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Efficient, Fair, and Incomprehensible:

How the State “Sells” its Judiciary

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Abstract

Sociolegal scholars often approach dispute resolution from the perspective of the disputants, emphasizing how the resources on each side shape the course of conflict. We suggest a different, “supply-side” perspective. Focusing on the state’s efforts to establish centralized courts in place of local justice systems, we consider the strategies that a supplier of dispute resolving services uses to attract disputes for resolution. We argue that state actors often attempt to “sell” centralized courts to potential litigants by insisting that the state’s services are more efficient and fair than local courts operating outside direct state control. Moreover, we argue that state actors also invest significant energy in claiming that the local courts are incomprehensible. Thus, in its efforts to introduce and advance centralized courts, the state argues not only that it offers the best version of what the citizenry wants, but also that it is impossible to conceive that people would want something other than what the state offers. We illustrate our argument and explain its significance by examining judicial reform in New York, where there has been a decades-long effort to displace local justice systems.

In his seminal analysis of why the “haves” come out ahead, Marc Galanter identified a continuum of dispute resolving mechanisms, ranging from the informal mediation provided by ethnic clubs and associations to the formal, full-scale litigation offered in the state’s centralized courts (Galanter 1974). Galanter’s fundamental claim was that this universe of dispute resolving mechanisms should be assessed in terms of the disputants’ characteristics: to understand the operation and outputs of any given arbitration or adjudication one must understand the nature of the conflict in which the parties are involved and the kind of resources that the parties possess.

Galanter explained why and how the demand for different kinds of dispute processing mattered. But what of the logic of supply? Independent of the motives and means that parties bring to specific dispute resolving venues, what can be said about the strategies that the suppliers of dispute resolving services use to attract disputes for resolution?

In this article, we examine the supply side of dispute resolution, focusing on the reasons and arguments that the state gives for attracting individuals to its judiciary. After briefly reviewing the demand-side view common in sociolegal studies, we develop an account of how the state attempts to persuade people to use the state’s centralized courts rather than the local justice systems operating outside the state’s direct control. We argue that the state will make claims about the superiority of its centralized courts, both in terms of greater efficiency and greater fairness. Moreover, we argue that these claims of superiority will be often directed toward those who may lose their disputes. By insisting that even losers will be better off in the state’s centralized court system, the state strengthens its case for the superiority of its services.

On a deeper level, we also argue that the state will claim that its own courts are literally the only sensible options. That is, beyond asserting that local justice systems are inferior, we expect the state to insist that the alternatives to the official centralized courts are

incomprehensible. The claim of incomprehensibility complicates the process of marketing the centralized courts: the state not only seeks to persuade people that its courts are more efficient and fair than local competitors, but also attempts to convince people that no rational case can be made for pursuing different means of adjudication. Beneath its insistence on the superior value of its centralized courts, the state advances a series of claims that reserve the mantle of intelligibility for itself.

We test our account of the state's supply-side logic by examining the justifications given by New York state for the abolition of village and town courts. Originally created during the colonial era, the village and town courts in New York have long been targeted by state actors seeking to replace the local justice systems with a new network of state-run district courts. Relying on official reports and transcripts from the past five decades, we assess the arguments that the New York state government has marshalled against local justice courts and in favor of new state courts. Consistent with our expectations, we find that the state government touts its own centralized courts not only by arguing that such courts do a better job of meeting the people's needs, but also by insisting that only the state's understanding of popular needs (and not the understanding of local people themselves) is coherent. In its efforts to establish new centralized courts, we find that the state claims (i) that it offers the best version of what the citizenry wants, and (ii) that it is impossible to conceive that people would want something other than what the state offers.

The Demand Side of Dispute Resolution

Over thirty-five years ago, Galanter published a now-classic explanation of how the attributes of individual parties affect the treatment of conflict (Galanter 1974). Galanter

described a broad continuum of dispute resolving venues (126-27), extending from formal litigation to “appended” dispute settlement systems (where “parties settle among themselves with an eye to official rules and sanctions”) and “private” remedy systems (where parties rely on “other norms and sanctions” independent from the official ones). Galanter argued that the placement of conflicts on the scale from “official” to “private” dispute settlement mechanisms depended primarily on the “density” of the relationship between the parties: “the more inclusive in life-space and temporal span a relationship between parties, the less likely it is that those parties will resort to the official system and more likely that the relationship will be regulated by some independent ‘private’ system” (130).

Galanter suggested that the characteristics of disputing parties not only determined whether their conflict found its way into a formal system of litigation, but also dictated the form and content of the conflict’s settlement. As Galanter put it, parties that are “repeat players” (RPs) with “low stakes in the outcome of any one case” and with the “resources to pursue... long-term interests,” can successfully “play the odds” in litigation, outmanoeuvring “one -shotter” parties (OSs) who are willing to sacrifice long-range gains for the sake of the case immediately at hand (98, 99). It is this difference in individual resources and strategies that ultimately shapes outcomes: “Since they expect to litigate again, RPs can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules. On the other hand, OSs should be willing to trade off the possibility of making ‘good law’ for tangible gain. Thus, we would expect the body of ‘precedent’ cases – that is, those cases capable of influencing the outcome of future cases – to be relatively skewed toward those favorable to RP[s]” (101-2).

Galanter’s emphasis on the motives and means of disputing parties influenced an entire generation of sociolegal scholarship (Glenn 2003). Indeed, by situating disputants at the center

of his analysis, Galanter helped give rise to the “Disputing Framework,” the basic analytical approach used by sociolegal scholars to disaggregate “disputes into a sequence of discrete moments or successive stages, from the earliest experience of injury through, at least potentially, various stages of dispute claiming, formal action, and resolution.” (Haltom & McCann 2004:74). By carefully investigating the processes of “naming, blaming, and claiming,” sociolegal scholars have continuously refined Galanter’s fundamental insight and developed a sophisticated sense of how dispute resolving systems are driven by demand (Felstiner et al 1980-81; Mather & Yngvesson 1980-81; Haltom & McCann 2004:73-99).

Justice for Sale

In this article, we step away from the conventional sociolegal emphasis on the demand for dispute settlement and focus on questions of supply. Our specific concern is with two links in the long chain of different dispute resolving mechanisms: we are interested in how the state goes about attracting individuals to its centralized courts and away from local justice systems outside direct state control. By concentrating on the ways in which the state “sells” its centralized courts, we do not intend to displace the substantial body of work that has grown up around Galanter’s original contribution. Instead, our aim is to call attention to the factors that are missed by concentrating scholarly analysis on the genesis of disputes and the search for settlement. As essential as disputant characteristics may be, it is also important to recognize that the suppliers of dispute resolving services are not necessarily passive actors who remain idle while disputing parties work out the dynamics of demand.

To begin our examination of centralized courts and their local competitors, consider that the state is, in a general sense, always at work “selling” its official courts to the populace. It is

true, of course, that the state can and does compel individuals to use its centralized courts. But it is also true that centralized courts, like other governmental agencies, critically depend on voluntary compliance. Obedience to the state's judiciary stems from the public's confidence in the courts – a confidence that is not produced by the threat of state force, but by popular acceptance of judicial authority (Geyh 2007; Gibson et al 1998; Brown & Wise 2004). States plainly recognize the importance of public confidence and consequently require sitting judges to behave in ways that inspire respect for the law and compliance with judicial decisions. In the words of the Code of Conduct for United States Judges, “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. The prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen” (Code of Conduct for United States Judges 2009: Canon 2A). To maintain their position as authoritative arbiters, judges must always attend to how their actions (in both substance and appearance) affect the public's willingness to use the centralized court system.

