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CRIMINAL LAW

LOWER CRIMINAL COURTS: THE PERILS OF PROCEDURE*

JOHN L. BARKAI**

Impartial administration of the law cannot make inequitable laws fair.¹ Nevertheless, the general

* 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.

W. SEAGLE, *LAW: THE SCIENCE OF INEFFICIENCY* 14 (1952).

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 justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Douglas v. California*, 372 U.S. 353, 355 (1963). Thus by establishing an indigent's right to counsel on appeal, the Court presumably enhanced the impartial administration of justice.

consensus² of those who write task force reports or otherwise contribute to the legal literature on criminal justice,³ 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 as crimes acts which the poor are more likely to commit than are the rich . . . [T]he 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.

² See, e.g., Oliphant, *Reflections on the Lower Court System; The Development of a Unique Criminal 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

this country have failed to create even the illusion⁴ of fairness.⁵

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

NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMMISSION), REPORT ON CRIMINAL PROCEDURE 1 (1931). More recently, former Governor Reagan expressed his feelings on the subject. *Reagan Asserts Law Aids "The Criminal Defendant,"* N.Y. Times, May 27, 1976, at 24:

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."

⁴ 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 Eng.-lish 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.

⁵ "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,⁶ 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 move-

ments, 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 1969⁷, the specific purpose of which was to address the problems of America's lower criminal courts.⁸ In attendance were some of the foremost legal scholars who had previously investigated and reported on lower court reforms,⁹ as well as the younger generation of scholars who were just beginning to take up the cause.¹⁰ Francis Allen

valuation of that process in relation to popular wisdom or common sense notions which people have about their rights vis-à-vis the criminal justice system. Such perceptions may well reflect accurately the current state of "official" procedural rights. See, e.g., *A "Miranda Card" Read to Suspect*, N.Y. Times, Feb. 2, 1976, at 24: "Two 'Miranda cards' were found on Mr. Miranda's body after the slaying. The cards, on which defendants' rights are printed, have been carried by policemen since the Supreme Court ruling of 1966 that requires the authorities to inform suspects of their rights." Such perceptions may, however, only evidence survivals of popularly recognized but newly abolished rights. See Mesch, *Human Rights, Chile and International Organizations*, 24 DE PAUL L. REV. 999, 1008 (1975). They may express the potential rights of the criminally accused but only in their nascent form. Thus, when in 1961, Clarence Earl Gideon told the Florida Circuit Court that the United States Supreme Court said he was entitled to be represented by counsel, he was wrong. He was vindicated later by the Supreme Court partially because, in 1961, he believed he had a right which in fact had not as yet been recognized. Finally, such perceptions may represent either an integrated or disorganized ensemble of real and imagined rights. (Cf. Leo Gorcey's prolix explanation to the New York police of his rights to fair treatment which had been guaranteed by the "U.S. Extreme Court," in the 1946 motion picture, *BOWERY BOMBSHELL*).

These virtual "theories of fairness" are frequently mixed together throughout many of the lower criminal court studies cited in this article.

⁶ It is generally agreed that the chronic symptoms of the ills of the lower courts include, but are not limited to, the following: The staggering volume of misdemeanor cases, the absence of dignity and decorum in these courtrooms, the lack of competence and integrity in court personnel which is often accentuated by their insufficient number, the pervasive failure to treat seriously these courts and the people who appear in them, and the infrequent use of defense counsel. For a more expansive discussion of the author's perception of lower court problems, see generally Barkai, *Accuracy Inquiries For All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 101-11 (1977).

⁷ MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL (C. Whitebread ed. 1970).

⁸ Paulsen, *Foreword*, in C. Whitebread, *supra* note 7, at vii: "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 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 conference¹¹ by citing an article written almost twenty years earlier by Samuel Dash,¹² 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.¹³

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 courts¹⁴ 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.¹⁵ At least three waves of

interest are discernible. The first, Roscoe Pound's confrontation with the issues of urban criminal justice,¹⁶ corresponded roughly to the period of political reform known as the Progressive Era.¹⁷ 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.¹⁸ 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.¹⁹

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.

¹⁶ See R. POUND & F. FRANKFURTER, *CRIMINAL JUSTICE IN CLEVELAND: REPORT OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO* (1922).

