

[DRAFT—COMMENTS WELCOME]

**What Are Courts For and What Do They Do? Review
Essay—*Courtroom 302: A Year Behind the Scenes in an
American Criminal Courthouse*. Steve Bogira.**

Alfred A. Knopf: New York, 2005

ISBN 0-679-43252-3

404 pages

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Courts occupy an ambiguous position within legal systems. Often the focus of academic courses on the legal system is the court. On the one hand, they constitute the jurisprudence that enables the system to work. Judges offer reasoned opinions (*ratio decidendi*) that provide the substance of and the form for legal interpretation and lawmaking. This is the zenith of legal thought; it is where the genius of the law resides. On the other hand, courts have a more mundane role of processing cases and parties in order to attempt to heal wounds and restore order. Broadly, of course, this falls into handling defendants in criminal cases and umpiring parties in civil cases. This is the nadir of legal administration; it is the perspective of costs, delay, and court budgets. The one deals in principles and the other in people. Therein lies the ambiguity of courts.

A number of cases on both sides of the Atlantic, while not necessarily establishing norms, are generating interest. Two that come to mind are the *BCCI v Bank of England* trial and *U.S. v Skilling and Lay* (the Enron prosecution). These cases are almost polar opposites in the conduct of litigation and the careful husbanding of judicial resources, which are always scarce. In the criminal sphere there is an odd mix of sometime rapid case disposition, as in the magistrates' courts, with the *longueurs* seen in jury trials. The main tenet of my argument is that in the UK we are tremendously profligate in the ways we deploy courts' resources, despite the introduction of Woolf's case management reforms, whereas in the US more is done to ensure their rational use. However, this does not mean that justice is conducted more prudently in either jurisdiction. Indeed, justice is most likely the missing component of the argument, but at an economic level it holds. The question is whether the economic position is sufficient.

For most nation states the rule of law has the status of both a virtue and a residual category designed to answer the concerns of the community. The virtue is especially visible in the higher echelons of civil law where elite lawyers and judges mingle. The residue is the criminal law where the accused are often the dispossessed of society and the legal representation perfunctory. Whereas civil law disputes are routinely allowed to escape the purview of the state because we believe in the sanctity and privity of contract, punishment can only be meted out by the state in order to satisfy the desire for reparation. Crime and its resolution no longer produce the Durkheimian ideal of social solidarity. In the UK we see further evidence of this residuality. For example, if we look at the way the courts' budgets are determined, we would expect to see a calculus based on what would constitute the necessary desiderata for a justice system. Unfortunately, it does not work that way. The justice budget is composed of expenditure on legal aid and on courts. Legal aid has the first take and what is left over funds the courts. The UK Treasury prefers this mode of budgeting because it places the burden of reducing the legal aid budget on the courts themselves, since they would gain directly if they were to be successful and the Treasury would incur no extra outlay. Given the importance of the rule of law, this may seem odd way to function, but it represents the kind of political horse trading that is found in most modern democracies. This is not to excuse it, merely to say it is *realpolitik*.

I hope to demonstrate these themes through a discussion of an important book about the operation of courts. Steve Bogira's *Courtroom 302: A Year Behind the Scenes in an American Courthouse* charts the day-to-day affairs of an urban criminal court that mainly deals with thousands of minor drug offences each year: a relentless torrent of defendants who are capable neither of helping themselves nor given any assistance to do so.

Although there is considerable research on the justice system, we know little about the day-to-day affairs of courts and those who populate them. There are notable exceptions such as Rock's study of Wood Green Crown Court.¹ A recent addition to the literature ought to stimulate policy makers, politicians and even legal theorists into reconsidering their strategies towards criminal justice, and civil, or rather the lack of it. *Courtroom 302: A Year Behind the Scenes in an American Courthouse* displays the stark despair of the criminal court in Chicago's Cook County and raises serious questions about what the rule of law actually means, or whether it exists.

The criminal court in Chicago is the biggest and busiest in the United States. It has 32 courtrooms and eight suburban branches. Let me provide some context: according to official US statistics in 2003 there were close to 2.1 million people in federal, state, and local gaols. In Chicago from 2001 to 2004, between 86% to 91% of all felony cases were disposed of by guilty pleas arranged through plea bargaining. And between 1994 and 2003 76% of all felony defendants were convicted and of those sentenced to prison or probation, 53% were imprisoned (p 360).

