# CONTEXTUALIZING THE COURT: COMMENTS ON THE CULTURAL STUDY OF LITIGATION

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This comment argues that to understand the role of trial courts in maintaining a particular order of differences in society, attention must be directed beyond official legal arenas and official rules to the actions of ordinary citizens and of "marginal" legal officials who make law and shape the court through practices that are excluded from official accounts. This move provides an account of the meaning of courts, of cases, and of law that is relational, and that attends to the agency of everyday people in producing and resisting forms of domination.

> The specific property of symbolic power is that it can be exercised only through the complicity of those who are dominated by it.
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> —Pierre Bourdieu (1987: 239)

What can the ethnographic study of trial courts contribute to our understanding of state theory and processes of domination and legitimation? How does an analysis of disputing in which local politics and local personalities play a central role illuminate the place of law in maintaining specific forms of order and in resisting challenges to that kind of order? Are "micro" studies of social process focusing on the actions and responses of particular actors at one point in time compatible with the explanatory aims of "macro" studies of social change *over* time?

In this Comment, I address these questions, arguing that the dichotomies (macro/micro, norm/process) around which the questions are structured are misleading. Indeed, the dichotomies take as given what studies of trial courts should be investigating: how fundamental categories such as "court," "case," and "law" are produced; and the politics of the process through which specific practices are defined as "legal," as appropriate to analysis when studying law and courts, while other acts and other kinds of talk are ruled out. This requires a shift away from a focus on law as pro-

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duced by the state and on trial courts as official sites for the practice of law to an approach in which legal reality is seen as a plural reality. Local understandings interpenetrate with official ones, affecting the ways that social events are understood and legal cases defined, the roles that courts come to play in everyday life, and the different ways that state power is legitimated and maintained in local settings. In this way my comment demonstrates the contingency of state power and the agency of "powerless" citizens in constructing the law.[1]

In the following pages I examine the use of a local court by working- and lower-class residents of a town in western Massachusetts to illustrate how this shift in focus contributes to a more dynamic approach to law. My analysis draws on several months of ethnographic research at the court and in surrounding communities. It focuses on "show cause" hearings held at the courthouse to determine whether, in cases where there has been no arrest, complaints brought by citizens and police are sufficiently serious to warrant issuance of a formal criminal charge. The hearings provide insights into the ways citizens interpret and use state law in the maintenance of family and neighborhood order as well as suggesting the different criteria used by court staff, police, and other local officials in constructing the official legal meaning of the same events. The analysis accounts for differences in official and local understandings, and explains the production of law as a process in which both ordinary citizens and legal officials are involved.

Complaint hearings, conducted at the courthouse but officially defined as "prior to the criminal process" (Committee on Standards, 1975: 3) and described by court officials as taking place "out of court," are presided over by the court clerk. This official need not be legally trained and is encouraged in official manuals to mediate cases before him rather than issue a formal criminal charge. Only upon issuance of such a charge does a complaint formally enter the court system. It is in this context that the clerk describes himself as a gatekeeper, keeping what is "not legal" out of the court proper.

This official construction of legal space as divided between judicial and nonjudicial moments skews the clerk's explanation of what happens "in court" and his interpretation of hearings before him, in a particular way. In the clerk's account, hearings mark the division of common-sense (everyday) understandings of events from professional ones,[2] that is, of "the social" from "the legal," or of "law" from "community." This division is reproduced in pat-

[1] The following discussion draws both on previously published material dealing with citizen-clerk interaction (Yngvesson, 1988) and on unpublished material relating to hearings in which the police were the complainants.

[2] See Santos (1977: 68), Yngvesson and Mather (1983: 66), and Bourdieu (1987: 224) on the ways specific kinds of arena constrain the interpretation given to events.

terns of formal complaint issuance (as recorded in court statistics) and represented in court perceptions of complaints brought by citizens to the clerk as "garbage." Only a small percentage of these complaints become formal "cases" in court.[3] Participants in citizen-initiated complaints (typically friends, neighbors, family members and other intimates involved in ongoing relations) are typically described by court staff as "brainless" and as having "no moral sense." Their verbal battles and physical fights are viewed as "a way of life" and are thus defined as "normal trouble" (Sudnow, 1965).

