FROM THE EDITOR

The convergence of the articles in this issue is the happy product of independent research upon two problems of widespread concern. Warren and Hiday examine civil commitment of the mentally ill in very different jurisdictions: urban California and rural North Carolina. Yet as Monahan suggests, in his synthetic overview, their data and analysis tend to point in similar directions. Steele surveys the literature on dispute processes and indicates how Hannigan, on the one hand, and Best and Andreasen, on the other, pursue complementary approaches to the study of consumer grievances and remedies. The present format has two advantages: the individual scholar retains the choice of topic and method, but research is still cumulative. I hope to encounter like conjunctions in the future.

As behaviors, mental illness and consumer grievances are about as far apart as could be imagined (though cynics would undoubtedly claim to see parallels). Nevertheless, the response of the legal system to each raises some common issues, which I shall explore here. First, we encounter once again, if in novel institutional settings, the familiar dilemmas of the "gap." There is the "gap" between substantive rules and their application by legal institutions, documented in distressing detail by Warren and Hiday. Scholars harp on this issue not because their theoretical framework is impoverished, but because they feel a strong obligation to develop a moral response to its existence. For many of us, for much of the time, the law is an embodiment of ethical aspirations. To point to a gap between aspiration and practice is thus to frame a moral critique of that practice in the strongest possible terms, by invoking the legitimacy of the law as an expression of normative consensus (if one that may be fictitious), as well as a product of correct procedures.

This critique is particularly telling in the area of mental illness. Americans became increasingly aware of the mistreatment of the mentally ill in the 1960s. An aroused conscience led to reforms in the method of commitment and in the treatment of those committed, expressed in new standards that were thought to constitute *minimal* safeguards. After all, the basic premise of a liberal society is that the state may employ force only when it adheres strictly to the rule of law. If government must be cautious when it apprehends and punishes criminals, it must be even more restrained when it deprives the mentally ill of their liberty, since they are not even charged with doing anything *wrong*. Thus, when Warren and Hiday demonstrate that the courts are denying liberty

to people who have committed no crime, in disregard of the minimal legal standards that bound the state's exercise of its monopoly of force, they are raising ethical questions of the highest moment.

A second "gap" that plagues all contemporary western legal institutions is the divergence between procedural ideals and practices. The civil commitment process exhibits three facets of this gap. First, institutions that are obligated to adjudicate essential facts appear, instead, to negotiate the existence of these facts—for instance, which of several possible grounds of commitment has been established. Second, institutions that are obligated to consider each case on its individual merits actually engage in bureaucratic rubber-stamping, as measured by the amount of time devoted to a case, the depth to which issues are pursued, or the frequency of agreement between judge and psychiatrist. Finally, institutions that claim to attain justice through the clash of equal adversaries deviate markedly from this ideal: most petitioners in civil commitment procedures lack counsel; and those lawyers who do appear usually abandon an adversarial posture, either because they are bound to their opponents of the moment by continuing relationships and ties of professional collegiality or because they relate to their clients in a paternalistic fashion, rather than as advocates. It is important to clarify why this gap also constitutes a fundamental ethical criticism of our legal system. It is not that negotiation, bureaucracy, and paternalism are necessarily bad. Rather, the state's monopoly of force is legitimated by its adherence to procedural as well as substantive norms; in Anglo-American law, these include individualized adjudication by means of an adversarial process. When Warren and Hiday show that those norms are not observed, and add to the evidence—cumulating and uncontradicted—that they *cannot* be, they undermine the rest of the ethical foundation of our legal system. At the very least, they require that we try to articulate an ethical justification for negotiated, bureaucratic, paternalistic procedures if we cannot eliminate them, instead of pretending that they are exceptional aberrations.

Both groups of articles also provide additional examples of the selectivity of legal institutions. One reason for this selectivity is that legal institutions in capitalist societies are reactive rather than proactive. Civil commitment of the mentally ill is initiated by family, neighbors, and bystanders. Even when the police are involved, they are almost always responding to a citizen's call. Monahan, following Bittner, suggests one explanation: the characteristics of mental illness are so vague that the police do not want

to act until the public confirms that the behavior is intolerable. The legal system is even more reactive in handling consumer problems. This relationship between society and the legal system may help to explain why the state has such a dismal record in dealing with either the mentally ill or consumer complaints. Legal institutions are the dumping ground for the failures of other social institutions. When the family can no longer handle a member, it ships that person off to a hospital. When buyer and seller cannot resolve their disagreements, one of them may litigate. Courts are thus presented with the most difficult cases, those where unofficial institutions like the media ombudsman have been unable to facilitate communication, where outpatient care has not worked—no wonder they fail.