The work of Martin Shapiro provides a detailed guide for thinking about how the state attempts to market its centralized courts (Shapiro 1981; see also Shapiro & Stone Sweet 2002). Shapiro begins by arguing that all courts are triadic in structure: they exist because two parties engaged in conflict seek judgement from a third. A critical instability in this triad inevitably occurs at the point of decision, for “when the third decides in favor of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one,” leaving the loser with little incentive to obey the judgement (Shapiro 1981:4). The oldest response to this two-against-one problem is to maximize consent. If the specific parties in a case

are jointly permitted to select the law applicable to their dispute as well as to pick the judge who will hear their dispute, then the “eventual loser” is placed in a position of “having consented to the judgement rather than having had it imposed upon him” (Shapiro 1981:4). Individuals may be sold on a court if they are allowed to buy in.

As Shapiro notes, however, the great difficulty that the modern state faces is that its centralized courts are not structured to elicit individual consent in its most direct and complete form. “The most purely consensual situation is one in which disputants choose who shall assist them in formulating a rule and who shall decide the case under it, as the Romans initially did” (Shapiro 1981:6). Modern courts often depart from this purely consensual model in important ways. Rather than being allowed to select and develop the decision making rule for their specific dispute, litigants in the state’s centralized courts typically confront an already developed set of laws. Moreover, rather than being allowed to choose the arbiter who will render judgement in their particular case, litigants are often faced with a judge already appointed by the state. The public must be willing to use and obey the state’s centralized courts if these courts are to be successful, and yet these courts are, by virtue of their design, frequently tough to sell to the public. With the priorities and commitments of both law and judge established by the state rather than by the parties themselves, defeat in court may easily look less like the rendering of justice than like the victorious litigant and the judge ganging up against the losing party. Or, as Shapiro puts it, “Contemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic” (Shapiro 1981:8).

How, then, does the state make an effective pitch for its centralized courts? According to Shapiro, one method is to inject some elements of consent into the official system. Although

courts remain centralized under the control of the state and the most complete forms of direct consent are no longer available, it is possible to introduce some elements of consent by allowing, among other things, for the popular election of judges. Individual litigants will not be able to pick a judge all on their own nor will the litigants be able to dictate the choice of relevant law. But if they are allowed to participate in judicial selection to some extent, then litigants will have been given reason to support the courts' decisions.

A somewhat different – and, according to Shapiro, far more important – method of persuading people to accept centralized courts is to argue that the very factors which move the state's courts away from pure consent also provide these courts with important advantages. This method of marketing may be developed along several different lines. Pre-existing law and state-employed judges can be defended as means for ensuring that arbiters in the centralized courts have not been bribed by (or otherwise made dependent upon) one of the disputing parties. More broadly, the independence of state law and state judges allows centralized courts to be justified as mechanisms for providing levels of efficiency and fairness unavailable in other dispute processing venues. The state-determined uniformity and stability of the centralized courts will readily appeal to those parties that find themselves on the losing end of a local justice system outside of the state's control. These same features can be used to mollify parties defeated in the centralized courts themselves: losers are assured that their rights, as citizens of the national polity, have been considered in their most general and universal form.

This way of packaging centralized courts does not change the fact that these courts are largely created and maintained by the state, and operate many steps away from pure consent. “When two parties must go to a third who is an officer,” Shapiro writes, “it is as evident to them as to the observer that they are no longer going to a disinterested third. Instead, they are

introducing a third interest: that of the government, the church, the landowner, or whoever else appoints the official” (Shapiro 1981:18). But if the rhetoric of independence does not change the basic structure of the state’s centralized courts, it nonetheless allows the argument to be made that such courts are more fair and efficient than local justice systems tied to the vagaries of provincial interests.

We follow Shapiro in expecting the case for centralized courts to be made by invoking the virtues that flow from independence. Yet we do not anticipate that the core of the state’s pro-court argument will be solely about fairness or efficiency. There is an additional factor that must be taken into account. As James Scott argues, the modern state pursues its interests using a particular epistemology suited to its purpose (Scott 1998). The state “sees” society in terms of simplified maps that highlight the information necessary for the official identification, organization, and control of citizens. According to Scott, these simplified maps are not mere guides: they are ways of perceiving that furnish the essential means by which the state governs. The state and the citizenry interact through clashing frames of reference, with formal official systems butting up against informal local ways that remain cognitively “illegible” from the state’s perspective.

Although Scott generally locates the line between different epistemologies on the border between state and civil society, his argument applies to *any* domain organized to serve purposes different from those pursued by the central state. Depending on context and circumstance, public institutions and private practices may both appear indecipherable to state actors. Indeed, studies suggest that the state has often seen local courts of limited jurisdiction in precisely this way (Silbey 1981). From the state’s perspective, local justice systems may seem to be irrational

because their highly particularistic, procedurally irregular work departs from the rule-bound, predictable processes of the state's centralized courts.

In our view, the arguments made by Scott and Silbey significantly complicate the marketing of the state's centralized courts. The initial challenge of overcoming the distance between official courts and pure consent is made more difficult by the epistemological distance between the state and its would-be litigants. Advocates of centralized courts must not only persuade disputing parties that the independence of law and judges makes for an efficient and fair process superior to the services offered by local courts, but also that "efficiency" and "fairness" should themselves be thought about in a new way. The successful packaging of centralized courts requires, in other words, the substitution of independence for more direct forms of consent and the displacement of local knowledge by the theories and logics of the state.

This is not to say that the contest between centralized courts and local alternatives will be conducted exclusively in terms of efficiency, fairness, and assertions of incomprehensibility. The effort to advance centralized courts will, like any political effort, also engage contending groups and their conflicting material interests. Yet the presence of competing ambitions and claims for power does not mean that analysis should be reduced to the clash of interest groups. Politics virtually "always involve[s] efforts by political actors to calculate, exert, and resist the effects of various constraints and incentives upon their own existing interests and those of others." And yet "politics also involves ongoing efforts to persuade others via normative arguments that they should think of themselves and their interests differently than they do" (Smith 1992:16, emphasis original). To focus on how the state "sells" individuals on its institutions is to call attention to the dimension of politics concerned with altering the sense competing parties have of the issues at stake.

The New York State Justice Courts

To test our account of the state's supply-side logic we turn to the case of the New York state town and village courts. New York's "Justice Courts," as they are also known, are a collection of more than 1250 town and village courts scattered throughout the state. The Justice Courts are administered by their respective municipalities. The judges who preside over these courts must live in the same town or village that they serve and are elected by its residents. While the bulk of their work is comprised of traffic cases, the Justice Courts hear a range of civil matters, as well as misdemeanours and preliminary hearings for more serious criminal matters. The Justice Courts originate from the British Justice of the Peace tradition and, as a result, judges on these courts are not required to be lawyers. In fact, less than a majority of the judges serving on the Justice Courts have law degrees.

