CRIMINAL COURTS REVISITED

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Lisa J. McIntyre. *The Public Defender: The Practice of Law in the Shadows of Repute*. (Chicago: University of Chicago Press, Studies in Crime and Justice, 1987). xiv + 199 pp. Notes, illustrations, tables, bibliography, index. $24.95.

Peter F. Nardulli, James Eisenstein, and Roy B. Flemming. *The Tenor of Justice: Criminal Courts and the Guilty Plea Process*. (Urbana: University of Illinois Press, 1988). 469 pp. Tables, notes, bibliography, appendix, index. $39.95.

Scholarly work on many aspects of criminal justice abounds. Nevertheless, after an explosion of interesting and insightful work in the 1970s on criminal courts as social institutions (see, e.g., Carter, 1974; Eisenstein and Jacob, 1977; Heumann, 1978; and Mather, 1979, following Blumberg, 1967), such work ground to a halt. One can cite a variety of reasons. The transformation of the National Institute of Justice, under the Reagan administration, from an agency funding some theoretical social science work to one exclusively funding applied research aimed at reducing crime discouraged new efforts to build on the rich scholarship of the 1970s. And emerging interest during the 1980s in civil justice processes diverted attention away from the criminal courts.[1] Thus the publication of two substantial books that examine criminal justice processes and key actors within the law and society tradition is, for this reviewer, a welcome event.

The Tenor of Justice and *The Public Defender* are about as different—in the uses of theory, method, and analysis—as two books on a similar subject can be. Peter Nardulli, James Eisenstein, and Roy Flemming have produced an empirical study of the guilty plea process in several middle-sized American communities; Lisa McIntyre has developed a case study of the organization of public defenders in one large court. Nardulli *et al.* rely primarily upon quantitative analyses to establish their most important themes; McIntyre relies primarily on qualitative methods such as interviews and observation. McIntyre's analysis is driven by theory, particularly about organizations and professions; Nardulli *et al.*'s analysis looks inward at the vast data base collected. These differ-

[1] See, for example, Jacob's presidential address to the Law and Society Association (1983: 408–09), which advocates a shift in scholarly attention from the criminal courts to civil courts and justice.

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ences offer a unique opportunity to assess the relative value of alternative approaches.

Nardulli and his colleagues focus on the guilty plea process in nine middle-sized counties, three each in Illinois, Michigan, and Pennsylvania. To their credit, the view is an expansive rather than narrow one. They take into account all the key actors—judge, prosecutor, defense attorney—not only as individuals but also in terms of their professional and personal interconnections. Indeed, exploration of the so-called "courthouse infrastructure" is their most significant conceptual contribution. They also provide detailed consideration of court technologies (scheduling, calendaring, etc.) and the external environment of criminal courts (police, media, politicians, etc.). The result is a comprehensive look at the forces shaping guilty pleas and, oftentimes, trial outcomes.

The Tenor of Justice addresses many questions and issues, indeed too many to digest in this review. The most often recurring and best-analyzed issue concerns whether guilty pleas are the product, primarily, of *concessions* (bargaining) or *consensus* (shared norms) among key courtroom actors. The authors correctly ascribe the concessions perspective to the earlier but still prominent work of legal scholars such as Albert Alschuler (1968), while observing the contribution of social scientists such as Malcolm Feeley (1979), among others, to the consensus perspective. The empirical results provide strong support for the predominance of a consensus model: reductions to the most serious charge are infrequent (5% to 21% in eight of nine counties); the dropping of secondary charges in multiple-charge cases typically had no sentencing consequences; and most sentences (80% or more in six of nine counties) fall into one of three clusters (probation, low and high jail time). In sum, the authors discover few indicators of give-and-take *bargaining*. Instead, they find a high degree of consistency in case outcomes, belying critics' charges of idiosyncratic justice. Likewise, they find few significant predictors, from among such extralegal variables as race and gender, of sentences outside the clusters, belying other critics' charges of biased justice.

Their analysis of differences between sites is more problematic. Nine study sites are too many. Resultant comparisons are unwieldy for the authors to make and difficult for readers to remember. (This problem is exacerbated by the obscurity and lack of political lore of such sites as Saginaw, St. Clair, and Dauphin Counties.) Though innumerable cross-site differences are identified, the only significant pattern that seems to stand out relates to state, as opposed to local, legal culture. State-based differences in calendaring systems, penitentiary space, and severity of criminal codes affect the guilty plea process and the severity of sentences. Thus the selection of different states was a good idea. By contrast, the selection of three middle-sized counties within each state based upon whether they were ring (suburban), autonomous, or declin-

ing was unconvincingly argued and proved fruitless in later analyses. Selection either by community size or other more directly theoretical criteria would have enhanced the value of the findings.