¹⁷ 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 also R. HOFSTADTER, *THE PROGRESSIVE MOVEMENT 1900-1915* (1963), and *THE AGE OF REFORM* (1955); G. KOLKO, *THE TRIUMPH OF CONSERVATISM, A REINTERPRETATION OF AMERICAN HISTORY 1900-1916* (1963); R. WIEBE, *BUSINESSMEN AND REFORM, A STUDY OF THE PROGRESSIVE MOVEMENT* (1962).

¹⁸ See generally P. CONKIN, *THE NEW DEAL* (1967); M. ROTHBARD, *AMERICA'S GREAT DEPRESSION* (1963); A. SCHLESINGER JR., *THE AGE OF ROOSEVELT*, Vol. 1, *THE CRISIS OF THE OLD ORDER 1919-1933* (1957); G. SELDES, *THE YEARS OF THE LOCUST* (1933); W. WILLIAMS, *THE CONTOURS OF AMERICAN HISTORY* 343-88 (1961).

¹⁹ 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*

¹¹ Allen, *Small Crimes and Large Problems: Some Constitutional Dimensions*, in C. Whitebread, *supra* note 7, at 74.

¹² Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951).

¹³ Allen, *supra* note 11, at 74-75.

¹⁴ See e.g., J. ROBERTSON, *ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS* (1974); Pound, *The Administration of Criminal Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

¹⁵ This assumption is based upon a survey of legal articles and widely publicized commission reports and analyses with at least some visibility within the legal community. Little or no effort has been made, for example, to locate chronologically newspaper or general

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.²⁰ 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 wavering 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.²¹

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-

possible not to quote in a book such as this: "A petty tyrant in a police court, refusals of a fair hearing in minor civil courts, the impatient disregard of an immigrant's ignorance of our ways and language, will daily breed bolshevists who are beyond the reach of your appeals. Here is work for lawyers. The Supreme Court of the United States and the court of appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and the ignorant; in indifference to their misery and helplessness lies disaster".²²

What is most interesting about these views is the extent to which they are wrong.²³ 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"²⁴ 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.²⁵

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

²² J. ROBERTSON, *supra* note 14, at vii-viii.

²³ In fairness to Justice Hughes, it should be pointed out that he was not alone in his misgivings about the durability of American institutions when confronted with the potential growth of pernicious foreign ideologies, especially if the ideologies were adopted by people from the lower reaches of society. See M. GREEN, *THE NATIONAL CIVIC FEDERATION AND THE AMERICAN LABOR MOVEMENT 1900-1925*, at 185 (1956). See J. WEINSTEIN, *supra* note 17.

²⁴ See text at note 16 *supra*.

²⁵ Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1403 (1971):

Various forces seem to have contributed to the lack of cohesion among working people in the United States. One important factor was the network of language, racial, and religious barriers thrown up by repeated waves of immigration. These differences often led to factions within the ranks of labor so that locals and even national unions were frequently dominated by particular ethnic groups.

See also M. KARSON, *AMERICAN LABOR UNIONS AND POLITICS 1900-1918* (1958).

YEARS, 1945-1974 (1974); H. MORGENTHAU, *TRUTH AND POWER: ESSAYS OF A DECADE, 1960-70* (1970); W. O'NEIL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S* (1971); K. SALE, *SDS* (1973).

²⁰ See J. ROBERTSON, *supra* note 14, at vii:

No formal legal institution, except the police, has as much direct contact with people as the lower courts. For millions of people these courts embody the law and judicial process. For most people the words "judge," "trial," and "court" have no experiential referent other than their encounters with the municipal, misdemeanor, traffic, and magistrate's courts of their community.

See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 29 (1967); L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT*, NATIONAL REPORT 123-24 (1965).

²¹ Allen, *supra* note 11, at 96.

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"²⁶ 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

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 and police courts. Many law students do not appear to like them very much either. See Slovenko, *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 Duperré in P. WEISS, *MARAT/SADE* 77 (1969):

Duperré: ... 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
Duperré: Released prisoners
escaped lunatics
[tumult 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.

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 less 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.

E. HOBSBAWM, *BANDITS* 84-85 (1969).

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-

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.²⁸ 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 courts²⁹ 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.³⁰

For example, Arnold Enker, while addressing

²⁸ The revolution is frequently said 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).