On a number of occasions over the past 50 years, New York state has attempted to reform the Justice Courts and replace them with a centralized state-run system. The extended reform effort has generated a considerable body of evidence about the state's pro-courts "sales pitch," allowing us to see how the state has tried to persuade local residents to abandon their own institutions of dispute resolution for the sake of new state-run alternatives. In recent years, the state has stepped up its efforts and staged a series of legislative and public hearings designed to advance reform. The recent spate of hearings provide even more evidence of state action and permit us to assess the state's marketing plans in detail.

We recognize at the outset that questions may be raised by our proposal to examine the Justice Courts with an analytical framework originally developed with reference to conditions quite different from those of our case study. For example, we rely on Scott's assertion that an

epistemological distance separates state perspectives from those of civil society, and we claim that this distance complicates the state's efforts to sell its courts. Since Scott drew his evidence of epistemological distance from colonial contexts, one might well question the applicability of his argument to our case. Similar doubts may also attend our reliance on Shapiro. Shapiro wrote about instances in which fledgling states promoted centralized courts as replacements for pre-existing, wholly independent courts operating at the local level. By contrast, the New York State Justice Courts have some links to the well-established central administration that is seeking to reform them. One may properly say that the Justice Courts are "outside" the state system in the sense that their judges originate from, and are selected and controlled by, the localities who fund them. The state nonetheless possesses a limited degree of authority over the Justice Courts via the state's Commission on Judicial Conduct and the Office of the Comptroller.¹ Although it is true that the Justice Courts operate at quite a distance from the central administration, it is also true that New York is simply not in the same position as a new state attempting to assert authority over the local provinces for the first time.

We acknowledge these doubts and suggest that that they actually point toward the potential strength of our analysis. Although we begin with scholarly arguments developed in the context of state formation, our aim is to develop a theory of supply side logic that is applicable more broadly. Taken together, the work of Scott and Shapiro tell us to expect claims of efficiency, fairness, and incomprehensibility whenever states are trying to establish their courts during formative periods. If we find similar claims in a different context, then we will have shown that the official marketing of courts has similar characteristics across a range of circumstances. Thus, it is partly because New York state offers a novel set of conditions that it provides a good test for our general theory about how official courts are "sold."

We also recognize that our application of Scott’s theory raises legitimate questions about how we are characterizing the state given that actors on either sides of this debate have linkages to both the state and civil society. For example, in New York state some of the most vocal advocates of centralized courts are non-state actors such as representatives of professional law associations, domestic violence organizations, and court reform groups. As noted above, our reading of Scott stresses the significance of adopting a state perspective – a perspective that “sees” in terms conducive to centralized governance and that finds local ways of knowing illegible. It is our contention that reformers, though they need not be state actors themselves, nevertheless adopt a state perspective by arguing for centralized courts that are grounded in conceptualizations of efficiency and fairness that serve the state’s purposes. In contrast, the defenders of the Justice Courts adopt a different perspective by arguing for a justice system grounded in conceptualizations of efficiency and fairness that stress the value of local ways of knowing and doing. Therefore for our purposes, and in keeping with Scott’s approach, we characterize “the state” as a perspective and not a fixed institutional identity, acknowledging that the adoption of a state perspective with respect to justice delivery need not imply alignment with the state’s interests in all cases.

Finally, we acknowledge that the distance between state and local perspectives may also involve material conflicts between (i) a locality that enjoys the monetary rewards that follow from the collection of traffic and parking violations, and (ii) a state that seeks to capture that revenue for itself. The fight over funds raises the prospect that assertions about fairness and efficiency in the reform debate are nothing more than a cover for the protection of material interests. And, indeed, one can find some material in the records supporting this view.²

We argue, however, that such an explanation is quite incomplete. The fiscal incentives to maintain control over the local courts varies greatly across localities and actors in New York.³ As several defenders of the Justice Courts note, if monetary concerns were their only motivation they would in fact support state efforts to take over the administration of local justice. An exclusive focus on material interests simply does not explain why actors who do not benefit materially still defend the courts. This suggests that the arguments framed in terms of efficiency and fairness actually do address -- as participants in the debate themselves maintain -- genuine bones of contention. Material interests no doubt shape the political struggle; but efforts to persuade actors to think about their interests in different ways are also important.

Before beginning our analysis, a few orienting remarks may be of use. We examine official reports and public hearing transcripts relating to Justice Court reform over a more than 50 year period (1953- present). We present our case study in two periods. The first period, beginning in 1953 and lasting into the late 1990s, features several state attempts to abolish the Justice Courts as part of larger reform initiatives aimed at overhauling the entire state court system. While major reforms to the overall system were accomplished as a result, the state found itself unable to make the desired changes to the Justice Courts. The key documents we analyze from this period are the Tweed and Dominick Commission reports. The second, more recent period of reform stretches over the last decade and shows the state trying to contain the Justice Courts through a series of compromise reforms that fall short of complete abolishment while still attempting to move the local courts under greater state control. The second period is notable because it involves in-depth and sustained attention to the Justice Courts alone, without accompanying efforts to change the larger state judicial system. The key documents we analyze in this period are the Dunne Commission's second report, transcripts from four public hearings

convened by the Dunne Commission (Ithaca, Albany, White Plains, and Rochester) as well as the State Assembly and Senate hearings on the Justice Courts.

Although the two periods of our case study present a record of frustrated reform and shifting state strategies, our aim is not to provide a causal explanation for why the state's efforts have repeatedly failed or why the state's approach to reform has changed over time. Instead we aim to show that regardless of the state's failures and changing strategies, the same features are present in its efforts to convince the people of the superiority of the state's preferred system of justice. The analysis is presented as follows. Taking each reform period in turn, we begin with an overview of the central events and outcomes, followed by our analysis of key arguments. Our analysis of the more recent reform period is more detailed because it is characterized by a more focused attention on the Justice Courts alone instead of a broader reform agenda. We do not try to valorize or romanticize the town and village courts as some of their defenders do, nor do we specifically endorse any of the state's preferred reform strategies or claims. Our argument leaves aside questions about which system of justice is best and focuses instead on the state's efforts to portray the Justice Courts as inefficient, unfair, and ultimately unintelligible to a public that has consistently expressed its attachment to its local systems.

A final word on method. Our analysis of documents and transcripts is guided by framing theory which aims to explain "the process by which people develop a particular conceptualization of an issue or reorient their thinking about an issue" (Chong and Druckman 2007: 104). More specifically, to frame is "to select some aspects of perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described" (Entman 1993: 52). Although framing research often focuses on the effects that elite

frames have on citizens' attitudes and beliefs (Kinder 2003, Jacoby 2000, Kinder and Sanders 1996, Nelson and Kinder 1996), other work has also shown that citizens adopt the frames they learn in discussion with other citizens (Gamson 1992, Druckman and Nelson 2003, Walsh 2003), and that social movement organizations use frames to mobilize and coordinate individuals around common understandings (Snow and Benford 1992).

