional. . . . Judge A typically explained: "You have a right of counsel." He did not say that they would be provided counsel if unable to hire their own. No instruction was given that they could not be sent to jail unless they had been represented by counsel or had waived that right. . . . The result of these instructions would leave the average person with the understanding that he could be represented in court if he were able to employ his own lawyer. The question of a waiver of the right to appointed counsel never arose in Judge A's court because the accused were never informed that the right existed.

Comment, The Effect of Argersinger, supra note 35, at 579.

\footnote{Mileski, supra note 35, at 484.}
If subsequent to the *Argersinger* decision, a majority of misdemeanor defendants still appear in the criminal courts without the assistance of counsel and waiver rates remain high,\(^5\) it may well be that though the Supreme Court has changed our understanding of who has a right to counsel in the criminal courts, the lower courts have not changed their routinized patterns of informing defendants of what rights (at least in theory) are available to them. "There is considerable evidence," Silverstein indicates, "of a cause-and-effect relation between the method a court uses to offer counsel and the proportion of defendants who waive counsel."\(^6\)

Procedural due process in practice falls far short of what is promised by the theoretical analyses of fairness and justice which characterize appellate reports. The right to counsel is just one—though perhaps the most critical—example of this discrepancy, and the limited analytical focus employed thus far to examine trial court operation may have brought into view no more than the tip of the iceberg of massive contrast between theory and practice in misdemeanor adjudication. Certainly there can be no full understanding of how these

\[^{5}\] S. Krantz, *supra* note 35, at 4-5:
Although most jurisdictions have begun to appoint counsel in nonfelony cases where imprisonment may be imposed (some jurisdictions, in fact, had done so even before *Argersinger*), compliance has generally been taken in nature. What this means is that: (a) waiver of counsel remains common and is often openly encouraged by judges .

\[^{6}\] Id. at 365:
Approximately one in five of the total defendants was accompanied by counsel at trial. The degree of representation was higher in Period III than it was in either of the other two periods. The presence of counsel made a large difference in all three periods on whether or not a defendant was found guilty.

\[^{7}\] The differences in the percentage of defendants found guilty with and without counsel in the three periods are 23 per cent, 18.8 per cent, and 22.1 per cent, respectively. Thus, counsel was not only demonstrably important but as well affected the number of accuseds who actually could be jailed.

Ingraham, *supra* note 35, at 634:
No substantial increase in the number of not guilty pleas entered to misdemeanor charges has resulted in the majority of jurisdictions polled. This may reflect the fact that misdemeanants are continuing in the great majority of cases to plead guilty to the charges placed against them even with counsel or that they are pleading guilty and signing waivers of counsel; or it may indicate that the courts are compensating for *Argersinger* by reducing the number and kinds of cases in which they impose jail terms so as to avoid the necessity of appointing counsel and reduce the possibility of not guilty pleas being made.


**ADVERSE MODELS**

Setting to one side the contradiction between the *Argersinger* vision and the continuing lack of access to counsel by criminal defendants in the lower court and reserving for other writers a further investigation of the constellation of problems revolving around the difference between the presence of defense attorneys in the court and a genuinely adversary proceeding,\(^8\) it can be stated that, conceptually, the *Argersinger* decision represents the proposition that essential reform of lower criminal court procedure can be achieved through massive injections of defense counsel. Such an injection can make operational the due process protections which are in this mainstream of criminal justice and thus make the adversary system a reality. This is not the only approach to reform of the lower criminal courts and, indeed, those committed to finding solutions to the chronic problems of the lower criminal courts may well be moving strategically in opposite directions.

Herbert Packer's model of the criminal process\(^9\) provides, at least initially, a convenient framework for considering the possible ways in which lower criminal court procedure can be altered. Packer presents two divergent models of criminal justice: a Crime Control Model and a Due Process Model. These represent the extreme polar delimitation of a spectrum along which, at some point, a balance is inevitably struck embodying an at least temporary reconciliation of conflicting procedural theories behind which stand entire systems of social values. The inquiry which Packer constructs around the antinomic relationship between his models has had a considerable impact upon general understanding of the criminal process.\(^10\) Other


\[^{10}\] G. Cole, *Politics and the Administration of Justice* 53 (1973): "In what is regarded as one of the most important recent contributions to systematic thought about the administration of criminal justice, Herbert Packer has articulated the values supporting two
model-builders have helped illustrate the opposition between a conception of criminal procedure which emphasizes crime control, public order, judicial bargaining and compromise at the expense of adversary process as against one which seeks to protect individual rights, the presumption of innocence, a combative trial procedure and civil liberties generally, maximized at whatever cost.\textsuperscript{58}

models of the justice process. . . .” and Griffiths, Ideology in Criminal Procedure or A Third “Model” of the Criminal Process, 79 YALE L.J. 359, 360 (1970). Packer’s article is widely regarded as the most important recent contribution to systematic thought about criminal procedure.\textsuperscript{59}