The selectivity of the official legal system means that private decisions determine which problems are brought to which institutions. Private decisions are thus more important than the decisions of public officials: they are more numerous, and the consequences of each one are more profound because the differences between institutions (in terms of substantive norms, processes, and outcomes) are greater than the degree of variation within any single institution. This suggests that we should shift our attention from official actors to private individuals.

Private behavior, when we turn to it, displays patterns that have thus far been imperfectly appreciated. Most striking is the significance of class, and other social divisions, for the operation of the law. A great deal of scholarly attention has recently been directed toward measuring bias in the decisions of legal officials, especially those who exercise criminal jurisdiction. Thus far the findings are mixed—partly, it appears, because though official actors may not be biased, they respond to actors and events in the social environment which differ along class and other lines (for instance, in obtaining bail or retaining a lawyer). But if we look directly at the legal behavior of private individuals, who are under no mandate of equality, either legal or moral, the evidence of class differences is unambiguous. Members of the upper class voice more consumer complaints to third parties in general (Best and Andreasen) and to newspaper hotlines in particular (Hannigan), than do lower class individuals. This is consistent with the numerous studies that demonstrate that the upper class is overrepresented, and the lower underrepresented, by lawyers, who have become virtually indispensable for access to contemporary western legal institutions. The inverse—avoidance of legal institutions—is also skewed: upper class individuals are significantly absent from proceedings for civil commitment to public mental hospitals, a differ-

ence that is not explicable in terms of the incidence of mental illness. The conclusion to be drawn from this cannot be overemphasized: because the input into reactive legal institutions is privately selected, the most evenhanded administration of the law cannot produce equal justice in an unequal society.

Finally, the reactivity of legal institutions is another way of stating that behavior within those institutions represents only the tip of the iceberg of the processes by which people handle disputes in society. To mix metaphors, it confirms the great pyramid of Hart and Sacks (1958); only I interpret that pyramid very differently. Speaking for most legal scholars, Hart and Sacks assume that the pyramid is hierarchically ordered, so that the most accurate picture of the behavior of legal institutions can be obtained most efficiently by starting at the top—the decisions of supreme appellate courts. But there is little empirical evidence to support this assumption, and the reactivity of legal institutions, depicted in this issue and elsewhere, is more consistent with the inverse relationship. The decisions of private individuals dispose of most problems without legal intervention, and determine which problems the law will handle. Most of the "mentally ill" are never subjected to civil commitment; most consumer grievances are handled by two-party negotiation, or by some third party, like a media ombudsman, other than the court. This is not to deny that the actions of official legal institutions, as perceived, understood, evaluated, and predicted by private individuals, do not exert a significant influence over social behavior. But it does suggest that legal scholarship, and the social science scholarship that follows its lead, by concentrating on the behavior of appellate judges, has gained economy of description at the expense of becoming trivial.

If unofficial dispute processes are more numerous, and more significant, than formal litigation, there are still other, more fundamental, strata in the legal pyramid, which we are just beginning to explore. Before a dispute arises, the parties must perceive a problem in their relationship: a consumer must characterize a good or service as defective or inadequate; a family member must see the behavior of another as mentally ill. Best and Andreasen persuasively demonstrate that the *perception* and *definition* of consumer problems differs by class: upper class individuals are dissatisfied with a larger proportion of their interactions with sellers of goods and services. And there is ample evidence that the labelling of behavior as mental illness is class biased (e.g., Hollingshead and Redlich, 1958). Although Americans appear not to be a nation of complainers, contrary to the conventional wisdom, some people do complain more than others. The paradox is that

those who have the strongest ground to complain about their treatment by society and by the informal and formal dispute institutions to which they must take their grievances, complain the least, and those who are treated better complain the most. Best and Andreasen suggest an explanation for this: in a capitalist society, where material success is the measure of inherent worth and personal effort, to express, even to acknowledge that one has experienced, a grievance is to confess failure. Only those who have succeeded in life—those who are relatively upper class—can admit to particular disappointments without too much damage to their sense of self-worth. Others deny that they have failed by insisting that they never expected anything more. The legal system conspires with other social institutions to create and preserve these differential perceptions. A complex interrelationship between what an individual feels he has a right to expect from others, what the individual believes will happen if he asserts that the expectation has been disappointed, barriers against access to informal and formal institutions in which such a grievance may be asserted, and the failure of those institutions to conform to substantive and procedural rules, or to provide the remedy proffered, ensure that legal institutions will continue to be used selectively by those who need them least.

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