Since ours is not an argument about the relative salience of competing frames or a causal argument that relates particular frames to particular reform outcomes, we do not undertake to count or systematically measure the frequency of different frames. Instead, we pay special attention to the concepts of efficiency, fairness, and incomprehensibility to see whether they appear and if so, how they are conceptualized. Throughout the documents and the reform debate, we find those who take the state perspective repeatedly adopt a framing of *fairness as due process* and *efficiency as uninterrupted service* in their efforts to sell the centralized courts. In the recent hearings especially, where the arguments of Justice Court defenders are explicit, we find alternate frames that we label *fairness as contextualized process* and *efficiency as proximity* that justify resistance to centralization and consolidation. Across both periods we find the state framing the *local justice system as incomprehensible*. The presence of these five frames suggests that the reform proposals and the reform debate conform to our expectation that centralized courts will be "sold" not only by claiming that the independence of the state's law and judges make for a more efficient and fair process, but also by insisting that the ideas of "efficiency" and "fairness" must themselves be made newly comprehensible.

The First Period of Reform

Over the past five decades there have been a number of state efforts to reform the Justice Courts. Each reform effort has failed – only to have another spring up.⁴ The first period of reform that we discuss began with a major state effort in the 1950s and continued with another major effort in the 1970s (Special Commission 2008: 26-28; New York State Office of Court Administration 2006: 14-16 [hereinafter “OCA 2006”]).

Tweed Commission

In 1953 the New York state legislature established the Temporary Commission on the Courts chaired by Harrison Tweed. The Tweed Commission was tasked with a comprehensive review of the state’s judicial system and addressed the Justice Courts for the first time in a 1955 report by the Subcommittee on Modernization and Simplification of the Court Structure chaired by Louise Loeb. The 1955 report recommended a broad restructuring of all the state’s courts including the replacement of the Justice Courts with a district system of local courts that would be fully integrated into a simplified overall system of state-run courts. Specific to the Justice Courts the report unequivocally stated that non-lawyer justices were undesirable and should be replaced:

There is no need here to dwell upon the merits and demerits of the Justice of Peace system and the lay judge. The Subcommittee, however, regards the lay judge as one of the serious shortcomings inherent in our present system not because of any lack of good will or effort upon the part of those officers, but because it feels that it is essential that legal questions be determined by one trained in the law, since good will and hard work alone will often not solve legal problems.

(Temporary State Commission on the Courts 1955: 60)

Encountering significant resistance to its recommendations – based on a far more positive perspective on the local processing of disputes – the Commission would later back pedal on its plans to eliminate the Justice Courts. Noting the way in which the original proposal had been “vigorously opposed, in whole or in part, by present judges of Town, Village and City Courts, by residents and officials of the area served, by members of the legislature and others,” the 1958 report recommended that the Justice Courts be left out of the restructuring of the state’s judicial system (Temporary State Commission on the Courts 1958: 17) settling instead for increased training for non-lawyer judges and some state administrative supervision of the local courts. The reversal in position was dramatic, and yet it remained clear that the Commission had not really changed its mind or been persuaded by the “vigorous opposition” it faced from local actors. The Commission made its view explicit in the revised recommendations:

The Commission is still convinced of the soundness of those [prior] recommendations, but is not willing to jeopardize the opportunity for major improvements in all other courts by insistence at this time on its suggestions for these courts.

(Temporary State Commission on the Courts 1958: 6)⁵

The Commission also expressed confidence that the defenders of the Justice Courts would, in time, come to see the state’s perspective.⁶ Ignoring the Tweed Commission, the Judicial Conference next issued recommendations of its own to abolish the Justice Courts.⁷ The Tweed Commission had, however, clearly identified a source of resistance that could not be easily side

stepped. The legislature roundly rejected the Judicial Conference recommendations for abolition and only minor training and administrative reforms to the Justice Courts were enacted.

Dominick Commission

And yet the drive for reform by the state continued. A decade after the Tweed Commission finished its work another major commission was formed to consider broad reform to New York state's judiciary and this commission again recommended major changes to the local courts. In 1973, the Temporary State Commission on the State Court System, chaired by Senator D. Clinton Dominick, issued 180 recommendations, which were the culmination of two and a half years of study (Special Commission 2008: 28). Among the recommendations were the proposals to abolish the village courts, eliminate town courts where state District Courts were available, and remove the Justice Courts' misdemeanour jurisdiction (Temporary State Commission on the State Court System 1973: 22-23). Like the Tweed Commission reports, the Dominick Commission report initiated another round of significant reforms to the state judiciary including the introduction of a Chief Administrative Judge and the centralization of court administrative functions. But, as had been the case before, the legislature ignored the recommendations directly pertaining to the Justice Courts and no significant reforms at the local level occurred. Local justice systems would, once again, remain largely unchanged.

As the Tweed Commission had done in 1955, the Dominick Commission expressed the view that law-trained judges were the only acceptable choice for processing criminal disputes:

Foremost, full-time legally trained judges would be deciding those actions that demand professional skills. When, an individual faces up to a year in jail on a misdemeanour charge, he should be afforded no less than this.

(Temporary State Commission on the State Court System 1973: 23)

The Dominick Commission supported its view by citing due process violations and fears that part time judging was resulting in trial delays and interruptions. The commission further argued that the Justice Courts favored locals, and that their decentralized nature made them resistant to administrative controls and difficult to service by probation officers, prosecutors, and administrative staff. Yet, in spite of the commission's promise to make the Justice Courts more efficient and fair, legislators remained unmoved.

Framing the Debate in the First Reform Period

The first efforts at reform had clearly not been successful. Our concern, however, is not about success, but about marketing. What sales pitch had the state used on behalf of its proposals? Because the Tweed and Dominick Commissions both pursued broad reforms, their attempts to persuade the public on the specific question of the Justice Courts were somewhat limited. Nonetheless several features of the state's logic and argumentation stand out. As expected, efficiency and fairness were key elements of the state's case for its courts. Framing *fairness as due process*, the state argued that only law-trained judges had the technical knowledge required to protect disputants' rights and that a professionalized judiciary made the state's proposed system the only sensible option. Framing *efficiency as uninterrupted service*, the state stressed the merits of easy coordination between different actors in the system (probation officers, prosecutors, administrators etc.), and argued that a centralized system of courts was uniquely suited to the task of local justice delivery.

The commission reports all rejected the alternative view that lay judges had valuable skills and qualifications relevant to the administration of justice (an alternative view that implied altogether different conceptions of fairness and efficiency). Indeed, this alternative view was so completely dismissed that its emphasis on local control and local knowledge was never actually articulated in the official reports as a coherent position to be opposed. Even after encountering significant local opposition to the state proposal – and in the case of the Tweed Commission, even after bowing to the local opposition – reformers remained absolutely convinced that their courts were not only superior but also uniquely appropriate to the task of local justice. That reformers were framing the *local justice system as incomprehensible* was made clear by this conviction as well as their confidence that local attachments to the Justice Courts would simply fade away over time.

The Second Period of Reform

In the last decade renewed reform efforts have provided the impetus for numerous commissions and public hearings. This recent period is distinct because instead of taking an “abolish and replace” position like the Tweed and Dominick Commissions, it is dominated by a “consolidate and contain” strategy for extending state control over local justice. This began in 2003 when the Office of the State Comptroller (OSC) issued a report recommending voluntary consolidation of town and village courts (Special Commission 2008: 36) and continued three years later when the OSC called for legislation compelling consolidation.⁸ This approach was also supported by two more broadly cast Commissions including the Commission on the Future of Indigent Defense Services in June 2006 and the New York State Commission on Local Government Efficiency and Competitiveness in 2008.