³⁰ "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).

wark, Shoreditch and Spitalfields rather than St. Giles-in-the-Fields or the shadier alleys of Holborn. G. RUDE, *WILKES AND LIBERTY* 15 (1962).

Hobsbawm and Rude are discussing the relationship between criminals and radical social movements in Europe and Britain yet there is no reason to believe the American pattern diverges from their analysis. The analogy is troubled by the fact, pointed out by Lawrence Friedman, that "Historians, legal and nonlegal, have paid surprisingly little heed to the history of criminal law and criminal justice" in this country. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 600 (1973).

²⁸ EDITORS OF THE CRIMINAL LAW REPORTER, *THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH*: 1960-1974, (1975) (dust jacket):

The revolution may be said to have begun with the 1960-61 term decision in *Mapp v. Ohio* (banning illegally obtained evidence from state prosecutions) and to have ended with the 1968-69 term decision in *Benton v. Maryland* (applying the Double Jeopardy Clause to the states). During these nine terms the Warren Court, using the Fourteenth Amendment as a lever, made binding upon the states nearly all of the guarantees of the Fourth, Fifth, and Sixth Amendments.

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."³¹ Presumably, the issue was resolved three years later when the Supreme Court ruled in *Argersinger v. Hamlin*³² that the sixth amendment right to counsel should be extended to criminal defendants who risk being sentenced to jail in the misdemeanor courts.³³ 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.³⁴ Neverthe-

less, relatively few writers³⁵ have shown any interest in approaching the problem of the uncounseled accused from 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.³⁶ 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.

L. SILVERSTEIN, *supra* note 20, at 93:

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.

Id. at 126; "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*].

³⁵ Some exceptions are: S. KRANTZ, *RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* (1976); Ingraham, *The Impact of Argersinger—One Year Later*, 8 LAW & SOC. REV. 615 (1974); Katz, *Municipal Courts—Another Urban Ill.*, 20 CASE WESTERN L. REV. 87 (1968); Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 LAW & SOC. REV. 473 (1971); Comment, *The Effect of Argersinger v. Hamlin on the Municipal Court of Toledo, Ohio*, 4 U. TOL. L. REV. 577 (1973).

³⁶ 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."

³¹ Enker, *Lower Courts*, in C. Whitebread, *supra* note 7, at 194. See also L. SILVERSTEIN, *supra* note 20, at 89; "As Justice Walter V. Schaefer of Illinois has said, 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'" ³² 407 U.S. 25 (1972).

³³ "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37.

³⁴ Cf. W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 199 (1955):

It seems fair to conclude that at least as many claims of denial of counsel are never appealed to higher courts as are, and that an even greater number of potential claims are never pressed in any court. The same indigence which resulted in the initial loss of the right to counsel continues to act as a restraint on possible corrective action.

M. SCHWARTZ, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE* 89 (1961):

To state that a defendant has a right to be represented by counsel may be misleading if the word "right" is given a Hohfeldian significance—implying a duty on some persons or institution to furnish counsel in all cases in which the defendant has the "right" to be represented by counsel. And even in those cases where there is such a duty, there remains the question: on whom does the responsibility to perform the duty rest?

Beaney, *The Right to Counsel in THE RIGHTS OF THE ACCUSED* 147 (S. Nagel ed. 1972):

In an adversary system, the right of all persons faced with loss of liberty to have the assistance of counsel seems obvious. Yet, as shown below, the right to counsel, especially for indigents, is of relatively recent origin, its expansion to various stages of the criminal justice system has been slow and erratic and the actual effectiveness of the right in practice difficult to measure.

Note, *Dollars and Sense of An Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1250 (1970):

Deprived of the assistance of counsel, the accused may be totally unaware of the procedural safeguards

theoretical development of the right is well documented in the appellate reports,³⁷ 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.³⁸

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.³⁹ Yet, neither right exists if

the defendant is unaware of it.⁴⁰ Thus a central focus of any history of the right to counsel would, of necessity, involve analysis of the ways in which criminal defendants know or are informed of their right to be represented by an attorney. A careful consideration of this process would also seem to be the appropriate starting point for any serious attempt to determine whether there is in fact a right to counsel in the lower courts, or in the criminal justice system generally. It is somewhat disconcerting to imagine a theoretical analysis which documents the subtle evolution of a constitutional right through careful textual interpretation of Supreme Court decisions, yet which nevertheless manifests little interest in, or recognition of, a ground-floor⁴¹

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

³⁷ See *U.S. v. Mandujano*, 425 U.S. 504 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Mempa v. Rhay*, 389 U.S. 128 (1968); *Gilbert v. California*, 388 U.S. 263 (1967); *U.S. v. Wade*, 388 U.S. 218 (1967); *In Re Gault*, 387 U.S. 1 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Betts v. Brady*, 316 U.S. 455 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932).