The “due process model,” often referred to as the “combat or adversary model,” is the image generally held by the public of the judicial system. This view stresses both the adversary nature of courtroom proceedings and the rights of the individual as the truth is discovered. . . . Although it does not deny the social desirability of repressing crime, it stresses the problems of errors committed during the fact-finding stages. Because of the value placed upon the individual’s freedom, the deprivation of which could result from the judicial process, every effort is made to protect the accused from the consequences of errors in the system. Hence, the model assumes that a person is innocent until proved guilty, that he has an opportunity to discredit the case brought against him, and that an impartial judge is provided to decide the outcome. . . . Compared with the “due process model,” the “criminal control model” de-emphasizes the adversary nature of the judicial system. Rather than stressing the combative elements of the courtroom, this model notes that bargaining between the state and the accused occurs at several points. The ritual of the courtroom is enacted in only a small number of cases; the rest are disposed of through negotiations over the charges, usually ending with defendants’ pleas of guilty.

A. SMITH & H. POLLACK, CRIME AND JUSTICE IN A MASS SOCIETY 157 (1972):
It is obvious that the reality of our judicial process conforms far more closely to the bureaucratic model than to the adversary ideal. Criminal defendants are adjudicated, not by a trial involving two equally matched lawyer-champions arguing before a neutral judge and jury, but by private negotiations between actors who have at least as much claim on each other as the defendant has on any one of them. The judicial process, in short, is one of bargaining and compromise; it is informal, and indeed exists only through its ability to short-circuit and bypass the prescribed, formal procedures.

The Crime Control Model tends to deemphasize this adversary aspect of the process; the Due Process Model tends to make it central. . . . The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom.

Though Packer outlined his conflicting models of criminal procedure in 1964, the basic tension between them was characterized as the central dilemma confronting any system of criminal procedure by Jerome Hall in a 1942 Yale Law Journal article, reprinted in J. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 220, 221 (1958):

None of the above sources, forms or standards of criticism has any relevance or utility apart from the ultimate ends of criminal procedure—to convict the guilty and acquit the innocent. Only in the light of this distinctive dual objective of criminal procedure can any intelligent judgment be made as to the logical, scientific, ethical or efficient quality of any method, proposal or reform. Hence the most important single generalization that can be made about American criminal procedure or for that matter about any civilized procedure is that its ultimate ends are dual and conflicting. It must be designed from inception to end, to acquit the innocent as readily, at least, as to convict the guilty. . . . The dilemma consists in the fact that the easier it is made to prove guilt, the more difficult does it become to establish innocence. . . . The presumption that to be charged means to be guilty has been tenaciously, if unconsciously, entertained by well-intentioned reformers lulled into complacency by humanitarian motives to substitute “treatment” for punishment, and enlightened by negligible insight into the functions of criminal procedure. It can be demonstrated that their agitation parallels Enrico Ferri’s almost to the word; one has but to read his condemnation of any presumption of innocence and of civil liberties generally to know where such reform leads.\textsuperscript{55} Packer, supra note 56, at 13.

