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Julia C. Lamber

Indiana University Maurer School of Law, lamber@indiana.edu

Mary Lee Luskin

Indiana University - Bloomington

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JOE VAN SEVEREN

Court reform: a view from the bottom

Local limited jurisdiction courts, “the lowest of the lower courts,” have long been the focus of criticism. Reformers, however, must carefully identify and address these courts’ particular problems and needs, because the standard court reform model may not apply.

by Julia Lamber and Mary Lee Luskin

Much, perhaps too much, has been written about lower court reform.¹ Although most of the literature is prescriptive, scholars also have looked at the origins and history of court reform, identifying three periods of activism in this century.² The first, beginning in 1906 with Pound’s catalyzing address to the American Bar Association, saw the formulation of the central tenets of mainstream reform in calls for simplifying court structure, centralizing accountability

within the judiciary, and increasing the professional qualifications of court personnel.³ Under the banner of court unification, these proposals became the manifesto of mainstream reform.

A second wave of activism, in the late 1930s and 1940s, saw the first adoptions of these prescriptions. And a third wave, peaking in the 1960s and 1970s, brought widespread adoption. By the mid-1980s, Henderson and his colleagues⁴ could write that the question was not whether a state court system was unified but the extent of unifi-

cation. And Baar concluded that unification has been accomplished and is unlikely to proceed further.⁵ In this period, courts also became increasingly professionalized.

Yet we should not too quickly conclude that court reform is complete. First, the challenges to the underlying principles of mainstream reform remain.⁶ Second, many “unreformed” courts continue to exist, especially among the lowest of the lower courts—that is, local limited jurisdiction courts in which judges need not be lawyers. Here, and among limited jurisdiction courts more generally, reform has been less thorough than among major trial courts. Baar argues that reformers were less successful with limited jurisdiction courts because the nature of their work made it difficult to integrate them into a unified court structure.⁷ But the failure to “reform” these courts has not meant satisfaction with them, nor has it provided a redefinition of the ideal. Instead, overlapping jurisdictions, local accountability, and nonlawyer judges keep these courts vulnerable to the standard reform critique.⁸

Opposing these pressures is the re-

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1. Task Force on the Administration of Justice, The President’s Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS (1976); The American Bar Association Commission on Standards of Judicial Administration, STANDARDS RELATING TO COURT ORGANIZATION (1974); Silberman, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY (1979); Wheeler and Whitcomb, JUDICIAL ADMINISTRATION (1977).

2. Munger, *Movements for Court Reform: A Preliminary Interpretation*, in Dubois (ed.), THE POLITICS OF JUDICIAL REFORM 51 (1982). See also Glick, *The Politics of State Court Reform*, in Dubois, *id.* at 17; Provine, JUDGING CREDENTIALS: NON-LAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM (1986); Berkson, *A Brief History of Court Reform*, in Berkson, Hays, and Carbon (eds.), MANAGING THE STATE COURTS (1977); Baar, *The Scope and Limits of Court*

Reform, 5 JUST. SYS. J. 274 (1980); Baar, *Inter-court Relations in Comparative Perspective: Toward an Ecology of Trial Courts*, 12 JUST. SYS. J. 19 (1987); Harrington, *Delegalization Reform Movements: A Historical Analysis*, in Abel (ed.), THE POLITICS OF INFORMAL JUSTICE, VOL. 2 (1982).

3. On the elements of mainstream reform, see Baar, *Inter-Court Relations*, *supra* n. 2, at 274-275; Glick, *supra* n. 2, at 18-19.

4. Henderson, Kerwin, Guynes, Baar, Miller, Saizow, and Greiser, THE SIGNIFICANCE OF JUDICIAL STRUCTURE: THE EFFECT OF UNIFICATION ON TRIAL COURT OPERATIONS 8 (1984).

5. Baar, *Inter-Court Relations*, *supra* n. 2, at 24.

6. Baar, *The Scope and Limits of Court Reform*, *supra* n. 2, at 283-285; Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35 (1976).

7. Baar, *Inter-Court Relations*, *supra* n. 2, at 23, suggests that reform does not reach these lower courts because they are limited jurisdiction courts in which judges need not be lawyers.