³⁸ See W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 199 (1955). "Obviously, with present incomplete data, no one can trace with precision the defects and accomplishments of American trial courts as they attempt to conform with the legal rules concerning counsel announced by the highest Court." *Id.* See also L. SILVERSTEIN, *supra* note 20, at 91: "Of the 194 counties in which docket studies were made, 42 had to be excluded at the outset because the records were not sufficient to indicate whether the defendant had counsel or not." See also *Powell v. Alabama*, 287 U.S. 45, 52 (1932): "The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed . . ." (italics added); *Katz*, *supra* note 35, at 117:

As a matter of course, no record is kept of the proceedings in the municipal courts. As a result, very few cases are appealed—certainly not those involving unrepresented defendants—and thus there is little likelihood of landmark appellate decisions affecting these courts, bringing the publicity that is always attendant upon such decisions.

³⁹ The distinction (though not its significance) is made clear in the NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMMISSION) REPORT ON PROSECUTION 30 (1931):

In America counsel was allowed from an early date and State and Federal Constitutions guarantee to accused in all prosecutions "the assistance of counsel for his defense," in this or some equivalent language. It will be seen from this bit of history that, as indeed the courts have held, the right guaranteed is one of

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 treatises 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 (1961).

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.

system, both of which determine his perception of what his rights are and what rights he should use. But this is presently impossible. As important as the defendant's attitude towards constitutional rights prior to his entering the courtroom may be to how he responds to the "information" received in court, the subject seems to have secured little or no attention.

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. Judicial⁴³ and professional⁴⁴ 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:

[I]n 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

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.

Von Moltke v. Gilles, 332 U.S. 708, 724 (1948). See also United States v. Plattner, 330 F.2d 271, 276 (1964).

⁴⁴ See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 11–12 (1967). ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE 84–85 (1966).

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.⁴⁶ Or, in a court where the judge's introductory remarks are expected to serve as a mass notification⁴⁷ of the various rights available to defendants with cases scheduled that day,⁴⁸ 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

is arraigned shortly after arrest, or (4) due process protections are defeated by the confusion and disorder of lower court operation or by the indifference of court personnel.⁴⁹

⁴⁹ 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.

R. BRANDON & C. DAVIES, *WRONGFUL IMPRISONMENT* 231 (1973).

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.

Duke, *The Right to Appointed Counsel: Argersinger and Beyond* 12 AMER. CRIM. L. REV. 601, 621 (1975).

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 read 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-

⁴⁶ See Mileski, *supra* note 35, at 484: "In a quarter (26%) of the lower court cases, the judge does not apprise the defendant of his constitutional rights at all." Though Mileski's observation of the lower criminal courts preceded the *Argersinger* decision, an Ohio municipal court monitoring project conducted by Krantz, *supra* note 35, at 410-11 subsequent to *Argersinger* revealed even more startling results:

Ohio Rules of Criminal Procedure require that any waiver of the right to counsel must be recorded, along with the court's advice on the defendant's right to have counsel represent him. Often there is no advice of the court to be recorded. The director of the Cleveland Legal Aid Society says that there are very few good waivers in the Municipal Court. He estimates that probably one-third of the municipal court judges make a serious effort to inform defendants of their rights, one-third make half-hearted efforts, and another third tell the defendant absolutely nothing about right to counsel.

⁴⁷ Mass notification has been approved for testing the voluntariness of misdemeanor guilty pleas. See In re Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); Mills v. Municipal Court, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973); City of Cleveland v. Whipkey, 29 Ohio App. 2d 79, 278 N.E.2d 374 (1972); Crew v. Nelson, 216 N.W.2d 565 (S.D. 1974).