By contrast, complaints brought to the clerk by police are typically issued[4] with only a cursory hearing to determine seriousness. The definition of these matters as "crime" at the court is linked to the appearance of police rather than of citizens as complainants; further, these complaints differ from those brought directly by citizens in that most involve property offenses between strangers rather than assaults between intimates. Police, who are typically called first in neighbor and family matters, attempt to handle these complaints "on the street" or send the complainant to the clerk without taking further action themselves. In the view of the police, these matters are "kidstuff," fights that occur because of "the psychology of the people," and are appropriate for handling by the clerk but do not warrant police action.[5] It is apparent that the police see themselves as representing a legal function that is different from and more important than that of the clerk, and that matters appropriate for resolution by the clerk are (in their view) less important than the ones they handle themselves.

These patterns suggest—and Carroll Seron noted this during discussion of my comments at the Conference on Longitudinal Research on Trial Courts[6]—that there is, in her words, "a certain conjuncture about the relationship between police power and court power that is somewhat symbiotic or interpenetrates" and that it is "disempowering of the community and their notions of citizenship and what it means to be a member of that community."

By this account the clerk, who continually handles (and dismisses) "garbage," reproduces a hierarchy in which court is distinct from (and makes powerful decisions about) the community, in which "the legal" is serious while "the local" is not, and in

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[3] Of 294 complaints brought by citizens during a seven-month period in 1982, only 33 percent (94) were issued.

[4] Of 324 complaints brought to the clerk by police during the same seven-month period in 1982, 82 percent (245) were issued.

[5] Analysis of interview and observational material from 110 citizen complaints indicated that in 81 of them there had been at least 1 (and in some cases up to 10) calls to the police before the complaint was brought to the clerk.

[6] This exchange took place at the Conference on Longitudinal Research on Trial Courts held August 24–27, 1989, SUNY Buffalo. See Special Issue Editor's introduction. [—Ed.]

which the law is seen as autonomous and the clerk defines its boundaries. The clerk's explanation that people "come to the courthouse" so that things can be "kept out of court" captures well these official understandings about law and community, and his complicity in reproducing them.

Yet by looking at the actual practice of complaint hearings (rather than simply at statistics about types of cases and frequency of complaint issuance), and by moving out of the courthouse itself into the community from which complaints emerge, a somewhat different account of the production of law and the nature of power emerges. As one of the arenas where local problems are distinguished from or transformed into legal matters, clerk's hearings become a site for the production of legal meanings and these are affected in significant ways by the stances of citizen complaints and those they accuse.[7] These stances, in turn, are shaped by (and affect) local social, economic, and political conditions as well as by official trial court policy.

This shift provides a different perspective on whether and how the community is disempowered in complaint hearings. The outcome of the complaint issuing process is not simply imposed by clerk or police on those who appear before them but is the product of exchanges in which citizens play an active role. Indeed, the clerk's power (as "transformative capacity" (Giddens 1979: 93)) is contingent on the willingness of citizens to bring complaints to him and, thus, on his continuing relationship with the "garbage people" who appear before him. They, in turn, are also empowered in this relational sense. Persuasion (what Bourdieu (1977: 191–92) terms "disguised domination" or "gentle violence") is a key dimension of the clerk's transformative capacity, and persuasion requires local knowledge, local ties, and some degree of shared understanding.

This relational and cultural matrix both shapes the complaining process and is produced by it.[8] The exchanges of clerk and citizens, or of police and citizens, emerge from and produce texts (stories about dangerous trees, recalcitrant citizens, or irresponsible parents) that frame the everyday experiences of citizen complainants and the practices of clerk and police alike. While police and clerk are advantaged in these exchanges, the structural conditions of the police/citizen or clerk/citizen interaction constitute the exchanges as moments of indeterminacy when reproduction of official meanings and the interrogation of these meanings is in tension. In what follows, I provide a few examples of this tension, drawing on complaints brought by police and by citizens to the clerk.