8. Provine, *supra* n. 2.

surgent political strength of concepts of community, access, and local autonomy, manifested in the growth of alternative dispute resolution and community policing. These forces may help insulate local limited jurisdiction courts or even lead to their expansion. Witness the proposal to use New York's town and village courts as a model for new community-based courts in Manhattan, for example.⁹ How the mainstream reform critique will affect the implementation of such proposals is unclear, but to the degree that new institutions resemble their prototypes, they will be subject to the standard critique and prescriptions. Thus we should expect conflict over structure, jurisdiction, and staffing.

Whether local limited jurisdiction courts are reformed, remain as despised anomalies, or expand, it is important to understand mainstream reform's implications for them. This article looks at the likely impact of standard reform prescriptions for the local limited jurisdiction courts of one state, Indiana. We argue that most prescriptions are merely symbolic: to the extent that the problems reformers identify are real, mainstream reform proposals are unlikely to address them. Instead, reform proposals address non-issues, advocating what are already structural and jurisdictional realities.¹⁰ In other instances, they may do more harm than good. For suggestions for improving these courts, we listened instead to the judges serving in local limited jurisdiction courts, and we propose some measures based on their views.

Empirical study

In recently completed cross-sectional research, we studied the work, finances, and personnel of Indiana's city and town courts. In the fall of 1988, we mailed questionnaires to all city and town court judges, interviewed a subset of them, and collected statistical information from a variety of sources on caseloads, court revenues and expenses, and city and town finances. Elsewhere we report on the personnel, caseloads, and finances of these courts.¹¹ Here we consider the judges' responses to questions about training and other support. In taking

Existing evidence does not show that lawyers and nonlawyers differ in how they judge.

the judges' views seriously, we depart from much of the prescriptive literature, which sees the judges as venal and ignorant at worst and well meaning but incompetent at best.¹²

Indiana cities and towns have authority to create or abolish these courts independently. In 1988, 73 communities opted for such courts, but the majority of Indiana's cities and towns did not. Judges for these courts need not be lawyers and, in 1988, more than half were not. These courts, like similar ones in other states, have jurisdiction over all violations of city and town ordinances as well as over all misdemeanors and infractions.¹³ City, but not town, courts also have jurisdiction in civil cases where the contested amount does not exceed, in most courts, \$500.¹⁴ Fines for violations of infractions and misdemeanors go to the state. Court costs, set by state statute, are apportioned among the state, county, and local governmental unit, with the largest share going to the state. As part of Indiana's general

court reform in the 1970s, these courts were twice scheduled for abolition. Before their elimination, however, the legislature enacted the current legislation allowing cities and towns courts if they wanted them.

The critique

To the extent these courts remain "unreformed," they continue to resemble justice of the peace courts because they are part-time institutions with nonlawyer judges and very limited subject matter. And because they look like justice of the peace courts, criticisms of the latter stick to them. Thus the conventional view would suggest that Indiana city and town courts exist because they are moneymakers for their communities or cheap sources of patronage. For example, one reformer concludes a justice of the peace is "prone to regard his office as a business operation rather than a vehicle for the administration of justice."¹⁵ The critique continues that, because their judges need not be legally trained, they are dependent on police and prosecutors. Moreover, the judges are said to be especially susceptible to local economic, social, and political pressures and to personal prejudice, resulting in questionable decision making. Judges of these courts, for example, are described as administering "unequal justice without regard to law."¹⁶

Though consistently drawn, this picture is not based on much direct evidence.¹⁷ Our empirical study did not set out to examine the effects of reform proposals, yet we were struck by the enduring quality of these courts in the face of near universal contempt by professionals. Moreover, our evidence on the ac-

9. N. Y. TIMES, September 27, 1990, at B1.

10. See also Kress and Stanley, JUSTICE COURTS IN THE STATE OF NEW YORK 12 (1976).

11. Lamber & Luskin, *City and Town Court: Mapping Their Dimensions*, 67 IND. L.J. 59 (1991).

12. For a discussion of the empirical base of this critique, see Provine, *supra* n. 2, at 45.

13. IC 33-10.1-2-2 (city court); 33-10.1-2-7 (town courts). Infractions are violations of a statute for which a person might be fined but not imprisoned. IC 33-1-13-1 (1988). In 1981 the state legislature added many infractions by decriminalizing many traffic offenses, designating several other actions as infractions, and lowering the status of some existing non-traffic offenses. Acts of 1981, P. L. 108. Maximum fines for infractions are found in IC 43-4-32-4. Indiana created this new category of petty violations in 1977 when it substantially revised and modernized its criminal code. Acts of

1977, P.L. 313, sec. 1. Probably the most common infraction handled by these city and town courts is speeding.