⁴⁸ If a defendant happens to be talking to his neighbor, if he is for some other reason inattentive, or if he arrives in court later than the scheduled ten o'clock, he is not formally informed of his rights unless the judge later informs him in a face-to-face encounter as he sometimes does. Inattention or tardiness, then, may carry with it whatever are the consequences of ignorance of constitutional rights.

Mileski, *supra* note 35, at 482. See also S. KRANTZ, *supra* note 35, at 112, where he states:

Mass notice of a right to counsel cannot be effective for several reasons. First, a defendant may not even be present, if the notice is read—as was the case in the Belle Glade Municipal Court and the Birmingham Recorder's Court—at the start of the session by the judge or a court clerk.

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.⁵⁰ 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.⁵¹

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:

[I]t is work and time for the court to apprise individual defendants of their rights. If there are to be appraisings at all, it is most expedient, from a bureaucratic point of view, to apprise as many defendants as quickly as possible in a situation where questions are not likely to be asked. Moreover, if a defendant understands and asserts his rights, it can be to the detriment of court efficiency.⁵²

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.

⁵⁰ "[M]ass warnings do little to dispel the possibilities for intimidation inherent in a busy nonfelony court. . . . Even the state courts that have condoned 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."

⁵¹ 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. 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.

Id. at 111.

"[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." 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.

⁵² 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,⁵³ 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."⁵⁴

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

courts presently function, and therefore of how to make them work justly and fairly, without a clearer focus being given to the actual everyday operation of the lower criminal court system.

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,⁵⁵ 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 process⁵⁶ 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.⁵⁷ Other

⁵³ 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 . . .

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. . . . 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.

⁵⁴ L. SILVERSTEIN, *supra* note 20, at 102.

⁵⁵ Cf. Alschuller, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC. REV. 15 (1967); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52 (1967).

⁵⁶ Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) and H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

⁵⁷ 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.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.

⁵⁸ G. COLE, *supra* note 51, at 55:

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.

Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. REV. 1, 9 (1964):

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

"If the Crime Control Model resembles an assembly line," Packer suggests, "the Due Process Model looks very much like an obstacle course."⁵⁹

It is not surprising, therefore, that many of those who have argued that the lower criminal courts offer no more than "assembly line" justice, have posed an alternative which places the procedural balance dramatically closer to the Due Process pole of Packer's spectrum.⁶⁰ Again, this is the focus of

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.

⁵⁹ Packer, *supra* note 56, at 13.

⁶⁰ See Oliphant, *supra* note 2, at 547-48:

Argersinger 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.⁶¹

However, in an important critique of the analytical framework which Packer employs, John Griffiths argues⁶² 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."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 Model seeks, in effect, tournament regulations which make it as difficult as possible for the state to put a suspected criminal in jail.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,⁶⁵ nor is he concerned with any interest of the accused beyond that defined by the process—to win his case, to avoid exile.⁶⁶ Also, defense counsel is certainly not concerned with the accused as a *person*,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 unself-conscious, articulation of the ideology which is responsible for the characteristic limitations of most contemporary thinking about the criminal process."⁶⁸ The primary value of Griffiths' inquiry into the scope of Packer's spectrum thus becomes one of demystification,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 Llewellyn⁷⁰ and that it inevitably suffers from similar weaknesses. Griffiths contrasts Packer's Battle Model with his own "Family Model,"⁷¹ and Llewellyn opposed the

form provided by the Supreme Court in *Argersinger*, little hope would remain that confidence in the lower court system could ever be restored. There would be even dimmer hope that the badly needed, massive overhaul of the lower court system would ever be effectively accomplished.

See also S. KRANTZ, *supra* note 35, at 4:

To millions of people, most of them poor, nonfelony courts appear to—and often do—dispense justice in an assembly-line basis, with little regard for the basic rights of individual. . . . Although the mere addition of appointed lawyers for eligible defendants will not alone reverse a century of neglect, the opinion has nonetheless been heralded by many as a significant advance in ensuring greater fairness for the poor. It is with this background in mind that *Argersinger* must be examined.

See also Bazelon, *Forward* to S. KRANTZ, *id.*, at xxvii.

⁶¹ *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972): There is evidence of the prejudice which results to misdemeanor defendants from this "assembly-line justice." One study concluded that "[m]isdemeanants represented by attorneys are five times as likely to emerge from police courts with all the charges dismissed as are defendants who face similar charges without counsel." . . . We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial.