\textsuperscript{50} See Oliphant, supra note 2, at 547-48:
Argersinger \textsuperscript{1} v. Hamlin openly invites an effective two-pronged attack on the injustice that exists in the lower courts. The opportunity exists for law schools throughout the nation to marshal the ability, enthusiasm and vigor of their students in the defense of misdemeanants, while simultaneously educating these prospective members of the bar in the actuality of ethical lawyering. The fashion in which this invitation, albeit challenge, is met will be critical to the improvement of the criminal justice system. If law students, law schools, and law teachers fail to seize the opportunity for education, service and re-
the Argersinger approach.\footnote{61}

However, in an important critique of the analytical framework which Packer employs, John Griffiths argues\footnote{62} that the two models outlined by Packer can readily be collapsed into a single model, a “Battle Model” of criminal procedure and that options obfuscated by Packer’s oversimplification should, in fact, be central to any serious consideration of reforming American criminal justice. As Griffiths states, “Packer consistently portrays the criminal process as a struggle—a stylized war—between two contending forces whose interests are implacably hostile: the Individual (particularly the accused individual) and the State. His two Models are nothing more than alternative derivations from that conception of profound and irreconcilable disharmony of interest.”\footnote{63} The Crime Control Model, therefore, tends to promote rules of procedure which make it easier for the state to secure a conviction whereas the Due Process rules of procedure which make it as difficult as possible for the state to put a suspected criminal in jail.\footnote{64} However, both of Packer’s models miss the point. Within the Battle Model, defense counsel is neither concerned with whether the accused is factually guilty,\footnote{65} nor is he concerned with any interest of the accused beyond that defined by the process—to win his case, to avoid exile.\footnote{66} Also, defense counsel is certainly not concerned with the accused as a person,\footnote{67} who is inevitably sent by the criminal justice system either to prison or back into the environment that generated the criminal behavior.

These issues do not even arise within the paradigm which Packer presents, and thus Griffiths is led to conclude that “the intellectual apparatus Packer presented with such revealingly extravagant claims is in fact a clear, if unsell-conscious, articulation of the ideology which is responsible for the characteristic limitations of most contemporary thinking about the criminal process.”\footnote{68} The primary value of Griffiths’ inquiry into the scope of Packer’s spectrum thus becomes one of demystification,\footnote{69} a cogent demonstration of the implicit ideological assumptions of Packer that animate a great deal of the contemporary debate about reform of the criminal process. Griffiths seems to sense, however, that it is not enough to discover the omissions in Packer’s theory. Rather, he notes that the Crime Control/Due Process dichotomy must be confronted with an alternative theory of available procedural options.

The first thing to be said about Griffiths’ alternative is that it has a great deal in common with the one proposed by Karl Llewellyn\footnote{70} and that it inevitably suffers from similar weaknesses. Griffiths contrasts Packer’s Battle Model with his own “Family Model,”\footnote{71} and Llewellyn opposed the

\begin{footnotesize}
\item[61] For an explanation of the difference between “factual” and “legal” guilt, see Barkai, Accuracy Inquiries For All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?, 126 U. PA. L. REV. 88 (1977).
\item[62] Griffiths, supra note 57, at 383.
\item[63] Id. at 384: “An analogous change in our attitude toward criminal defendants would bring with it a thoroughgoing respect for their rights and their dignity and their individuality, going far beyond the purely formal respect which now attaches to the defendant in his role as party to a tournament.”
\item[64] Id. at 410.
\item[65] J. Robertson, supra note 14. at 345–46: “John Griffiths’ critique of the adversary or ‘battle’ model, to use his term, shows the conceptual and practical limitations that flow from a narrow conception of the criminal process . . . . As an exercise in demystification, his article is essential to an understanding of the criminal process.”
\end{footnotesize}
"arm's-length" model with what he calls a "parental" model, but the distinction being made is the same. Griffiths is drawn to a Family Model of criminal procedure because the name "invokes a 'real world' institution which occasionally inflicts punishments on offenders for their offenses but which is nonetheless built upon a fundamental assumption of harmony of interest and love..." Llewellyn extrapolates his parental model from the practice of the Cheyenne and New Mexican Pueblos but in the end calls it a "parental" model because it corresponds in rough outline to the system "by which we make and administer the criminal law of and within the household, the school, the system under which we grow up." The implied analogy between the family and its internal politics and the criminal justice system as a basis for the alternative model is unfortunate. One commentator criticizes the analogy on the grounds that "if Professor Griffiths had set out to show that the 'Family Model' is a prototype of warfare he would have had an easier time of it—he would have had extensive aid from psychoanalysis." But more fundamentally, the family as an institution is already effectively integrated into the reproduction of modern society, including the present system of rules and their enforcement. The family then is hardly an innocent institution and, despite Griffiths' disclaimer, provides an inadequate basis even for an altogether abstracted and metaphorical example of an essentially different regime of criminal process.