14. The subject matter is also limited so that the ordinary city court does not have jurisdiction in actions for slander, libel, mortgage foreclosures, probate matters, guardians, or actions in equity. IC 33-10.1-2-3.1.

The city courts in the three second class cities in Lake County have jurisdiction in civil cases where the amount in controversy does not exceed \$2500. IC 33-10.1-2-4. City courts in third class cities that are not the county seat have civil jurisdiction where the amount in controversy does not exceed \$1000. IC 33-10.1-2-5.

15. Vanlandingham, *The Decline of the Justice of the Peace*, 12 U. KAN. L. REV. 389, 391 (1964).

16. *Id.*

17. *Supra* n. 11.

tual work of these courts suggests why reforms have been so unsuccessful.

Remedies

The most sweeping change, which has been noticeably unsuccessful, would be to eliminate these courts or, short of that, to require their judges to be lawyers.¹⁸ The casual observer might argue that the latter remedy would mean the courts' abolition. According to this view, it is unlikely that enough lawyers would be willing to serve. The data, however, do not support this notion. Alternatively, one might argue that requiring the judges to be lawyers would so alter the courts' character that they would be no different from other courts of limited jurisdiction. Our guess is that the courts' character involves more than just the judges' educational level.

Another sweeping reform would make these courts full time. Such a change would address the criticisms that the courts are not professional and that the judges inevitably have conflicts of interest because their main attention is focused elsewhere. Such a change also could alter the character of these courts as informal, alternative dispute forums. Because of the increased costs necessary to support a full-time court, the most likely consequence of this remedy would be to eliminate them. Even if the reform is simply to make the *judge* full time, the change probably would alter the character of the courts.

A goal of the judicial reforms of the 1970s, including the creation of Indiana's county court system, was to create full-time institutions and eliminate part-time ones, yet Indiana's city and town courts persist. In another article we consider the ability of these courts to withstand pressure to abolish

them.¹⁹ Here we discuss more limited proposals designed to address specific problems. These questions are related, because how one feels about abolishing the courts, restricting them to lawyer judges, or making them full time depends on understanding the issues raised below.

Several reforms are pragmatic, based on the notion that nonlawyer judges are a necessary evil to be tolerated but not encouraged. For example, Professor Linda Silberman suggests that lay judges' jurisdiction should be restricted by population, fiscal base, and attorney availability.²⁰ We heard a similar suggestion in our interviews, in this case, that second-class cities²¹ be required to have lawyer judges or that all cities with populations over 20,000 have lawyer judges. Our data show these suggestions already mirror reality, even though no such limitations on nonlawyer judges exist in Indiana. All communities with a population of more than 20,000 have lawyer judges. Indeed, the largest Indiana community to have a nonlawyer judge has a population of 15,000, while the smallest to have a lawyer judge has a population of 2,200.

More important, this reform does little to address the critique of these courts; it simply assumes that lawyers would do a better job. Existing evidence does not show that lawyers and nonlawyers differ in how they judge.²² Rather, the difference seems to be between courts with and without resources.²³ To the extent that court resources are related to community size, courts in smaller, rather than larger, communities need attention. A reform that creates two classes of courts based on community size is likely to compound the resource problem. The same objections hold for reforms that restrict

nonlawyer judges to communities with smaller fiscal bases or without lawyers.