⁶² Griffiths, *supra* note 57.

⁶³ *Id.* at 367.

⁶⁴ *Id.* at 363.

⁶⁵ 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).

⁶⁶ Griffiths, *supra* note 57, at 383.

⁶⁷ *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."

⁶⁸ *Id.* at 410.

⁶⁹ 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."

⁷⁰ Griffiths, *supra* note 57, at 372.

⁷¹ See K. LLEWELLYN, *The Anthropology of Criminal Guilt*, in *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 439 (1962). The commonality of the non-adversarial

"arm's-length" model with what he calls a "parental" model, but the distinction being made is the same.⁷² 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 . . ."⁷³ Llewellyn extrapolates his parental model from the practice of the Cheyenne and New Mexican Pueblos⁷⁴ 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."⁷⁵

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."⁷⁶ 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.⁷⁷ 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.⁷⁸

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,"⁷⁹ and "this feeling of We-ness, of love, acceptability, acceptance, and welcome . . ."⁸⁰ to the "objective life of the particular society."⁸¹ What is needed is a clear demonstration of the relationship between those structures of feeling appropriate to non-warlike systems of criminal adjudication⁸² and the

any other idea or institution as a heuristic instead of the most contentious one of all.

⁷⁷ American historian Christopher Lasch argues that the family is the most important agency of socialization since it not only teaches the child his first lessons in the character of formal social rules but also instills habitual modes of thought and feeling which will later form the individual's unconscious predisposition to act in certain ways in relation to all authority. It is this dual role which effectively implicates the family in the reproduction of social and legal codes of behavior. See Lasch, *The Family and History*, THE NEW YORK REVIEW 13 November 33 (1975).

⁷⁸ 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.

⁷⁹ Griffiths, *supra* note 57, at 371.

⁸⁰ K. LLEWELLYN, *supra* note 71, at 448.

⁸¹ See L. GOLDMANN, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 15 (1973): "We have long since learned from the social history of ideas that *every* mode of human thought and feeling is determined by mental structures which are closely related to the objective life of the particular society in which they develop."

⁸² An excellent description of the sort of shared belief system essential to the operation of a non-adversarial criminal procedure, which manages to maintain its legitimacy even when an accused felon is being tried, is provided by K. LLEWELLYN & K. HOBEL, in *THE CHEYENNE WAY* 132-33 (1941):

forms of procedure described by Griffiths and Llewellyn has been previously noted in Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973), and Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L. J. 480 (1975).

⁷² K. LLEWELLYN, *supra* note 71, at 447.

⁷³ Griffiths, *supra* note 57, at 372.

⁷⁴ K. LLEWELLYN, *supra* note 71, at 447 and K. LLEWELLYN, *THE CHEYENNE WAY* (1941).

⁷⁵ K. LLEWELLYN, *supra* note 71, at 448.

⁷⁶ Cowan, *Law Without Force*, 59 CALIF. L. REV. 683, 693 n.14 (1971):

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 Cuba⁸³ 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 bloodied 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.

⁸³ Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969).

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, ROSCOE 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.

F CASTRO, *HISTORY WILL ABSOLVE ME* (1967), *quoted in* Berman, *supra* note 83, at 1317.

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.

Berman, *supra* note 83, at 1318. Other useful accounts of how the Cuban legal system works are: H. BLUMSTEIN, *et al.*, *AREA HANDBOOK FOR CUBA*, DA PAM 417–30, 550–52 (1971); C. MESA-LAGO, *CUBA IN THE 1970'S: PRAGMATISM AND INSTITUTIONALIZATION* 68–73 (1974); J. YGLESIAS, *IN THE FIST OF THE REVOLUTION: LIFE IN A CUBAN COUNTRY TOWN* (1968). *See also* the most important legal article since Berman's analysis, Kennedy, *Cuba's Ley Contra La Vagancia—The Law on Loafing*, 20 UCLA L. REV. 1177 (1973).