For most defendants in Chicago their first experience of the court is being driven into the basement where the sheriff's deputies prepare them for their bond (bail) hearings in the courtrooms upstairs. The prisoners are searched and given a number written in marker pen on their arms. They wait, sitting, in order to avoid fights, in cramped cells until they are herded into lockups by the bond court. This starts at 8pm and the judge has to decide who remains in custody and who will be released on their own recognizance. The vast majority of the 40 waiting defendants are charged with drugs offences and most are represented by public defenders (PD). The task of the judge and lawyers is to process these bond hearings as quickly as possible. The prosecutor takes 15 seconds to present the defendant's background; the PD takes another 15 seconds to say good things about his client; and immediately the judge will state his bond decision. Each case takes about 45 seconds from start to finish (p 17). The deputies are responsible for keeping the flow of defendants moving at the same pace as the judge and lawyers—into court and out again.

¹ P. Rock, *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green* (1993).

In the authoritative Australian film about constitutional law, *The Castle*, lawyer Dennis Denuto, rather than delve into the intricacies and technicalities of the various articles of the constitution (since he doesn't know them), declares to the court that what matters is "the vibe of the constitution".² From the first moments of a defendant's appearance in Chicago's criminal court, it's clear that the vibe has been stilled and is only felt in the most extreme circumstances.

Daniel Locallo, the judge resident in courtroom 302 is descended from an Italian immigrant family; he followed his police officer father into the law—partly influenced through watching *To Kill a Mockingbird* as a child (p 31)—by attending a local law school in Chicago. His father's connections helped him become a state's attorney (prosecutor), from whose ranks many judges are chosen. Once on the Democratic Party slate, election was guaranteed. Even though judges have to be re-elected periodically, as long as they are conscientious, they will remain on the bench until retirement. And even though various commissions of experts have recommended the use of appointment boards, i.e., merit selection, instead of elections, politicians in Chicago have yet to release their grip on judicial selection.

Courtroom 302 is small, windowless and dreary, with the public gallery fenced off from the court by a Plexiglas screen. Locallo has up to 20 cases to dispose of in a day and "dispose" is the vital term. As Bogira puts it: "The main job in the courthouse has always been sorting. The judges and lawyers sift through the raw material dropped off by the police and determine who gets to walk out of the courthouse and who must leave on a bus with barred windows" (p 35). If every case were dealt with thoroughly, the system would be unable to cope with the demand and collapse. The key to a flow of dispositions ("dispos") is to ensure that, where possible, cases are plea bargained (p 39). Plea bargains must be freely entered into by the accused, however bargains are often "sold" to defendants by their PDs. Prosecutors, defenders and judges collaborate in processing "dispos". All the participants in the courtroom are scrutinized on their dispo rates and are called to account if they fall below the unstated norms. If one court slows its dispo rate, unfair burdens are shifted to other courts. And all disposition rates are published and disseminated at re-election/retention time.

Defendants have to be taught their role in this process. Although constitutionally they can insist on a trial, their PDs will explain to them that a guilty plea will usually mean probation or a conditional discharge: in others words a lenient non-custodial sentence. An expensive and time-consuming trial will incur the wrath of the judge who will impose a much greater sentence if the accused is found guilty. The trial "tax" is steep and most defendants strive to avoid it. The judge's unspoken subtext, according to Bogira, is, "*In return for the favor of your guilty plea and the time it'll save us, I've agreed not to bang ya, d'ya understand?*" (p38). As with the bond hearings, once the defendant has agreed to a plea bargain, the actual process takes little time. The judge recites the necessary admonishments, the

² *The Castle* (1997) dir. Rob Sitch (Melbourne family living next to airport fights compulsory purchase battle).

defendant agrees: another disposition, the “clearance sale” is conducted in 15 minutes.

Courts are also like airlines, constantly overbooked to ensure full capacity (p 142). If the precise number of cases that could be heard were scheduled, the judge’s list would implode. Judges, however, are not the ones to suffer the effects of overbooking because they are the forces of determination in the courtroom. The ones to wait are the defendants and their lawyers.

Cases may be disposed of but the defendants rarely are. If they receive probation and some community service, it is more than likely that over time they will forget their obligations as they fall back into their old style of life. Usually, when defendants are in the last few days of their community service, they are arrested and brought back into court. Most receive a slap on the wrist and are told to complete their service. Proper aftercare would of course ameliorate the problem. The reasons for this state of affairs are known, but within the courtroom they have no explicit exculpatory force at all.

The vast majority of defendants are African American. They are born and raised in the ghettos of Chicago. And as William Julius Wilson has graphically shown, many grow up without any contact with white people.³ When the programmes to alleviate the conditions of African Americans were introduced in the 1960s, huge amounts of money were poured into social housing. Mayors like Richard J. Daley of Chicago ensured the housing projects for the poor were situated in a few consolidated areas far away from the prosperous white neighbourhoods.⁴ The city schools are also under funded and unemployment among African Americans is high. Mental illness, single parent families, and gang membership also suffer excessive rates in their communities. The despair of living in these conditions with little possibility of escape provides a receptive environment for finding heterodox exit routes. Narcotics are the most favoured: crack cocaine and heroin are cheap and plentiful but powerfully addictive. Addicts and small-time dealers constitute a huge amount of the court’s caseload, around 30,000 cases a year. And given the regularity and monotony of the caseload, the court’s main function is sorting the accused into the requisite categories—discharge, probation, or prison. The “war on drugs” has meant the criminal justice system is caught between politics and justice. Many of the small possession cases are so minor, they could be thrown out with a warning. But on the occasion when Chicago’s politicians were presented with a plan to downgrade the possession of a gram or less of heroin or cocaine to a misdemeanour and so clear the courts, they balked (p 119).