Two other pragmatic reforms are concerned with criminal defendants' rights. One suggestion is that courts in which judges need not be lawyers have an extremely limited criminal jurisdiction so that a criminal defendant's legal rights are within the control of a lawyer judge whenever possible.²⁴ This limitation, the argument goes, should be measured in terms of both complexity and punishment. Thus jury trials could not take place in city and town courts because they are too complicated for lay people to conduct. Most reformers would agree that ordinance and traffic violations would be within the range of cases these courts could hear. Silberman concludes that, on balance, these courts also could hear uncontested misdemeanors. But she argues that restrictions on jurisdiction should be based on possible punishments sought in a particular case rather than the offense category.²⁵

The other pragmatic reform addressed to criminal defendants provides for transfer to a lawyer judge.²⁶ Silberman suggests that automatic transfer to a lawyer judge is preferred, but providing for automatic transfer for offenses with prison terms or requiring trial *de novo* on appeal would be sufficient to meet the problem.

Current practice in Indiana already conforms to these limitations. Jury trials in Indiana city and town courts are rare: in 1988 there were seven.²⁷ The reported caseload is overwhelmingly ordinance and traffic violations, and uncontested misdemeanors. Furthermore, Indiana provides for a trial *de novo* on appeal from city and town courts.²⁸ Indiana also allows automatic changes in judge, by right in civil cases and by discretion in criminal cases.²⁹

These reforms are simply exceptions to the view that all judges should be lawyers. They presuppose that nonlawyer judges are not as good at protecting the rights of criminal defendants and that the solution is to allow the criminal defendant a trial by a lawyer judge or at least to make sure that nonlawyer judges do not decide anything important. But to the extent that nonlawyers and lawyers do not differ in how they judge, these exceptions

18. See, e.g., Task Force on the Administration of Justice, *supra* n. 1, at 35.

19. Lamber and Luskin, *supra* n. 11, at 79-83.

20. Silberman, *supra* n. 1, at 104.

21. In Indiana a second-class city has a population range of 35,000 to 249,999. In our sample, there are five second class cities, and all have lawyer judges.

22. See Provine, *supra* n. 2. Silberman, *supra* n. 1, has an extensive and useful bibliography. See also, Kress and Stanley, *supra* n. 10; Ryan & Guterman, *Lawyer v. Non-Lawyer Town Justices*, 60 JUDICATURE 274 (1977).

23. See particularly Provine, *supra* n. 2, at 122-165.

24. Silberman, *supra* n. 1, at 105.

25. *Id.* at 105-110.

26. *Id.* at 111.

27. INDIANA JUDICIAL REPORT, Vol I, 1988 at 53.

28. IC 33-10.1-5-9.

29. The Indiana City and Town Court statute appears to allow for an automatic change of judge, IC 33-10.1-5-2, as does a general criminal statute, IC 35-36-5-1. Rule 12, Indiana Rules of Criminal Procedure, however, makes the change of judge discretionary. *State ex rel. Robinson v. Grant Superior Court No. 1*, 471 N.E.2d 302, 303 (Ind. 1984) (statute has no force and effect to the extent it conflicts with Indiana Rule of Criminal Procedure). *Accord*, *Gary v. State*, 471 N. E. 2d 695, 698 (Ind. 1984).

are unnecessary.

One can make similar reform arguments for civil cases. Courts in which judges need not be lawyers should have only concurrent civil jurisdiction, limited to "simple civil matters," with automatic transfer to a lawyer judge and no jury trials. Again, the data conform to this limitation. The statute limits city court civil jurisdiction to \$500 in most cases,³⁰ although ordinance violations are within the exclusive jurisdiction of city and town courts. Indiana's "by right" change of judge rule applies to civil cases, and jury trials are very rare. But again, there is no justification—empirical or theoretical—for this proposal; it simply assumes that a lawyer judge would be better.³¹

Training programs

A different kind of reform calls for mandatory training programs for nonlawyer judges of limited jurisdiction courts.³² Silberman reasons that whether training is considered valuable depends on one's view about how much education is needed. For those who think that because of their comprehensive law school education, all judges should be lawyers, no training program could, or should, replace that experience. Similarly, for those who think that common sense is all that is needed to preside over a court of limited jurisdiction, training is unnecessary, because anyone of reasonable intelligence can serve effectively. Silberman argues for a middle position: Because courts of limited jurisdiction require fewer demanding legal judgments than general jurisdiction courts, a well-designed training program is the best way to reduce incompetent decision making without eliminating the position altogether.³³

Any training program would have to take into account wide differences among the courts in workloads, resources, and environment. Yearly filings in Indiana's city and town courts ranged from less than 100 to more than 15,000. Notwithstanding similar jurisdictions, the kinds of cases the courts heard differed considerably. Among city courts, which have civil jurisdiction while town courts do not, most heard few or no civil cases. But the range was enormous, with

A well-designed training program is the best way to reduce incompetent decision making.

one court's docket composed almost entirely of civil cases. Criminal caseloads varied as well. Some courts heard mostly minor traffic violations, while others heard mostly non-traffic misdemeanors.