Nardulli *et al.* conclude their book by characterizing the tenor of justice in these nine communities as "bureaucratic," by which they mean "adherence to routine . . . structured by pragmatic people of limited imagination and experience dealing with large numbers of fairly routine cases in the context of limited resources and options" (p. 378). The label "bureaucratic" seems troublesome and potentially misleading. Inferred from findings of consistency in case outcomes ("pigeonhole sentencing"), it seemingly ignores the qualitative character of plea conversations that occur in or near the courthouse. These conversations, other researchers have found, contain detailed information—"mini-trials" (Neubauer, 1974), tell distinctive stories (Maynard, 1984), consume significant amounts of time (Ryan *et al.*, 1980), and, more generally, intensify the adversary nature of the criminal process (Feeley, 1982), thereby providing a form of individualized justice outside of trials. Bureaucratic justice connotes, in Blumberg's use of the term, factory-like inattention to individual cases, something which Nardulli *et al.* probably do not mean and which is not supported by others' (or their own) data.

More generally, *The Tenor of Justice* does not sufficiently utilize the insights of previous research or grapple with the empirical findings of more contemporary criminal justice research (e.g., Bureau of Justice Statistics, 1984; Smith, 1986). Several chapters prefatory to data analysis draw upon parts of the plea-bargaining literature effectively. But when findings are reported in subsequent chapters, the authors offer few if any linkages to that literature. The result is an unnecessarily insular view of a vast, and rich, data base.

Not all subtitles are illuminating of a book's actual contents. But "The Practice of Law in the Shadows of Repute" nicely captures what *The Public Defender* is all about. It is first about lawyering and secondarily about cases and their outcomes. Grounded in Cook County (Chicago), this is a case study that looks outward.

Casper (1972) was among the first to document that public defenders get no respect, a conclusion symbolized by the oft-repeated attorney-client exchange "Did you have a lawyer when you went to court the next day? No, I had a public defender" (ibid.: 101). McIntyre argues persuasively that public defender organizations choose *not* to solicit respect from the courthouse community and, especially, the public at large. She cites numerous instances where the Cook County Public Defender's Office avoided the limelight or even opportunities for publicity, in the belief that its prevailing "stigma of ineptitude" served the office well. This laissez-faire approach was designed to ensure the survival of the organization at a resource level sufficient to facilitate day-to-day defense of indigent

defendants. *Real* successes of a public defender's office—acquittals, bargains to reduced charges or time—cannot be publicized, she argues, for they run contrary to what the public and some courthouse regulars expect of the office (polite, speedy, uncontroversial defenses that lose).

What are the consequences of this type of organizational milieu for the typical public defender? McIntyre devotes the bulk of her book to this question. For one expected consequence—job burnout and rapid turnover—she finds no empirical support. Utilizing data from Cook County and throughout Illinois, she shows that the five-year job-survival curve drops off less sharply for public defenders than for most other types of lawyers—for example, government lawyers, solo practitioners, or lawyers in firms of varying size (50% of public defenders are still on the job after five years compared with, for example, 30% of lawyers in large firms). One less obvious consequence flowing from this milieu is what she calls the "antistructure" of the public defender's office and the resultant discretion granted to individual attorneys, even newcomers, in the conduct of investigations, trial strategies, and negotiation of case outcomes. This discretion, McIntyre argues, may be essential to that high survival rate, for it provides public defenders with an affirmation of their professionalism in the absence of salary or prestige parity with peers in the Cook County prosecutor's office.

McIntyre's portrayal of public defenders is both empathetic and sympathetic. It is empathetic because she has done an excellent job of conveying to the reader how these criminal defense lawyers view their job and the world around them. Her interpretations are also sympathetic (e.g., lawyer as victim) and stand in some contrast to Nardulli *et al.*, who characterize experienced public defenders in several of their research sites as lethargic in client advocacy and more interested in building private civil practices (not permitted in Cook County, where the job is full time). This difference of perspective points up limitations of the case study approach. The organization of the indigent-defense bar, as Nardulli *et al.* demonstrate, differs considerably across even similar-sized locales. Second, intimate contact with research subjects sometimes diminishes critical analysis. McIntyre's view of public defenders cannot be labeled apologetic, but it is probably more sympathetic than available data warrant.

The publication of these two books may signal a resurgence of scholarly interest in the criminal courts. But what paths might future research most profitably travel? Framed more directly, do we need more new data on the criminal courts or new theories about them? If *The Tenor of Justice* reveals how large data bases can sometimes get in the way of creative theoretical development, *The Public Defender* illustrates how midlevel theory can be developed too definitively from limited data. On a theoretical level, the

courtroom work-group metaphor and its kin (courthouse community, infrastructure, etc.)—important and accurate as they are—may have taken us as far as they can. Shifting ground from organizational theory to the professions[2] may be a useful departure. Methodologically, a middle ground somewhere between the extremes of a nine-site, all-purpose study and a one-site, limited-purpose study may be most illuminating. Whether we can benefit proportionately more from longitudinal research, as Jacob (1983) advocated, has neither been established nor, apparently, yet tested.

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[2] For perspectives on the profession of "lawyering," see, e.g., Nelson (1985) on large law firms; also, Sarat and Felstiner (1986) for divorce cases.

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