Occasionally a different type of case arrives in court, one with ramifications that go beyond those implicated directly. They are called "heaters" because of the heat they create and the publicity they attract. In the Cook County courts a computer

³ W. J. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

⁴ If one stands in the observation tower of the Sears Tower, the projects are visible stretching for miles through Chicago's south side.

allocates cases randomly. Judge Locallo received a heater this way: a race crime with reputed mafia ties. A couple of black kids bicycled into the white neighbourhood of Bridgeport to obtain free air from a garage. On their return they were attacked by a group of white youths who beat them up, leaving one for dead. To add fuel, one of the key witnesses was subsequently killed in what appeared to be a mob hit. To make the case even more inflammatory, the trial was scheduled to occur just before Locallo's re-election. It is the type of case that inevitably ignites controversy. It scares the politicians, pastors, and divides the populace. The low expectations of the black population in Chicago, however, have inured them against the probability of justice being done. On the other side is the fear that no possibility of a fair trial exists because of the rampant prejudice felt in the city. Moreover, because of the defendant's father's alleged mob ties through labour unions, a groundswell of adverse opinion could be raised against the judge if he reached the "wrong" verdict. Despite all the fears, the case moves smoothly through an eight-day trial to a verdict of hate crime guilt against Frank Caruso (p 283). The exceptional aspects of the case included the fact that the defendant's family's wealth enabled him to secure a strong defence lawyer with the services of investigators and public relations consultants. No average defendant can hope to receive this type of defence.

But poor defendants can occasionally receive enhanced defences. Leroy Orange (p 171) had been on death row for 13 years for killing two adults and a child. A Northwestern University law professor had persuaded the Illinois Supreme Court to order the death penalty hearing to be reconsidered on the basis that Orange had been denied effective assistance of counsel. Orange claimed that although he had confessed, he had done so under torture which had included electric shocks, having his head placed inside a plastic bag, and having his testicles squeezed. All of this was denied and no medical evidence was adduced. Orange's half-brother testified at trial that he was the killer but Orange was still convicted. Orange had many character witnesses and had led an exemplary life in prison. The prosecution attempted to sway the court by showing pictures of the dead victims. Most of the court personnel have seen these kinds of images before and are rarely affected, just as doctors get habituated to horrific accident injuries. While Locallo took the case under advisement, he had a parallel matter to hear.

Orange's counsel was trying to petition for a new trial on the basis of the alleged torture. During the 1980s there had been allegations of systematic violations of prisoners by the police in which both the police and the city of Chicago were found liable. However, the city had never admitted to Orange being tortured, and another case was taken under advisement. Locallo eventually allowed a new sentence hearing despite the "savagery" of the murders (p 231), but during the new trial hearing he resisted the defence pleas and ultimately, and sarcastically, rejected the plea for a new trial (p 285).⁵ The defence counsel expressed no surprise as he believed it was common knowledge that few judges in the 26th Street courts would

⁵ Orange was pardoned by the governor of Illinois in 2003, but he was re-arrested for drugs offences shortly afterwards and sentenced to prison (p 342).

believe allegations against police since too many of them had been prosecutors before ascending to the bench.

Judge Locallo's records with "dispos" were good and prosecutors and defence counsel liked him, but trials like the Bridgeport case disturb the normally placid waters of judicial retention. "Heaters" bring publicity but also raise notoriety. Despite the case, six bar association groups awarded him "highly recommended" and "highly qualified" ratings (p 292). Yet between receiving the recommendations and the election he had to sentence the Bridgeport defendant. Two factors complicated his decision making: one was that the normal sentence for aggravated battery was up to five years which could be extended in exceptional cases, and the second was that two other defendants in the case were due to be heard immediately after the sentencing. Locallo finally sentenced the defendant to eight years, extended by three over the normal limit. The defendant's father promised to use his clout to have Locallo defeated. And at the subsequent trial of the other two defendants, they accepted plea bargains which got them probation and community service (p 309). Locallo was criticised both for being too harsh on the first defendant and too lenient on the other two.