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[7] Black (1971) argues that the complainant plays a key role in how problems are defined by the police.

[8] See Giddens's (1979: 69) discussion of the "duality of structure" in which structure is both a medium and an outcome of practice.

The first example involves a complaint brought by police against a man (Zlack) for "deliberately and maliciously" damaging a maple tree owned by the town of Riverside, the county seat. Zlack, a town native, was living with his wife and family in a house inherited from his father. The tree in question was growing on land that separated his property from the street. Over time, its roots had begun to damage the plumbing connections between his home and the town sewage system, and his father (who had occupied the house until the previous year) had asked the board of selectmen to have the tree removed. The request was denied, but allegedly one of the selectmen suggested that the man take action himself since he (along with his son, the present occupant of the house) was in the tree-cutting business. In consequence (according to Zlack) he "girdled" the tree by cutting the bark all the way around so that it would die. Some months later, the department of public works, which was responsible for maintenance of town trees, complained to the police. According to their complaint, Zlack had attempted to destroy town property; but the "girdling" had only damaged, and not killed, the tree. As a result it constituted a hazard to passersby, and the DPW had to cut it down. They were demanding $257.76 for the cost of removing the girdled tree. The police attempted to settle the matter directly with Zlack, and brought the complaint to the clerk when his effort was unsuccessful.

From the perspective of court staff and the police, this was a typical "nuisance" complaint, not a criminal matter. The police spent several weeks attempting to work out a schedule of payments with Zlack ("If he would have made some effort—even $5 a week!"); the clerk made further efforts to reach a compromise agreement during the hearing, arguing that if the complaint was issued, Zlack would have a criminal record. When this was unsuccessful, the clerk continued the complaint for a week in hopes that Zlack would "work something out" with the police and the DPW. But in the end the complaint was issued, and Zlack was ordered by the court to pay the fine.

The framing of this complaint during the hearing as "about a hazardous tree" was not challenged by any of the participants. Zlack described the potential danger to neighborhood children created by dead limbs and the damage to his sewer. He claimed, however, that his girdling of the tree was not malicious, but was a response to the denial by selectmen of his father's application to cut down an already hazardous tree. "As far as malicious cutting of the tree . . . especially given a five year-old kid that almost got killed . . . it's certainly not malicious." And he explained:

> They've got a telephone line going right through the center of it. They cut out the entire center, but they didn't paint it. So the limbs are just falling off. We tried that chemical [used for killing roots in a sewer]. . . Right now,

> we've got the sewer open, we have to! Every time it rains, we have a flood in our basement . . . . It's a small tree. One person could take that tree down. I said, I'll gladly take it down . . . . We've got toilet paper and everything going right down into our cellar.

The transformation of a standard "garbage" matter into a criminal complaint in this example was the outcome of exchanges over several weeks between Zlack and several official parties (police, clerk, DPW). From Zlack's perspective, the official agencies "all work together," and his response to the court order that he pay the fine was, "You can't fight 'em. They'll get you if they want to." Nonetheless, the case that ultimately was sent by the clerk to the court proper emerged from such a fight, and was the product of Zlack's resistance to the efforts by clerk and police to pressure him into a settlement "out of court." These efforts also shaped the definition of what this case, in the end, was really "about." As the clerk noted after the hearing, this was "a bad tree" and Zlack should have "raised a fuss because the tree was a hazard. He should have had the mother of the child (who barely escaped injury by a falling branch) raise a fuss, and have had the newspaper pick up on it. Then the town would have *had* to act." By the time the complaint reached the clerk, however, the police no longer viewed the case as "about" a hazardous tree, but framed it as a challenge by a working class family to local structures of authority. Zlack and his father had acted against a decision by the selectmen; he had chosen on his own to destroy town property, putting in question the legal role of the DPW to protect and maintain this property; and he had refused to cooperate with the police when they tried to negotiate a settlement. Thus the policeman who pursued the case later described his aim in the matter as showing Zlack "that he couldn't short-circuit the law. He knew exactly what he was doing! If he thought he could get away with it he would have cut the tree right down."