A further question involves the content of a training program. The assumption is that what is needed has something to do with training in the law, because lawyer judges are exempt. But is training in the law the most essential component? Most decisions city and town court judges make are not legally complex. But managing large caseloads, mediating interpersonal disputes, brokering community services, and marshaling the cooperation of county-level agencies are difficult, especially with limited budgets and nonexistent staffs. Any "well-designed training program" should pay attention to the courts' actual work. Finally, training does little to address the conventional critique that these courts are interested only in making money, providing patronage, and ignoring civil disputes. Nor does the reform address the criticism—founded or not—that the judges are too susceptible to local economic, social, and po-

litical pressure.

Another reform proposes the enactment of a code of conduct for non-lawyer judges.³⁴ This reform has the potential to speak directly to some parts of the popular critique of limited jurisdiction courts in which judges need not be lawyers. For example, to the extent that the city and town judges are criticized for relying too much on police and prosecutor, or being too susceptible to local pressures, a code of conduct and training in its application may be worthwhile. Also beneficial is the practice of the Indiana Commission on Judicial Qualifications of providing written opinions to help resolve questions about permissible conduct. In addition to the formal opinions, the commission responds in writing to judges whose concerns are primarily local in nature.³⁵ But neither a code nor the opinions can address other parts of the critique, such as the appearance of making too much money. The basic problem with the code of conduct reform is the difficulty of writing such a code with enough specificity and flexibility.

The judges' views

How do the judges see their own needs? In contrast with other studies that rely on information from central state sources, we sought the judges' views of their own educational needs. We asked judges whether they felt their training was adequate to perform certain judicial functions, what kinds of help they would find useful, and what they find most difficult about the job. Not surprisingly, the judges believe they are adequately trained to decide the cases that come before them and to impose sentences. Eighty-eight percent said their training is adequate to decide criminal cases, 86 percent said it is adequate to decide civil cases, and 97 percent said their

30. See IC 33-10.1-2-3.1—33-10.1-2-5.

31. It is ironic that these courts are criticized on the one hand as inadequate to decide civil cases and on the other as inadequate for failing to hear civil cases. It may be that the criticism for failure to do civil work is based on the notion that a court has to hear all kinds of cases to be a "real" court.

32. Silberman, *supra* n. 1, at 117; Kress and Stanley, *supra* n. 10, at 159.

A different but similar reform calls for a system of judicial counsellors; see Kress and Stanley, *supra* n. 10, at 159-160; along with their suggestion that the state assign responsibility for supervision

and oversight of these courts to county court judges; *id.* at 153-155. Without this supervisory responsibility, which in itself is quite a drastic change, it is unclear how this system of counsellors would work.

33. Silberman, *supra* n. 1, at 248-49.

34. Kress and Stanley, *supra* n. 10, at 153. In Indiana the state Supreme Court would enact such a code because the Indiana Constitution grants it exclusive and original jurisdiction in matters involving the discipline, removal, and retirement of judges in Indiana. Ind. Const. Art. 7, sec. 4.

35. INDIANA JUDICIAL REPORTS, 1988, Vol. 1 at 1-2.

Table 1 Judges' interest in help

Help with	Very interested	Somewhat interested	Not at all interested	N
Civil cases	48%	24%	28%	50
Case management	56	40	4	52
Record keeping	60	38	2	53
Personnel	37	51	12	49
Sentencing, alcohol related	77	14	10	51
Sentencing, other	77	17	6	53
Defendants' rights	84	15	2	55
Judicial ethics	80	18	2	51

training is adequate to impose sentences. Although both lawyers and nonlawyers are confident, lawyers are more confident. All the lawyers believed they have the training to perform all of these tasks.

