

FROM THE EDITOR

The articles contained in this issue were not selected for their thematic affinities but simply because they seemed to be the most interesting and best executed among the many excellent manuscripts submitted. It is remarkable, therefore, that all five articles concerned with contemporary western legal systems focus upon a common problem. I would define this problem as follows: All legal systems are confronted with the necessity of making discretionary choices. Contemporary western legal systems operate in societies riven by inequalities. But at the same time the liberal ideal of justice prohibits the affirmation, and thereby the legitimation, of such inequalities. How do the legal systems respond to this contradiction, what can be done to resolve it, and what are the consequences for the continuing legitimacy of the system?

The necessity for choice hardly needs to be argued anymore. The image of law as a machine, with substantive norms as the only input, has long been discarded, if it was ever held in its pure form. Were further evidence needed, Blankenburg's study of the gross underenforcement of the norm against shoplifting provides an extreme example. But discretion is not only exercised in detecting, apprehending, reporting, and charging alleged offenders. As the other articles demonstrate, the legal system makes choices in determining the composition of juries, bargaining over pleas, deciding whether to prosecute, sentencing, and granting parole. Official norms do not, and perhaps cannot, govern all of these choices.

Similarly no one could challenge the proposition that western societies—certainly the two discussed in this volume (the United States and West Germany)—exhibit enormous inequalities in wealth, status, and power among their citizens. But while there is considerable ideological disagreement about whether these inequalities are good or bad, contemporary western legal systems are committed to the belief that they have no place in the legal process. The liberal ideal of justice is blind to such "extra-legal" attributes. Is the legal system, operating within an unequal society, able to fulfill the ideal of equal justice? The articles in this issue are unanimous that it is not. At all points where discretion is exercised, of which those described here are only a fraction, the legal system is biased in terms of sex, race, age, national origin, residence, income, occupation, education, and undoubtedly many other variables.

It is equally important to recognize that such bias need not be the result of conscious, or even unconscious, prejudice. Shoplifters may be apprehended because, in the past, persons from that category have been disproportionately caught stealing. Women may be excluded from juries in the belief that they would not want to serve; blacks and youth may be overlooked because they are not registered voters. The poor may receive longer prison sentences because they cannot raise the bail that would allow them to prepare their cases, or lack the money to retain private counsel. Blacks may serve a larger proportion of their prison sentences because they are required to participate in institutional treatment programs as a prerequisite for parole.

Bias may be eliminated, at least to some extent. As a result of the Fair Jury Project of the Attica Brothers Legal Defense Organization, women, who had constituted only 16.8 percent of the Erie County jury pool, now serve on juries in proportion to their share of the population. And the study of the federal jury pool for the Eastern Division of Massachusetts makes a major contribution in demonstrating how the numerous other biases—race, age, residence, and education—could be alleviated. But success in equalizing representation on juries may not be generalizable. There are few systemic pressures to retain discretion—i.e., there are few important roles within the system whose power is contingent on exercising discretion—and jury composition is not a visible, or highly controversial political issue, by and large. The same cannot be said about the apprehension, disposition, and parole of criminals. There is every reason to expect that the combined force of external politics, and competition for power inside the legal system, will create new opportunities for the exercise of discretion as fast as the old are eliminated. As Clarke and Koch suggest, for instance, constraints on the judge's latitude in sentencing may simply lead to more plea bargaining. The critical question remains, therefore: can a legal system in an unequal society mete out justice without bias? The articles in this issue offer no basis for optimism.

What is the consequence of this bias for the legitimacy of the legal system? Austin Sarat, in an essay reviewing the literature on attitudes toward the legal system, which will appear in a subsequent number of the *Review*, argues that the perception of inequality is the single most important reason why citizens hold the law in low esteem. And, indeed, Blankenburg's article reveals the extraordinary unwillingness of customers, and even storekeepers, to invoke the criminal process against shoplifters (although this may express an aversion to "hassle" as much as

skepticism about the fairness of the process). The contrast with Collier's description of the attitude of Indians towards the traditional legal system of Zinacantan (Chiapas, Mexico) could not be more striking. Both litigants and judges value the legal process highly. This is not to say that the legal system treats all persons equally. Zinacanteco society contains substantial inequalities in wealth, status (especially religious status), and power. But these inequalities are viewed as legitimate, and therefore a legal system that respects them is not "biased." What Zinacantecos value about their law is its lack of coercion. Consequently, aspiring political leaders, seeking power through the accumulation of a personal following, must arbitrate disputes according to traditional procedures, which are thereby preserved and strengthened.

If tensions within western law contain a warning—that a legal system whose legitimacy depends on adherence to the ideal of equal justice cannot maintain respect in an unequal society—Zinacantan offers the confirmation of an inverse example—a traditional ideology of conciliation sufficiently powerful to resist a government eager to assimilate Indians to Mexican society, and thereby able to retain popular support.

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