The major problem, however, with the Griffiths/Llewellyn alternative is the failure to perceive the necessity of relating closely their speculation about the potential for "reconcilable—even mutually supportive—interests, a state of love," and "this feeling of We-ness, of love, acceptability, acceptance, and welcome..." to the "objective life of the particular society." What is needed is a clear demonstration of the relationship between those structures of feeling appropriate to non-warlike systems of criminal adjudication and any other idea or institution as a heuristic instead of the most contentious one of all. Griffiths, supra note 57, at 372 indicates that "I wish to emphasize, however, that this allusive reference is to our family ideology as I take it to be, not to the facts of all or particular families." Presumably the purpose of this emphasis is merely to protect his conception of a Family Model of criminal process from contradiction by the life experience of a handful of families. If Griffiths is suggesting that the family ideology he perceives has no relation to the general situation of the family in society, then his model would no longer even invoke a "real world" institution and Griffiths' discussion would then be even more obviously disconnected from any specific social institution.

I welcome the idea of thought constructs that are alternative to the model of the criminal sanction as war. But the notion of using the human family as a methodological root metaphor in opposition to a "Battle Model" is disturbing to me. I am at a loss to understand how the manner in which the members of the human family treat one another is, overall, any better than society's current treatment of the criminal. If Professor Griffiths had set out to show that the "Family Model" is a prototype of warfare he would have had an easier time of it—he would have had extensive aid from psychoanalysis. He must be aware that the especially heinous crimes are family based and that the family's most atrocious outrages are not even recognized as crimes at all. He must also know that the progress of the human family is toward disintegration to its biological nucleus not the other way about; and that family law is, if anything, in a worse state of confusion than even the criminal law. I wish he had chosen almost...
objective character of social interests and conflicts within societies where the Battle Model has been or would be effectively discarded. Jesse Berman's first-hand account of lower criminal court procedure in Cuba\(^{83}\) provides a useful step in the right direction. While Berman examines the stated purposes and functions of the "popular tribunals,"\(^{84}\) the key participants in court operations,\(^{85}\) and the variety of typical misdemeanor cases,\(^{86}\) his com-

The homicide record of the Cheyennes—sixteen recorded killings within the tribe in two generations (1835–1879), or an annual rate of almost one killing to a theoretical ten thousand of population—is another evidence of the conflict between the aggressive personal ego of the individual male and the patterns of restraint which were also ideationally promulgated by the culture.

The killing of one Cheyenne by another Cheyenne was a sin which blooded the Sacred Arrows, endangering thereby the well-being of the people. As such it was treated as a crime against the nation. . . . Much of the crystallization of Cheyenne community consciousness into political reality was due to the action of this social catalytic. . . . When murder had been done, a pall fell over the Cheyenne tribe. There could be no success in war; there would be no bountifulness in available food. "Game shunned the territory; it made the tribe lonesome." So pronounced Spotted Elk; so assent all Cheyennes.


\(^{84}\) Berman introduces his discussion of Cuban lower court criminal justice by quoting a statement made in 1953 by a well-known Cuban lawyer (Fidel Castro) on one of Roscoe Pound's favorite subjects (see, e.g., S. GLUECK, *ROSCEO POUND AND CRIMINAL JUSTICE* 30-36 (1965)), the individualization of the criminal process:

> When you judge a defendant for robbery, your honors, do you ask him how long he has been unemployed? Do you ask him how many children he has, which days of the week he ate and which he didn't, do you concern yourself with his environment at all? You send him to jail without further thought.


Blas Roca, Chairman of the Commission for Constitutional Studies of the Central Committee of the Cuban Communist Party, provides a description of the lower courts with which Berman compares his own observations of the system in practice.

The fact that the Popular tribunals are organized and function in the neighborhood, so that neighbors and acquaintances of those being judged can attend the trials and can make these trials truly public, and that the judges sitting in these trials come from the same community in which they live and work, reinforces the idea that the justice they administer is that of the working people, the expression of the power of the working people in the socialist state . . . to edify and consolidate the new society of socialism and communism, to educate the new man, to secure and to perfect the rules of the socialist community.

\(^{85}\) These include the lay judges, the *Asetones* (who train the popular judges and also perform appellate functions within the court system), the Committees for the Defense of the Revolution (which are neighborhood organizations that function as intelligence gatherers for the judicial system and occasionally bring accusations in court), the police and the spectators. Berman, supra note 83, at 1334–43.