Nonetheless, the judges would welcome help. We asked whether they would be “very interested,” “somewhat interested,” or “not at all interested” in various sorts of help. Table 1 summarizes their responses. A majority were at least somewhat interested in each category of help. The judges were least interested in help with civil cases: 28 percent were not at all interested (no doubt because so few of them hear civil cases). Yet even for this item, 48 percent said they were very interested in help.

Three questionnaire items pertained to administration: case management, record keeping, and personnel. Again the judges are interested in help. Among these, they expressed the least interest in help with personnel, probably because most courts employ only one person (usually part time) besides the judge. More than three-fourths of the judges expressed strong interest in help with sentencing in both alcohol-related and other cases. They were most interested, however, in help with respect to defendants' rights and judicial ethics, with 84 percent and 80 percent, respectively, saying they were very interested.

Finally, we asked judges, “What is the most difficult part of your job?” Of the 53 judges who responded to the question, 28 percent mentioned some

aspect of administration and 25 percent mentioned the difficulty of imposing punishment. We characterized another 36 percent of the difficulties reported as being “other work specific”—that is, they involved performing the duties of judge. Although these responses varied, a typical response concerned the difficulty of learning to be fair. Such responses are consistent with the judges' expression of interest in help with respect to sentencing and especially with respect to defendants' rights and judicial ethics.

Because we did not analyze case outcomes, we cannot speak directly to the issue of impartiality in decision making. Nonetheless, the interviews show judges who accept, in principle, a standard of impartiality. No doubt the principle is easier to uphold than the practice. Yet judges were sensitive to special problems created by their local ties to their communities. Some talked about impartiality as something one has to learn; many reported that impartiality was the hardest part of doing their job. They reported feeling discomfort the first few times they found against friends or acquaintances. And they pointed to previous experiences—for example, as a law enforcement officer—that prepared them to ignore personal feelings.

A modest suggestion

Mainstream reforms are largely symbolic, based on the notion that only lawyers should be judges. To the extent the conventional critique of limited jurisdiction courts identifies problems, mainstream reform proposals are unlikely to address them. And even when reality conforms to suggested reforms, dissatisfaction remains with limited jurisdiction courts in which judges need not be lawyers. Yet it is unlikely that these courts will disappear in the foreseeable future (nor is it

clear that we should break out the Dom Perignon if they should). As long as we retain the standard court reform model as the sole model for the “improvement” of these courts, however, we inhibit action that might provide support to them or improve the quality of justice they dispense.³⁶

Given what is known about these courts and their judges, states should focus their reform efforts and educational messages on addressing ethical dilemmas in nonthreatening contexts. If the presumption in favor of lawyer judges is set aside, the core of the critique of local limited jurisdiction courts is concern about the fairness of decision making within a structure embedded in local politics and society.³⁷ The interviews and survey suggest the judges know that impartiality in their jobs is necessary but difficult and that there is a real interest among the judges in knowing more.

Recent scandals in government and business have brought issues of ethics to the fore. Also, there is more concern with how individuals can be sensitized to the presence of ethical issues as they arise in their work. Doctors, lawyers, journalists, and researchers have realized the need for training in ethics, and ethicists are developing ways to teach these issues. This training differs from typical educational efforts, because the point is to practice recognizing ethical issues and to develop ways of thinking about issues, facts, or people, rather than to know how and where to look something up in a book.

Not only does focusing on ethics education reach the heart of the critique of these courts, it has the advantage of not involving additional costs (or generating more paperwork) for local courts. Efforts like those in Indiana to provide written answers to local inquiries are also good. States also might want to consider adopting a separate code of conduct for limited jurisdiction court judges. But the most important part of such a reform would be training in its application or more generally focused education on those issues. □

JULIA LAMBER is a professor in the School of Law at Indiana University.

MARY LEE LUSKIN is an associate professor in the Department of Criminal Justice at Indiana University.

36. Baar, *The Scope and Limits of Court*, *supra* n. 2, at 286-288.

37. Some authors are especially suspicious of the exercise of judicial power in small places. See, e.g., Wood, *SUBURBIA: ITS PEOPLE & THEIR POLITICS* 280 (1958). (“The smaller the town, the more justice is a matter of personal opinion in the community itself, rarely formalized, rarely permanently established depending on the sentiment of the moment.”)