The second reform period is also notable for its several efforts focused exclusively on the Justice Courts. Responding to the Commission on the Future of Indigent Defense Services report, the OCA announced its Action Plan for the Justice Courts and in November 2006, two months after the *New York Times* ran a three part expose on the shortcomings of the Justice Courts (see Glaberson 2006a-c), issued its report. The OCA report set out a series of reforms, including facility upgrades, new state reporting requirements, and increased training, which it would begin pursuing immediately (OCA 2006: 4-6; Special Commission 2008: 40-42). Soon thereafter, the state assembly and senate conducted hearings in December 2006 and January 2007, respectively (New York State Assembly Standing Committee on Judiciary and Assembly Standing Committee on Codes 2006 [hereinafter Assembly Hearing 2006]; New York State Senate Standing Committee on Judiciary 2007 [hereinafter Senate Hearing 2007]) resulting in minor legislative changes pertaining to consolidation and extending the state's role in administering the courts.⁹

Nowhere was the exclusive focus on the Justice Courts more apparent than in the work of the Special Commission on the Future of New York State Courts chaired by Carey R. Dunne. The Dunne Commission's first report, issued in February 2007 noted the renewed attention to reforming the local courts and concluded that "additional time and study is needed before structural or other reforms can be evaluated" (Special Commission on the Future of New York State Courts 2007a:11 [hereinafter Special Commission 2007a]).¹⁰ After receiving authorization for additional study, a slightly reconstituted Dunne Commission continued its work by concentrating on the Justice Courts and convening four public hearings around the state.

In September 2008 after six months of study the Dunne Commission issued its second report entitled *Justice Most Local*, the first report in New York state's history dedicated

exclusively to a review of the town and village courts. In keeping with the general reform approach of the second period, it outlined a proposal featuring¹¹ a legally enforceable consolidation plan, state-wide enforceable minimum standards, and an “opt-out” right to have misdemeanor cases heard by an attorney judge. In pursuing a compromise strategy that stopped short of complete replacement of the local justice system, the Dunne Commission claimed to be finding a way “to achieve the necessary improvements without abandoning the system entirely, something that we believe there is no consensus or political will to do” (Special Commission 2008: 107). Thus the Dunne Commission expressed a somewhat chastened tone that captured the spirit of all of the second-period reform recommendations.

Framing the Debate in the Second Reform Period

Despite taking a different approach than that of the first-period reforms, the second-period reforms showed the state continuing to emphasize the merits of its alternative in terms of efficiency and fairness. Furthermore, in an effort to persuade a public attached to local control of their courts that a more centralized state system was the only sensible way to deliver justice, the state continued to advance particular understandings of efficiency and fairness that clashed with those of Justice Court defenders. The clash was evident in the very framing of the Dunne report which stressed that the Justice Courts’ very configuration defied any rational logic. Using language like “overabundant,” “redundant,” “fragmented,” “current jumble,” and “*ad hoc*” to describe the Justice Courts, reformers argued that measures were needed to establish an orderly system of local justice. The Dunne Commission framed the *local justice system as incomprehensible* in their report’s cover design (Figure 1). The map of New York state on the

report cover used dots to indicate the location of each town and village court. The significance of this image was explained in the report itself:

If one were to map out from scratch a rational and efficient system of local courts to address the varying dockets and demographics throughout our state, the result would look nothing like the blur of courts that is depicted on the cover of this report. The current array of Justice Courts has grown on an *ad hoc* basis over hundreds of years with few or no questions raised along the way... As a result, Justice Courts are sprawled around the state, with many counties supporting a glut of courts... there are serious economic and quality-of-justice consequences to this vast array of courts.

(Special Commission 2008: 11)

Figure 1 about here

According to the report, this unwieldy distribution was part of what made oversight so challenging and prevented the standardization of services. The “disorder” of the Justice Courts was not only an inefficient use of resources, but also the reason why service delivery suffered and court users found local processing unreliable. Thus, even as the state adopted a much less ambitious position regarding local justice reform, it continued to “market” its proposals as a matter of bringing efficiency and fairness to an unintelligible jumble of local practices.

The official sales pitch for state-run courts was repeatedly advanced in public testimony at six public hearings convened by the assembly, the senate, and the Dunne Commission itself. As we demonstrate below, these public hearings were dominated by claims of efficiency and fairness arrayed around an epistemological chasm separating proponents of reforms from

defenders of the existing system. Unlike the reports, these hearings allow us to examine the state's sales pitch for reform when located in direct exchange with opponents and to examine for the first time the alternate conceptions of efficiency and fairness these opponents adopt.

Efficiency Frames in the Public Hearings

Advocates of structural change in the second-wave reform public hearings made repeated claims about the efficiency of a centralized or consolidated system. As in the first reform period this argument focused on the way a more centralized system of courts would be easier to administer, oversee, and staff. Describing the Justice Courts as institutions that “cry out for more supervision from the central court administration,” Michael Bongiorno, District Attorney for Rockland County, argued that “district courts are more efficient and cost effective than the current fractured justice court network.” (Special Commission on the Future of the New York State Courts 2007d: 78, 82 [hereinafter Special Commission 2007d]). Challenging the notion that locally run courts in every locality provided efficient access to justice, reformers stressed that the new courts, because of their centralized administration, would actually improve access framing efficiency once again *as uninterrupted service*. They argued that a centralized system would provide courts that were open daily instead of weekly or monthly and staffed full-time by district attorneys who currently travel between the many Justice Courts in their area. In the view of Greg Lubow of the New York State Association of Criminal Defense Attorneys, only a new centralized scheme, and not the current system, would provide true “access to justice.”

I have heard testimony here that the Justice Courts will provide access – close access.

That's nonsense. Most town and village Justice Courts have no access, except on the

one night a week that they sit, and one night a month, or the one afternoon a month, when the district attorney is present. ... They do not provide access.

(Assembly Hearing 2006: 294)

Thus reformers made their case by emphasizing that centralization, or at least consolidation, was the only sensible approach to delivering *efficiency as uninterrupted service*.

To further stress the irrationality of the current system and the perspective that links efficiency to the local nature of the courts, reformers challenged the claim that the Justice Courts were truly local in two key ways. First, they argued the “localism” of the Justice Courts was highly overdetermined, since in many jurisdictions courts were found virtually across the street from each other. As Lubow elaborated, arguments based on proximity alone did not justify the status quo.

It’s absurd. The duplication of services is ridiculous. It was created at a time when traveling five miles between communities over dirt roads and through the woods and forests would take three to four hours. If you wagon it might take a whole day.

Today traveling five miles takes five minutes. ... It’s a waste of resources.

(Special Commission on the Future of the New York State Courts 2007b: 77

[hereinafter “Special Commission 2007b”])

Second, reformers noted that “local justice” was not particularly local any longer, especially now that the Justice Courts heard such a large number of traffic cases. In reality, many court users travelled long distances to contest speeding or parking tickets they had received while passing through or visiting a locality.¹² As Barbara Bartoletti of the League of Women Voters contended,

the notion that Justice Courts were servicing mainly the residents of their town or village was simply not accurate.

Most litigants already travel to so-called local courts. Anyone who has gotten a traffic ticket on their way to Rochester or Buffalo and has to return somewhere between Rochester and Utica to attend a local court know of that experience.