This case demonstrates that Seron described as the "conjuncture of police power and court power" in handling a "nuisance" matter. But it reveals as well that an event *becomes* a "nuisance" in the interactions of court officials or police and private citizens over time, and that these same interactions, shaped by structural conditions of inequality, may produce a recasting of "nuisance" as "crime," as a matter that "needs more formal intervention" by the court rather than simply "settlement" by a clerk. Zlack's recalcitrance defined the event as, in the clerk's words, "a principle thing. They could be afraid that if you get away with it, everybody will be doing it." Thus it was in the exchanges of police, clerk, DPW officials, and a private citizen over several weeks that the meaning of "malicious damage to a tree," and the appropriate role of the courthouse in handling this act emerged.

The next example involves a series of complaints brought to

the clerk from a low-income neighborhood in Milltown, a small industrial community in the court's jurisdiction. Unlike the previous case, in which the police were central actors, these complaints were brought by private citizens. They were framed as charges of assault, threats, or trespassing, and were defined by complainants as "children's fights" in which adults became involved as they sought to control the fighting. Police referred to them as "kid-stuff" and were unwilling to file a written complaint. The clerk dismissed most of them (Yngvesson 1988: 432ff.). As in the previous case, however, the meaning of events in these cases developed over time in the interactions of court officials with local citizens; and it was in this process, "out of court" and invisible from an official standpoint, that the local role of the court (and the role of the local in constructing the court) was played out.

For complainants, charges brought to the court served as vehicles for addressing problems of moral order that centered on issues of race and class, and were tied to gentrification. Milltown is widely perceived by court staff and in the county at large as a slum, a place where "the other half of American lives." Recently developers, supported with federal funds, began work on a low-income housing project, as well as a number of downtown "beautification" efforts supported by local businesses. A crackdown by police on adolescent loiterers in the business district accompanying these moves was explained on grounds that the loiterers discouraged a potential outside (and more affluent) clientele that might patronize the renovated downtown. At the same time, new working-class homeowners in the area attempted a "cleanup" of their own that was at cross-purposes with the efforts of developers. Focusing on Hispanic and other renters whom they perceived as undesirable, they brought repeated complaints of threats with knives, or punching, shoving, and pushing against the children of these residents of assault, voicing fears that their neighborhood would be taken over by "a lot of Puerto Ricans." Large groups of homeowners appeared at the courthouse and in other arenas (such as the board of selectmen) to express concerns about local developments, demanding attention to the needs of youth who had no place except the streets to "hang out" and voicing their own concerns about invasion by unwanted outsiders.

The clerk sought to shape these Milltown problems as everyday matters that belonged in the parents' hands; participants, by contrast, argued that the neighborhood was "bad" and "violent" and described repeated acts of physical and verbal aggression by Hispanic, Polish and other white ethnics against one another. In one event involving one child's alleged threat to knife another on the way to school, and which the parents described as one of a number of neighborhood incidents keeping their children out of school, the clerk cast the situation as expected behavior for children but reprimanded the parents for their role in instigating it:

> It's not a real vicious thing, it doesn't appear. We won't have another hearing but we'd issue it if there was more trouble. Kids push kids. One thing parents should be sure they don't do is discuss their problems in front of their kids. The kids watch TV, they want to protect the parents, they take up your fight, and first thing you know kids eight or ten or so are fighting and their fathers are slugging it out.