It is worthwhile to compare Cuba's popular tribunals with the neighborhood courts experiment in Chile prior to the overthrow of the Allende government. Jose Antonio Viera-Gallo, then Subsecretary of the Chilean Ministry of Justice, stated in a speech in 1972 that:

The state must guarantee to the people not only access to justice, but also participation in the exercises of judicial power. Learning from experiences of many countries, we want the people to participate in numerous ways in the administration of justice. Perhaps we differ as to the form of this participation, but we start from a common assumption—the self-discipline of the people in matters of justice. Several months ago we introduced a bill in the congress through which these ideals would be made concrete by the creation of neighborhood courts (*Tribunales vecinales*). Numerous jurists and magistrates, with diverse political ideologies, participated in its drafting. The bill was based partially on the phenomenon of popular justice or informal conflict resolution, which has been growing spontaneously and totally unregulated throughout Chile and which resolves problems of incandescent interest to the people. Popular justice is now common in land reform settlements, rural cooperatives, neighborhood councils, and other community groups. The Government does not want to remain indifferent to the demand of the people, and hence, the bill creating *tribunales vecinales* collected together and consolidated all these experiences.

Viera-Gallo, *The Legal System and Socialism*, 1972 WIS. L. REV. 754, 765. *See also* Mesch, *supra* note 5; Platt, *The Clinical Legal Assistance Program: A Chilean Experience in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY AND THE INTERNATIONAL LEGAL CENTER, SELECTED READINGS IN CLINICAL EDUCATION* (1973).

⁸⁵ These include the lay judges, the *Asesores* (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-con-

he echoes one of the central propositions of the Cuban theory: that the judicial process itself is a form of political culture.⁹⁰

The contrast between Berman's description of Cuba's popular tribunals in action and the reality of American municipal court justice could not be more striking. Lewis Katz reports that:

Apparent during almost every visit to an urban court was the fact that most of the defendants are poor and black The black defendant faces an almost exclusively white establishment seemingly unconcerned with his problems. This attitude represents the inability of successful persons to understand the least successful members of the community and the problems which have brought them before these courts.⁹¹

However, if we are interested in evaluating the "workability" of non-warlike models of criminal procedure in American courts,⁹² we would need to

sciously "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 ideology⁹³—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.⁹⁴

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,”⁹⁵ the reply seems inadequate. We may also be dissatisfied with Griffiths’ contention that “basic faith in public officials would revolutionize American criminal procedure.”⁹⁶

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,”⁹⁷ 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.⁹⁸

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,⁹⁹ where constitutional protections are most available to those who can afford them¹⁰⁰ and are, as Griffiths

⁹⁸ *Id.* at 447–48 (emphasis added).

⁹⁹ 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*.

¹⁰⁰ 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 necessitated 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

Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner, 9 LAW & SOC. REV. 675 (1975); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC. REV. 63 (1974); Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC. REV. 695 (1975); Statsky, *Community Courts: Decentralizing Juvenile Jurisprudence*, 3 CAPITAL U. L. REV. 1 (1974); Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974).

⁹³ Griffiths, *supra* note 57, at 380, 367, 368, 371, 373, 382 and 413.

⁹⁴ See R. BONACHEA & N. VALDES, *CUBA IN REVOLUTION* (1972); R. DUMONT, *CUBA: SOCIALISM AND DEVELOPMENT* (1970); M. HALPERIN, *THE RISE AND DECLINE OF FIDEL CASTRO* (1972); K. KAROL, *GUERRILLAS IN POWER* (1970); *THE NEW CUBA: PARADOXES AND POTENTIALS* (R. Radash ed. 1976); H. MATHEWS, *REVOLUTION IN CUBA: AN ESSAY IN UNDERSTANDING* (1975); *REVOLUTIONARY CHANGE IN CUBA* (C. Mesa-Lago ed. 1971); A. RITTER, *THE ECONOMIC DEVELOPMENT OF REVOLUTIONARY CUBA: STRATEGY AND PERFORMANCE* (1974).

⁹⁵ Griffiths, *supra* note 57, at 381 n.81.

⁹⁶ *Id.* at 380.

⁹⁷ K. LLEWELLYN, *JURISPRUDENCE*, *supra* note 71, at 444.

convincingly argues, generally irrelevant "to the actual experiences of the sorts of people on whom the system ordinarily operates;"¹⁰¹ 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,¹⁰² 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.

¹⁰¹ 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.

See also Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. REV. 1062, 1078.

¹⁰² 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 Rule of Custom in THE SOCIAL ORGANIZATION OF LAW* (D. Black & M. Mileski 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*.¹⁰³

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]

¹⁰³ 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 L.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.