(Special Commission 2007b: 53)

The reformers' efficiency arguments were contested by local actors who conceptualized efficiency and access to justice from the perspective of on-the-ground court users adopting what we call the *efficiency as proximity* frame. Defenders of the Justice Courts emphasized the benefits of physical proximity, evening hours, and free parking – all of which help suit local courts to user needs. Access was particularly important, defenders argued, in rural areas where social services were limited. Claiming that the Justice Courts served a unique purpose in these rural jurisdictions, defenders like Hon. Schneider-Dennenberg, Gallatin Town Judge, insisted that “often times the courts are the first contact in which extreme family or neighborhood dysfunction is indentified” (Special Commission 2007b: 242).¹³ Defenders also emphasized that without the local courts operating on flexible hours and the willingness of local magistrates to be on call for late night arraignments, defendants would have to be transported to other jurisdictions and detained for unnecessarily long periods. The Justice Court defenders thus advanced different notions of efficiency that made the state's arguments appear skewed and self-serving. This was perhaps best articulated in testimony from Hon. Vanderwater, a Van Buren town justice, in his testimony before the Dunne Commission public hearing in Albany:

A justice system organized around the needs and best efficiencies for law enforcement, for defense, for prosecution would each likely be a little different. The organization and efficiency of the local justice system should have as its most compelling considerations, first of all, the ability to provide justice, of course, as well as the needs and preferences of the community it serves, not the needs and preferences of the people that serve the community, if push comes to shove.

(Special Commission 2007b: 145)

Constantly repeating their rallying cry that the Justice Courts were the “courts closest to the people,”¹⁴ defenders of the status quo argued that centralization and consolidation would compromise the courts’ central value which they framed in terms of *efficiency as proximity*.

Fairness Frames in the Public Hearings

In addition to claims about efficiency, the second-period public hearings prominently featured arguments about fairness. The state perspective again framed *fairness as due process*, stressing objectivity, and equal treatment and portraying the local aspects of the courts as a threat to fairness so defined. While they were sympathetic to the intentions of local justices, reformers believed local judges were approaching their task in inappropriate ways and that they were structurally positioned to be unable to make fair judgements due to their lack of professional legal training. Lubow stated:

These are people that come from a system where they were the justice of the peace.

They were members of their town board. They were protectors of the community.

They were not impartial judges. They are not people who consider the evidence in a

cold sometimes hard way and come to a legal decision. They're the people that have to go to the coffee shop the next morning and say 'Why the heck did you let that kid out of jail? Why didn't you put him in jail? We know he broke into the house.' The political and personal pressure on those judges is incredible.

(Special Commission 2007b: 78 *emphasis added*)

Reformers highlighted how these serious shortcomings of the local courts left particular groups at a systematic disadvantage. According to this view, the Justice Courts gave special treatment to locals (Assembly Hearing 2006: 208), encouraged inappropriate collusion between prosecutors, police and judges (Special Commission 2007e: 39), and resulted in the unfair handling of domestic violence cases (Special Commission 2007d: 43). Many groups, including non-locals, criminal defendants, victims of domestic violence, would most likely fare better in a reformed system.

Framing the problem in this way suggested two ways that state run courts would be more sensible. First, because the reformers equated fairness with distance, objectivity, and equal treatment for all, they argued that centralization or consolidation would increase fairness by reducing the extent to which judges were locally rooted (though they would still be elected as is the common practice in New York state). Second, reformers argued that requiring or increasing the number of lawyer judges would ensure that adjudicators would, because of their professional training, be unbiased and therefore fair.

This call for credentialed judges elicited a great deal of discussion featuring competing notions of fairness (the discussion was extensive even though the reform proposals ultimately left the role of non-lawyer judges unchanged).¹⁵ Framing *fairness as due process* implied that

dispute resolution should be viewed as a technical and professional task that was properly handled by legal experts. In the words of Lorraine Power Tharp, former President of the New York State Bar Association, it was therefore “offensive, to say the least, that nail specialists and massage therapists are required to have more training than Justice Courts’ non-attorney justices”(Assembly Hearing 2006: 66). In its most extreme form framing *fairness as due process* underscored the necessity of law trained judges on constitutional grounds. Although the New York State Court of Appeals ruled in 1983 that there was no constitutional right to lawyer judges, many reformers argued such a decision would not be replicated today, or appealed instead to federal constitutional standards as their measuring stick.¹⁶ A slightly less extreme implication of this framing of fairness emphasized the complexity of contemporary criminal law and suggested that these developments made the presence of non-lawyer judges an outmoded idea whose time had passed (Assembly Hearing 2006: 286). The argument about the complexities of criminal procedure provided an opening to legislators (many of whom appear to be seeking a compromise position) to suggest that it was only in the criminal arena that the lawyer judges would be necessary. For example, speaking to a non-lawyer magistrate witness, Assemblymember O’Donnel stated:

I would put almost any decision in your hands, and feel comfortable about your ability to make that.¹⁷ The idea that you would be able to admit documents into evidence in a way that is appropriate in a criminal proceeding, and have – you know, that seems to me, a really big thing to expect someone to bite off, who does not have the legal training. And since I would have to wait a decade from getting out of law school to be able to sit there to do that, it does strike me as odd that it’s being done in places in this State without that training.

(Assembly Hearing 2006: 216)

Some reformers expressed a willingness to assist non-lawyer judges with additional resources on the grounds that it was impractical to staff all the Justice Courts with properly credentialed judges (Assembly Hearing 2006: 30). But this willingness to help support non-lawyer judges hardly translated into strong support for them. Many reformers favored consolidation efforts as a way of reducing the number of non-lawyer judges suggesting that despite their practical resignation to lay judges, they too were adopting the *fairness as due process* frame. Other reformers more adamantly opposed lay judges. Daniel Murdock of the Fund for Modern Courts, for example, claimed that he had not heard “a well reasoned affirmative defense of having non-lawyers serve as judges” (Assembly Hearing 2006: 230) suggesting there was no intelligible reason, aside from feasibility, to oppose lawyer judges or in other words, that there was no way to conceptualize fairness except as due process.

In actuality there *was* a positive defense of non-lawyer judges and it was grounded in a conception of fairness that expressed a fundamentally different approach to dispute processing than that advocated by state-centered reformers. Justice Court defenders reasoned that fairness did not always require equal treatment in the way assumed by the *fairness as due process* frame. From this perspective the relevance of legal training for judges was often called into question, as it was by Judge Kramer, Delaware Town Justice when he stated: “I really don’t fully understand the rationale of those who feel a law degree should be a requirement for town and village justices” (Special Commission 2007d: 153). The alternate framing of fairness favored by Justice Court defenders implied that lay judges were in fact most appropriate for the task. As Kevin Crawford of the Association of Towns of the State of New York argued, it was “not just out of

necessity” that non-lawyer judges should remain but also because they were equally, and perhaps more, likely than lawyer judges to possess the particular forms of local knowledge integral to the administration of local justice (Senate Hearing 2007: 184). On this view, local knowledge of culture, place, and people might call for *unequal* treatment in order to arrive at decisions that the local community considered fair. Thus the local perspective adopted a framing of *fairness as contextualized process* that stressed benefits of lay judges and the local knowledge they possess.