These efforts at redefining events usually resulted in a dismissal to which complainants agreed, based on the clerk's skill in evoking shared meanings about local life (that the children's behavior "wasn't real vicious" and that parents should avoid "taking up their problems in front of the kids"). His ability to do this derived from long familiarity with the area as a local policeman and a style of managing the hearings that combined paternalism with a wry humor that defused tense encounters. Thus complainants acquiesced in his suggestion that he simply issue complaints "technically" but "hold" them in his office for several months and dismiss them if there was no more trouble.

Acquiescence at one point was typically followed by reappearance at another, however, and the clerk's perspective shifted over these months of ongoing interaction. He mocked a Polish complainant who had been a defendant in an earlier complaint that was not issued, and this behavior contributed to efforts by other white ethnics to pressure him and his family to move; and he supported a Hispanic woman who was the target of some of the complaints, arguing that those who accused her of violence were afraid of their own violent potential, rather than of her.

These exchanges sometimes polarized the litigants and led more than once to a hostile outburst against the court itself as an arena for justice. But they also produced more subtle shifts in official definitions of neighborhood order in an area in which fighting was perceived (officially) as the only order. Through the appropriation by upwardly mobile residents of an imagery of chaos in which knife-wielding children were central figures, the clerk was persuaded over two years of repeated complaints brought by the same individuals[9] that the neighborhood needed attention and that matters had gone beyond what was normal in a nearby city "or even in New York." As a result complaints were issued, and in court the judge reprimanded local police for their tolerance of an unacceptable situation. The charges were ultimately "continued without a finding" and dismissed, reflecting the official insignificance of these matters. But the Hispanic woman and her children, who were the object of many of the accusations, left town shortly after the complaint was issued, the Polishman and his wife were unable to renew their rental contract, and another family involved in the fights also left Milltown.

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[9] Fifteen complaints were involved in this extended case.

I suggest that while officially the "court" did not become involved in these events, in practice it was pulled into them on an ongoing basis, and (through the clerk's exchanges with participants) helped to define their course. To see complainants as disempowered in this process is to privilege a view of power defined in official terms as what "the court" does and perceived as unilateral action by court officials or police. This definition ignores the relational matrix out of which actions emerge, and which produces definitions of local order as well as understandings about the place of law. In this series of hearings the meaning of "trouble" in Milltown was recast and the clerk became a participant in the process through which this was accomplished. At the same time, the image of Milltown complainants as brainless and uncontrolled was confirmed in hearings that transformed an "autonomous" court into a neighborhood battleground and reinforced the definition of clerk's hearings as the appropriate space "out of court" for handling these matters.

My analysis of complaint hearings suggests that the development of "a case," the role of the court, and understandings of neighborhood and family order are shaped in the exchanges of court officials with people who "don't count," in spaces that are officially defined as marginal, and in a relational context marked by the interdependence of citizens, court officials, and police. These conditions embed the law in the politics of daily interaction, even as they produce a cultural construction of law as set apart and of the court as an arena that is inappropriate for interpersonal "garbage" but suitable for "cases" and "crime."

This comment has focused on the construction of "law" from "garbage," and on the ways this construction simultaneously reproduces and sets in question official categories and the cultural moorings to which they are bound. To understand this process requires attention to what Natalie Davis (1975: 2) terms the "slippery" dimensions of the concept "social force." Social forces imply determining conditions, "circumstances or events that shape a man's [*sic*] attitude toward many things" (*ibid.*, p. 3), as revealed, for example, in analysis of the social and economic context of complaining to the court clerk; but social forces must also include the countless acts and responses of specific individuals at specific moments in time, separately or in concert, through which cultural understandings are "taken on" or reinterpreted and recast. I have focused on these acts, suggesting that they must be an integral part of our explanation of how power is exercised and order produced in and over time. This analysis does not invalidate Seron's point about the conjuncture of police power and court power. It implies, however, that that to understand this conjuncture and its intransigence, we must examine the everyday practices of police, court officials, and others with and through whom particular forms of power are reproduced and challenged in everyday places.