\(^{86}\) A woman claimed that her neighbor (a soldier) took more than his share of water from a common source; a wife claimed that her husband had struck her in the face; a husband knifed his wife; a wife claimed that her husband had publicly accused her of having affairs with other men; a family was charged with having altered the
ments on the selection and training of lower court judges are particularly revealing.

The Popular Tribunal judges are laymen. Aside from a three-week training course, their only legal experience is that which they gain while serving as Popular Tribunal judges.... Perhaps it is not unfair to say that it is deemed more important that the people know the judges than that the judges know the law. The judges do indeed come from the community; they are among the four or five thousand residents of the zona over which their Tribunal has jurisdiction. They are workers, employed in various, full-time jobs during the day, and they serve in the Popular Tribunals, which meet at night, without pay. Their working class background is genuine. In the Luyano section, in Havana, for example, the judges also do all the plumbing and cleaning in the courtrooms.... While Cuba cannot yet be termed a classless society, the Popular Tribunal judges of any given zona appear to be relatively indistinguishable from the acusados, from the audience, or from the people of that zona in general.87

There certainly seems to be evident, in the Cuban lower courts, a fundamental harmony of interests, which provides the basis for Griffiths' alternative to the Battle Model of criminal procedure.88 When Griffiths argues that the courts have important educational functions to perform in relation to the popular conception of social responsibility,89 clothing pages of their ration booklets; a retired baker was accused of having sold bread on the black market; a young man was alleged to be a peeping Tom. Berman, supra note 83, at 1323–24.

87 Berman, supra note 83, at 1335.
88 Berman, supra note 83, at 1318:
More practically speaking, the purpose of the Popular Tribunals is to encourage acceptance of the laws of a new society by making the courts, which enforce these new laws, not institutions of coercion, but familiar, popularly accepted institutions. If the people can identify with the courts, they can identify with the law they learn in those courts, and can learn to avoid voluntarily what these courts term "anti-social conduct."

89 Griffiths, supra note 57, at 389–90:
One particularly important substantive function with reference to which any institution can be designed is its educational impact upon those exposed to it. Children, defendants, and everyone else, learn both from the objective of a process they participate in and from the nature of the process. Robert Dreeben has recently written about the pedagogical effects of the structure of a schooling environment, as distinguished from the effects of the instructional content of the school curriculum (taken broadly to include such things as "citizenship" which are self-consciously "taught"). His thesis, with "defendant" substituted for "pupil" and "the criminal process" for "teachers" (this should really be by "schools"), is precisely what is central to the Family Model conception of the relation of process to substantive functions in criminal procedure.

90 Berman, supra note 83, at 1342–43: These ideas may be capsulized as popular involvement and popular education. Thus, audience participation is encouraged and the residents of each zona show up ... in overflow crowds. When asked why they come, their answer is often simply "to see the trials." These spectators generally pay close attention to the proceedings, reacting with "oohs" and "ahs" at appropriate intervals. One is at first tempted to conclude that the trials are seen by the people as merely entertainment, but it is perhaps more accurate to state that people come because they are interested, and overflow crowds can be observed even in zonas where the Popular Tribunal has been in operation for more than a year.

Whether the Cuban popular tribunals have scored such a smashing success with the people because of their serious educational function or simply because they provide a preferable source of entertainment on warm evenings in Havana does not particularly trouble Berman, yet it represents one of the few points of reservation in regard to the effectiveness of the Cuban lower courts he harbors. One might wonder if there is in fact a contradiction between instruction and amusement. Cf. BRECHT ON THEATRE: THE DEVELOPMENT OF AN AESTHETIC 72–73 (J. Willett ed. 1964). See also Ball, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater," 28 STAN. L. REV. 81 (1975).
91 Katz, supra note 35, at 90.
92 There is a growing literature on experimental models of community or neighborhood dispute resolution in the United States. See Katz, supra note 35; Danzig, Toward the Creation of a Complementary, Decentralized System of Criminal Justice, 26 STAN. L. REV. 1 (1973); Danzig & Lowy,
contrast not only the obvious discrepancies between the way Cuban and American misdemeanor courts function, but also the divergent social systems of the two countries. The Cubans have managed to supersede the Battle Model of criminal procedure—and the “absolute irreconcilability of interest between the state and the individual” that Griffiths considers its essential ideology—only to the extent that they have achieved popular control over state power through a widely-publicized, decade long effort to transform the social structure and social history of the island.