The appeal to “local knowledge” took several forms in the arguments of Justice Court defenders. First, it was described in terms of knowledge of rural life in contrast to the urban realities of “downstate,” for example in the comments made by Justice Fuller in his testimony before the Assembly:

It’s remarkable how the non-lawyers know a lot of things that the lawyers don’t know. ... if you’re talking about game wardens, if you’re talking about trucks, if you’re talking about other areas that-- ... they do bring something.

(Assembly Hearing, p. 159)

Though Justice Fuller did not elaborate, his comments implied that knowledge of rural practices like hunting were important for a local judge’s ability to resolve disputes effectively. Such “rural cultural competency” was more important than professional legal training – training that seemed here to be associated with urban life.

Second, local knowledge was praised because of the capacities it instilled in judges. Local justices were expected to have a greater familiarity and commitment to local laws and to be attuned to local needs and concerns. One concrete example was offered during the Assembly hearings by Judge Bogle of the New York State Magistrates Association who argued that local

magistrates, by virtue of their rootedness in and familiarity with the locality, would be more likely to act immediately on a zoning violation because they appreciated its importance to the local community in a way that outsiders would not (Assembly Hearing 2006: 209). Noting that this familiarity was seen by reformers as a limitation and even a reason for judges to exclude themselves from cases Justice Fuller articulated the clash of conceptions of fairness explicitly:

Well I can tell you that I would have to exclude myself from every case on that basis. Because if someone describes an area in Tuckahoe, I know where it is, I can visualize it. But to me that's not a problem. I think it's an advantage, because you can see really what area you're dealing with.

(Assembly Hearing 2006: 150)¹⁸

Third, local knowledge was linked to people as well as place, revealing the problem-solving and social work orientation that many Justice Court defenders assigned to the role of local justice. Some, such as Richard Hoffman, drew explicit comparisons to the urban problem-solving courts, describing the Justice Courts as “progenitors of what we now proudly call community courts, courts that strive to resolve life situations as well as the cases of their clients by connecting them to necessary services” (Special Commission 2007b: 225). Others emphasized the “human side” of this familiarity and its impact on their interactions with defendants which they say were characterized by eye contact, handshakes, and the tendency to explain things in detail to litigants.¹⁹ Overall court defenders argued that a well-developed sense of place helped local justices identify social problems like domestic violence and addiction, and address them through sentencing that involved treatment and referral (Special Commission 2007b: 181). As Chief Pickering of the Webster Town Police noted:

Our local judges become very familiar with our frequent flyers [recidivists] that make their way through the system. And they can, because of that knowledge, they can address the sentences or the scales of justice accordingly and order appropriate referrals for necessary help.

(Special Commission 2007e: 246)

Therefore, from a perspective that frames *fairness as contextualized process* and accepts the need for unequal treatment of litigants in different circumstances, knowledge of local culture, place, and people is far more important than legal training. The fairness of locally contextualized decisions is based in a conception of judicial legitimacy rooted in consent. While Justice Court reformers stressed the importance of independence and professional training, Justice Court defenders claimed that public confidence in the local courts flowed from the fact of local judicial elections. Although reformers never challenged the institution of judicial elections directly in their criticisms of the local courts, their emphasis on legal credentials for judges was considered a threat to the local understanding of how the justice system ultimately elicits consent. From this perspective, people consent to the courts because they had a hand in staffing them, not because they adhere to some abstract ideal of justice. Michael Scortino, Town Justice of Parma traced this notion to America's revolutionary struggle for independence stating that:

Bit by bit, one could argue that we are reconstructing that which the patriots so nobly fought against those many years ago. To deny the people local control over their own courts and their own judges is far more important to our democracy than are isolated instances of misjudgement.

(Special Commission 2007e: 268)

Any constraints on judicial qualifications (especially the requirement of lawyer judges) limited the ability of the people to choose their own adjudicators. As Justice Vanderwater claimed, the insistence that judicial qualifications be increased threatened to de-legitimize the local courts in the eyes of the community:

The requirement of a law degree is an unnecessary barrier to running for town or village judges. Unnecessary barriers to running for office, regardless of the motive, are harmful to the basic fundamentals of democracy.

(Special Commission 2007b: 154)

Therefore, it was precisely the feature that reformers saw as the central problem with local justice (i.e., unequal treatment of litigants) that defenders highlighted as its great benefit by framing *fairness as contextualized process*. Furthermore, defenders not only saw reformist strategies to make local courts “more fair” on their own terms as counterproductive but also as a threat to the very legitimacy of local courts rooted in democratic consent. The packaging of the centralized state courts in terms of fairness involved presenting altogether different conceptions of judicial legitimacy and fairness as the only ones that could be considered sensible.

Conclusion

We began by raising a question about the logic of supply: what arguments and claims does the state make as it attempts to “sell” its own centralized courts to disputing parties? Drawing on the existing literature, we argued that the state would, in part, make the pitch for its judiciary by claiming the centralized courts are more efficient and fair than any alternatives. We

also argued, however, that these claims of superiority would be complicated by an epistemological distance between the state and the would-be litigants it hoped to attract. Centralized courts are structured and understood in the context of state interests and purposes; as a result, the state considers its own dispute processing services to be the only possible coherent option. From this perspective, other forms of dispute resolution, designed to suit the interests and purposes of other actors, are bound to be seen as incomprehensible. Thus, in selling its centralized courts, we argue that the state must not only make relatively straightforward arguments about efficiency and fairness, but also find ways of persuading an audience of potential court users that the state itself considers to be irrational.

We then applied our theory to the case of New York, where the state has worked for many years to displace the local system of Justice Courts with its own state-run system of district courts. Examining the legislative and bureaucratic efforts of the past five decades, we found that the state has repeatedly made arguments about the superior efficiency and fairness of its courts, only to find these arguments blocked by local judges and community members whom think about efficiency, fairness, and the function of courts in a fundamentally different way. Even as the state has lowered its goals and sought to manage the Justice Courts rather than abolish them, the distance between the different ways of knowing at the state and local level remains apparent in the ongoing reform debates. The presence of these features and the import of this disconnect in the New York case suggests that our account has more generalized relevance. If efficiency, fairness, and different epistemologies are salient in a context where the cultural distance between state and local actors is relatively minute, and where the developed state already has partial involvement in the administration of local courts, there is good reason to expect to find these elements in other contexts.

We have developed theoretical expectations for the state's supply side logic and we have confirmed these through an in-depth analysis of one particularly revealing case. Future work is needed to develop this framework further, (i) by examining efforts to abolish local courts in other jurisdictions, both in other US states as well as in different national contexts; (ii) by broadening the focus to include state's efforts to extend a centralized rule of law in contexts beyond local courts; and (iii) by considering how other suppliers of dispute settlement systems make their sales pitch and how their strategies may differ from those of the state. Such additional investigations would further supplement the already well-established demand-side focus of sociolegal scholarship and provide new insight about the way courts operate. As this logic of the supply is further elaborated it will enable the exploration of causal relationships between its elements and various outcomes. For example, where reforms have proceeded more easily the result may be related to a supplier's success in selling its own conceptions of efficiency and fairness to local actors. By contrast, those contexts where suppliers have been unable to persuade, might suggest a failure to contend with different frames of reference applied at the local level. While the elaboration of this supply side framework in other contexts and the articulation of its causal implications must await future work, we hope here to have established convincingly that efficiency, fairness, and incomprehensibility are central features of the state's attempts to establish its centralized courts.