Locallo's re-election was bitter. He was vilified both by the Italian community and the black constituency. Nevertheless, he received a 78% affirmative vote (p 326). As with decriminalising drug possession in small amounts, Chicago's politicians refused to release judges from the vulgarity of re-election in favour of merit selection. The Democratic machine had righteously avoided relinquishing control over its domain.⁶

Courtroom 302 is a dissection of despair. Society's detritus, as the accused are perceived, are given no hope. Their lives are grist for the court's milling machinery to be dealt with as expeditiously as possible. Constitutional niceties are abandoned in favour of expedience and targets. In this way Chicago's courts are seen as highly efficient processors as long as one doesn't examine the results too closely. In this respect, the courts are rational users of their resources, as I mentioned at the beginning of this essay. The problem is that no society should want to allocate resources in this fashion. Bogira's analysis of Locallo's courtroom shows that the court is capable of recycling its defendants. Most of them will re-offend for exactly the same reasons as before, and the court will perform the same actions on them as before. The only difference may be a slight increase in sentence. The alienation felt by these people will be further reinforced.

According to the National Audit Office around 2 million defendants pass through the English courts, many of which are subject to delay.⁷ The primary cause of delay is the lack of coordination, and administrative liaison, between the

⁶ Judge Locallo was eventually moved to the Law Division of the Cook County Circuit Court hearing personal injury cases; where he remains today.

⁷ *Criminal Justice: Working Together*, National Audit Office, 1999. But also see, *Facing Justice: Tackling Defendants' Non-Attendance at Court*, National Audit Office, 2004.

responsible parties: police, prosecutors, defence counsel, the prison service, the prisoner escort service, and the probation service. Adjournments through non-appearances of defendants and witnesses are frequent, which can result in cases taking in excess of 100 days to be resolved. This would be the kind of “dispo” rate that would have a Chicago judge become a certainty for non-retention. Within the Crown Courts the key problem is with “cracked” trials, those that collapse at the start of the trial, usually with a late guilty plea. Despite the systemic features that impose enormous strains on courts in the UK, there is also a tradition of judicial laissez-faire. There is not the equivalent judicial control of the courtroom that would be apparent in the US. What was apparent in the trial of Skilling and Lay was that the judge would brook no attempts by lawyers to sidetrack the court with, in his interpretation, unnecessary digressions. The Enron trial began at the end of January 2006 and the jury delivered its verdict in May 2006. If the Enron case is compared to the Jubilee Line fraud case that collapsed in March 2006 after 18 months of hearings and racking up costs of £60 million, it is apparent that no English white-collar crime trial could be conducted at a similar pace. No English judge would direct his or her courtroom with the same discipline; instead the conduct of the trial is left in the hands of the lawyers. This is in spite of moves by the Courts Service to import “vigorous” case management. A former head of the Serious Fraud Office was justifiably critical when she said, “Even the most senior of judges are not trained in proper case management and that becomes glaringly obvious when you see cases like the Jubilee. You have to move into the 21st century — some judges are still there with quilled pens.”⁸

Resonances of this perspective are also found in civil justice, which has supposedly been brought under control by the Woolf civil justice reforms. The *BCCI v Bank of England* case, however, recorded the longest opening speeches ever by counsel: plaintiff’s counsel speaking for 86 days and the defendant’s counsel for 119. Moreover, the case generated costs of over £100 million having been initiated twelve years earlier. One commentator noted, “After 11 months of bitter wrangling, [Mr Justice] Tomlinson was so concerned about the apparent vacuity of Deloitte’s claim, that he warned Lord Woolf, Britain’s most senior judge, that the hearing was ‘a farce’ which had the capacity to ‘damage the reputation of our legal system’.”⁹ Even a senior judge presiding in the Commercial Court was unable or unwilling to exercise judicial control and bring the trial to early resolution. Permitting counsel to address the court for such protracted periods, allowing witnesses to be cross-examined for seven weeks seems to be the strangest behaviour. Interestingly, the judge felt justified in criticising the participants after the trial collapsed, but could have never brought the lawyers to heel during its progress.

⁸ Legalweek.com, “Tampering with the jury” 28 June 2006, <<http://www.legalweek.com/ViewItem.asp?id=24792>>

⁹ J. Randall, “It looks Bleak for Deloitte as judge says case was a load of Pollock” *Daily Telegraph*, 14 April 2006.

Are courts the least-worst solution to dealing with one of society's law jobs, namely, trouble cases? They hover in a space that has elite factions in one part and low-status groups in another. We bring them under the same rubric in an attempt to inspire the judicial process with esteem and sanctity. Are we too reverential towards judges? Perhaps they should be appraised, reviewed and assessed, that is, be accountable. The kinds of narratives that are being told about courts today suggest that rather than being symbols of justice and equity, they have become inefficient instruments of administration processing of large numbers of people and money within a context that has not been clearly articulated or defined. Perhaps within these narratives is a possible explanation for the rise of private dispute resolution. Reading *Courtoom 302* ought to force us to reconsider what we expect from courts and judges.