It is not acts of faith or a renewed spirit of public confidence, but rather a genuine sharing of social wealth and political power, which can alone secure the kind of democratization of governmental authority that would permit experiments in non-adversary judicial process without risking the transformation of the courts into naked organs of narrow political interests. Thus, when Francis Allen asserts that we have repeatedly witnessed the abuse of state power in this century and Griffiths responds that “we have also seen enough to render untenable any assumption of the inevitable malevolence of state power,” the reply seems inadequate. We may also be dissatisfied with Griffiths’ contention that “basic faith in public officials would revolutionize American criminal procedure.”

Though Karl Llewellyn makes the same criticism of the Battle Model as Griffiths, suggesting that “the basic policy-choice is that of distrust of officials,” he appears to remain, nevertheless, aware of the risks involved in substituting a parental model for a Battle Model of criminal procedure:

As contrasted with arm’s-length attitudes, the law, the procedure, the treatment, the attitudes, the emotions are parental. There is infinite patience in the tribunal, infinite long suffering. Typically, also, there is infinite ultimate inflexibility: it is the offender who will have to do all the ultimate yielding. The results, 95% of the time, make our results look weak, uncertain, costly. But when the parental system ever goes wrong, the results do raise the hair. Let officials turn the machinery to work out a personal grudge; or to enrich themselves corruptly; or to put down political dissent—and one begins to understand why our forefathers, through the centuries, found it worth blood to win through to measures which could partly control officials.

Therefore, given the present configuration of American social conflicts and interests, the reform disposition finds itself trapped between Scylla and Charybdis: faced on the one hand by a judicial system where the impartial administration of law may only mask the inequity of the laws, where constitutional protections are most available to those who can afford them and are, as Griffiths


Griffiths, supra note 57, at 380, 367, 368, 371, 373, 382 and 413.


Griffiths, supra note 57, at 381 n.81.

Id. at 380.

K. LLEWELLYN, JURISPRUDENCE, supra note 71, at 444.

88 Id. at 447–48 (emphasis added).

93 One ought to be troubled that the criminal-law-that-is, and the ideology which seems symbiotic with it, can readily be interpreted as serving mainly the class benefit of the comfortable middle classes.

If one were to analyze the criminal process itself, and the “benefits” it has to offer to those who are exposed to it, it seems to me possible that one might conclude that the Battle Model ideology rationalizes and justifies a system whose “balances of advantage” rules give considerable advantage to middle-class defendants, but offers precious little protection to the great bulk of those who are processed by it and whose offenses are perceived, realistically or not, as directly threatening the social position of the middle class.

Griffiths, supra note 57, at 415. See also note 1, supra.

Harold Laski makes the familiar point that the constitutional rights and liberties guaranteed by liberalism and the rule of law are precisely those which were neccessitated by the rise of the free market and that the availability of those rights rarely (and never systematically) transcends the interests of those who manage the free market economy: men of property.

H. LASKI, THE RISE OF LIBERALISM 8–9 (1936):

For what produced liberalism was the emergence of a new economic society at the end of the middle ages. As a doctrine, it was shaped by the needs of that new society; and, like all social philosophies, it could not transcend the medium in which it was born. . . . The individual whom liberalism has sought to protect is always, so to say, free to purchase his freedom in the society it made; but the number of those with the means of purchase at their disposal
convincingly argues, generally irrelevant "to the actual experiences of the sorts of people on whom the system ordinarily operates;" yet confronted on the other hand with the historically transparent dangers involved in any attempt to graft a non-adversary model of criminal procedure onto a society of inequality and division, indeed one with has always been a minority of mankind. The idea of liberalism, in short, is historically connected, in an inescapable way, with the ownership of property. The ends it serves are always the ends of men in this position. Outside that narrow circle, the individual for whose rights it has been zealous has always been an abstraction upon whom its benefits could not, in fact, be fully conferred. Because its purposes were shaped by owners of property, the margins between its claims and its performance have always been wide.