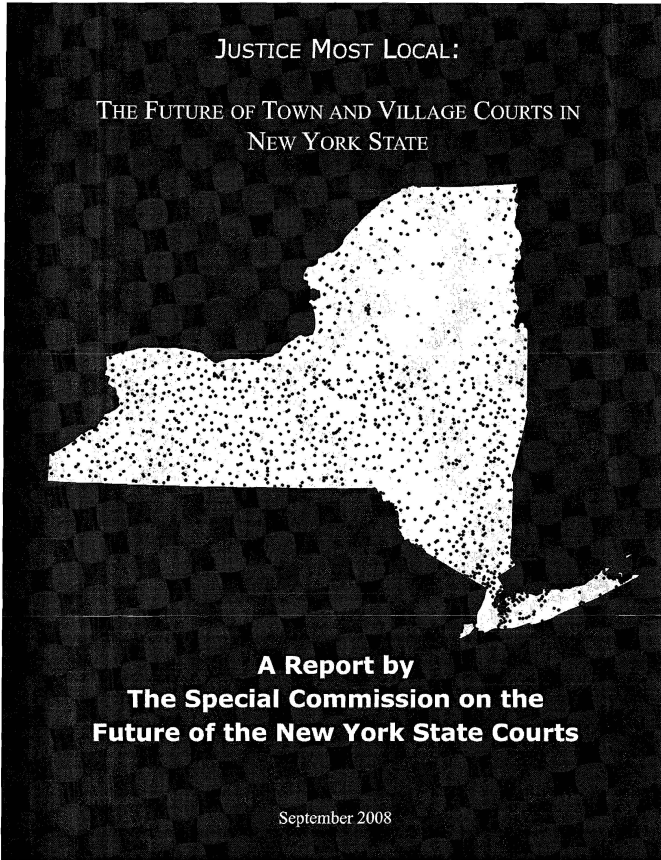


Figure 1. Cover of *Justice Most Local* Report

NOTES

¹ Though the state run Commission on Judicial Conduct does have jurisdiction to investigate and censure local justices, the local courts operate relatively independently. As a recent report puts it “while they, in theory, answer to several different governmental bodies, they are entirely under the control of no one.” (The Special Commission on the Future of the New York State Courts 2008: 33), [hereinafter “Special Commission 2008”]).

² For example, Michael Bongiorno expressed his skepticism about the motives of local governments who advocate for keeping their control over the courts suggesting that Justice Courts were viewed “in some villages” as “money-making ventures, not as dispensers of justice” (New York State Assembly Standing Committee on Judiciary and Assembly Standing Committee on Codes 2006 [hereinafter Assembly Hearing 2006]: 126).

³ As Gerald Geist from the New York Association of Towns points out “you know it is hard to come to a conclusion or a determination that this is a profit making venture. ... Every town or village is in a different situation, in terms of profitability or lack of profitability” (Special Commission on the Future of the New York State Courts 2007d: [hereinafter Special Commission 2007d]: 103).

⁴ While these efforts include a small number of reform referenda (e.g., In 1967 Rockland County residents campaigned via referendum to have their Justice Court’s replaced with a district court system. After a surprisingly bitter campaign the reform failed to pass discouraging voters in other jurisdictions from pursuing similar measures -- see Glaberson 2006c.), and reform lawsuits (e.g., In 1983 the Court of Appeals ruled in a 4-3 decision on *People vs. Charles F.* that there is no absolute constitutional right to an adjudication by a law-trained judge thus sealing off one

avenue for forcing Justice Court reforms -- see Glaberson 2006c.), it is the legislative and bureaucratic reform efforts that are most relevant for our purposes, for it is such attempts that are clearest indicators of the state's attempts to "sell" its way of processing disputes to a public accustomed and attached to the locally controlled courts.

⁵ The report concludes: "the Commission believes that the major improvements herein recommended deserve the full support of everyone who wishes to make progress rather than not to start at all" (1958: 18).

⁶ The report states: "Effective administration will, in the opinion of the Commission, furnish sufficient de-tailed data and incentive so that judges themselves, the public and the Legislature can all unite to effect needed improvements in these courts" (1958: 6), and concludes: "Some improvements in the justices of the peace and other local courts will be achieved at once... with the promise of greater improvements in the future" (1958: 18).

⁷ "A uniform institutional court of limited civil and criminal jurisdiction such as is here proposed will be more efficient both in a judicial and in an administrative sense than the present system." (Judicial Conference Recommendations, 1958, p. 16).

⁸ Only two successful efforts at voluntary consolidation have taken place (Special Commission 2008: 49-50).

⁹ Specifically these were provisions allowing more than two contiguous towns to consolidate courts, increases in the Justice Court Assistance Program (JCAP) grant ceiling, expansion of the Administrative Judge's temporary assignment powers, and the disqualification of felons from serving as town or village judges (Special Commission 2008: 44).

¹⁰ As cited in Special Commission 2008: 51.

¹¹ The report makes clear that these elements are the centerpiece of the reform approach. See section heading “Combining Justice Courts Remains the Most Effective Path to Reform” (Special Commission 2008: p. 104).

¹² For more on the discussion about the favoritism towards locals vs. outsiders in the operation of the courts see p. 28 below.

¹³ The notion that it would be the court’s role to identify family or neighborhood dysfunction hints at the different conceptualizations of fairness on either side of the debate- we turn to those shortly.

¹⁴ For examples of the use of the this phrase (“courts closest to the people”) see Special Commission 2007b: 34, 174; Special Commission on the Future of the New York State Courts 2007c: 26, 82 [hereinafter “Special Commission 2007c”]; Special Commission on the Future of the New York State Courts 2007e: 141, 242 [hereinafter “Special Commission 2007e”].

¹⁵ Recent reform proposals include additional training and resources for non-lawyer judges, consolidation and relaxed residency requirements to increase the number of lawyer judges, and an opt-out option from having a case heard by a non-lawyer judge but do not directly challenge the presence of non-lawyer judges in the local courts.

¹⁶ See Assembly Hearing 2006: 287 where non-lawyer judges are described as “a fundamental deprivation of the constitutional right to counsel” and Special Commission 2007b: 78-79 where the Supreme Court’s opinion that use of non-lawyer judges “involves such a probability that prejudice will result that it is deemed inherently lacking in due process” is invoked and further where the challenge is made that if a law degree is required to give legal advice it must be required to make a legal decision (185).

¹⁷ Here O'Donnell is referring to his confidence in the ability of non-lawyer judges to make decisions about civil disputes and traffic offenses, elsewhere Commission member Eve Burton explores the option of “splitting the baby” by requiring lawyer judges for criminal but not civil and traffic cases in the local courts (Special Commission 2007b: 58).

¹⁸ See also comments from District Attorney Macnamara at the hearing in Albany “There’s certain issues that go on in those communities. There’s roads and certain crimes that make a bigger difference” (Special Commission 2007b: 139).

¹⁹ For example see comments from Judge O’Hare of the New York State Magistrate’s at the Assembly Hearing explaining how a study of the quality of justice in the local courts “cited items such as eye contact, such as explaining things to them. We are at the town and village levels. Whether you’re—at the town and village levels, we do that all the time. We shake hands, and I’ve see that, with defendants when they’re coming through. We make sure we explain things to them” (183).

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