Griffiths, supra note 57, at 415-16:
The Battle Model's lack of concern for what follows conviction—its reliance on social exile—perhaps responds to an accurate perception of what is, for the middle classes, unimportant. The Due Process Model in particular—the Model, as Packer says, of the "schools," of liberal intellectuals and enlightened judges and lawyers—sometimes seem mostly a reflection of a vaguely left-wing concern about political prosecutions, rather than a response to the actual experiences of the sorts of people on whom the system ordinarily operates. Surely the Fourth and Fifth Amendments, and all of their refinements, are fairly marginal in the actual administration of criminal justice; what is not marginal is the way ordinary defendants are treated during the process, and what happens to them afterwards. It is this reality which is so grim, which affects mainly the poor, and which the ideology of the Battle Model serves conveniently to explain, to excuse, and to justify.


Anthropologist Stanley Diamond emphasizes the importance of adversarial procedures in the defense of the citizen as a person against the state. He asserts that the intricacies of procedure, while not guaranteeing justice under law, nevertheless constitute the individual's last line of defense. See Diamond, The Role of Law Versus the Order of Custom in The Social Organization of Law (D. Black & M. Milske eds. 1973) 318, 338-39:
The major focus of the defense of the citizen as a person can only be on procedure or, as we call it in our own society, due process. As every intelligent lawyer knows, the substance of the law can hardly be assimilated to morality. It is clear, therefore, why von Jhering (1866: Vol. 2471) insisted that "form is the sworn enemy of unlimited discretion (of the sovereign power) and the twin sister of freedom." The degrees of theft or homicide, the question of double jeopardy, habeas corpus, the right to counsel, the question of legitimate witness, trial by jury and the selection of jurors, protection against summary search and seizure, the very division between civil and criminal law—these intricacies of procedure are a recent experience of extraordinary irresponsibility in the highest echelons of state power.

In a society where the non-adversary model of criminal adjudication works, it may be the best of all possible systems of criminal process. In situations where an objective social basis for the identity of interest between the state and the individual is lacking, the non-Battle Model of criminal procedure may well result in the Crime Control Model par excellence.

Conclusion

This article first attempts to demonstrate the necessity of trying to understand the ebb and flow of lower criminal court reform sentiment in relation to historical periods of general concern regarding social stability. The point is not to match mechanically developments in legal thought and analysis with neatly organized historical periods. It is rather to ask whether the relationship between lower court visibility and perceived crises in the social order may not reveal something about the assumptions upon which the reform commitment is based and to suggest some of the internal weaknesses of the reformist critiques.

Next, an effort is made to focus specifically on the contrast between judicial theory and courtroom practice in the right to counsel area, in order to provide a sense of what the lower courts actually look like from a "ground-floor" level and to point out how such an analysis can provide different the primary, but far from absolute, assurance of whatever justice can be obtained under the rule of law. . . . Procedure is the individual's last line of defense in contemporary civilization, wherein all other associations to which he may belong have become subordinate to the state. The elaboration of procedure then, is a unique, if fragile, feature of more fully evolved states, in compensation, so to speak, for the radical isolation of the individual. [Italics added]

Although it cannot be denied that the parental ideology fits some systems known to history, these procedural systems can be found either in tribal cultures or in those modern societies that attempt to restrain antisocial conduct independently of state authority. While in the first case no state has yet developed, it is claimed in the second that the state is moribund, and new reactions to unacceptable behaviour are harbingers of the stateless future. But from the moment the state appears as a factor of any significance until such time as it actually withers away, the parental ideology may rightly be regarded with some circumspection, for it may provide a rationalization for the most brutal kinds of governmental oppression [Footnotes deleted].

Damaska, Structures of Authority and Comparative Criminal Procedure, 84 YALE LAW J. 480, 531 (1975).
kinds of information from the standard variety of legal analysis. New perspectives may be gained which will challenge previous reform assumptions or provide more concrete illustrations of why the lower criminal courts do not function effectively.

Finally, the article explores the theoretical reasons why it is insufficient to begin directly eliminating obstacles to lower court effectiveness once they have been accurately identified through the most methodologically vigorous analysis. It remains for the analyst or reformer to stand back and self-consciously examine the theoretical implications of his strategy for changing lower criminal court procedure. Without this kind of self-awareness, the reform effort may be expended in a futile attempt to substitute legal solutions for necessarily social ones, or conversely, to solve a legal problem while creating a political nightmare.