THE PRACTICE OF LAW AS CONFIDENCE GAME

Organizational Cooptation of a Profession

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A RECURRING THEME in the growing dialogue between sociology and law has been the great need for a joint effort of the two disciplines to illuminate urgent social and legal issues. Having uttered fervent public pronouncements in this vein, however, the respective practitioners often go their separate ways. Academic spokesmen for the legal profession are somewhat critical of sociologists of law because of what they perceive as the sociologist's preoccupation with the application of theory and methodology to the examination of legal phenomena, without regard to the solution of legal problems. Further, it is felt that "... contemporary writing in the sociology of law ... betrays the existence of painfully unsophisticated notions about the day-to-day operations of courts, legislatures and law offices."[1] Regardless of the merit of such criticism,

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1. H. W. Jones, *A View From the Bridge*, Law and Society: Supplement to Summer, 1965 Issue of SOCIAL PROBLEMS 42 (1965). See G. Geis, *Sociology, Criminology, and Criminal Law*, 7 SOCIAL PROBLEMS 40–47 (1959); N. S. Timasheff, *Growth and Scope of Sociology of Law*, in MODERN SOCIOLOGICAL THEORY IN CONTINUITY AND

scant attention—apart from explorations of the legal profession itself—has been given to the sociological examination of legal institutions, or their supporting ideological assumptions. Thus, for example, very little sociological effort is expended to ascertain the validity and viability of important court decisions, which may rest on wholly erroneous assumptions about the contextual realities of social structure. A particular decision may rest upon a legally impeccable rationale; at the same time it may be rendered nugatory or self-defeating by contingencies imposed by aspects of social reality of which the lawmakers are themselves unaware.

Within this context, I wish to question the impact of three recent landmark decisions of the United States Supreme Court; each hailed as destined to effect profound changes in the future of criminal law administration and enforcement in America. The first of these, *Gideon v. Wainwright*, 372 U.S. 335 (1963) required states and localities henceforth to furnish counsel in the case of indigent persons charged with a felony.[2] The Gideon ruling left several major issues unsettled, among them the vital question: What is the precise point in time at which a suspect is entitled to counsel?[3] The answer came relatively quickly

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CHANGE 424–49 (H. Becker & A. Boskoff, eds. 1957), for further evaluation of the strained relations between sociology and law.

2. This decision represented the climax of a line of cases which had begun to chip away at the notion that the Sixth Amendment of the Constitution (right to assistance of counsel) applied only to the federal government, and could not be held to run against the states through the Fourteenth Amendment. An exhaustive historical analysis of the Fourteenth Amendment and the Bill of Rights will be found in C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5–139 (1949). Since the Gideon decision, there is already evidence that its effect will ultimately extend to indigent persons charged with misdemeanors—and perhaps ultimately even traffic cases and other minor offenses. For a popular account of this important development in connection with the right to assistance of counsel, see A. LEWIS, GIDEON'S TRUMPET (1964). For a scholarly historical analysis of the right to counsel see W. M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955). For a more recent comprehensive review and discussion of the right to counsel and its development, see Note, *Counsel at Interrogation*, 73 YALE L.J. 1000–57 (1964).

With the passage of the Criminal Justice Act of 1964, indigent accused persons in the federal courts will be defended by federally paid legal counsel. For a general discussion of the nature and extent of public and private legal aid in the United States prior to the Gideon case, see E. A. BROWNELL, LEGAL AID IN THE UNITED STATES (1961); also R. B. VON MEHREN, et al., EQUAL JUSTICE FOR THE ACCUSED (1959).

3. In the case of federal defendants the issue is clear. In Mallory v. United States, 354 U.S. 449 (1957), the Supreme Court unequivocally indicated that a person under federal arrest must be taken "without any unnecessary delay" before a U.S. commissioner

in *Escobedo v. Illinois*, 378 U.S. 478 (1964), which has aroused a storm of controversy. Danny Escobedo confessed to the murder of his brother-in-law after the police had refused to permit retained counsel to see him, although his lawyer was present in the station house and asked to confer with his client. In a 5–4 decision, the court asserted that counsel must be permitted when the process of police investigative effort shifts from merely investigatory to that of accusatory: "when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

As a consequence, Escobedo's confession was rendered inadmissible. The decision triggered a national debate among police, district attorneys, judges, lawyers, and other law enforcement officials, which continues unabated, as to the value and propriety of confessions in criminal cases.[4] On June 13, 1966, the Supreme Court in a 5–4 decision underscored the principle enunciated in *Escobedo* in the case of *Miranda v. Arizona*.[5] Police interrogation of any suspect in custody, without his consent, unless a defense attorney is present, is prohibited by the self-incrimination provision of the Fifth Amendment. Regardless of the relative merit of the various shades of opinion about the role of counsel in criminal cases, the issues generated thereby will be in part resolved as additional

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where he will receive information as to his rights to remain silent and to assistance of counsel which will be furnished, in the event he is indigent, under the Criminal Justice Act of 1964. For a most interesting and richly documented work in connection with the general area of the Bill of Rights, see C. R. SOWLE, POLICE POWER AND INDIVIDUAL FREEDOM (1962).

4. See N.Y. Times, Nov. 20, 1965, p. 1, for Justice Nathan R. Sobel's statement to the effect that based on his study of 1,000 indictments in Brooklyn, N.Y. from February–April, 1965, fewer than 10% involved confessions. Sobel's detailed analysis will be found in six articles which appeared in the New York Law Journal, beginning November 15, 1965, through November 21, 1965, titled *The Exclusionary Rules in the Law of Confessions: A Legal Perspective—A Practical Perspective.* Most law enforcement officials believe that the majority of convictions in criminal cases are based upon confessions obtained by police. For example, the District Attorney of New York County (a jurisdiction which has the largest volume of cases in the United States), Frank S. Hogan, reports that confessions are crucial and indicates "if a suspect is entitled to have a lawyer during preliminary questioning . . . any lawyer worth his fee will tell him to keep his mouth shut", N.Y. Times, Dec. 2, 1965, p. 1. Concise discussions of the issue are to be found in D. Robinson, Jr., *Massiah, Escobedo and Rationales For the Exclusion of Confessions*, 56 J. CRIM. L. C. & P.S. 412–31 (1965); D. C. Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L. C. & P.S. 143–57 (1965).

5. Miranda v. Arizona, 384 U.S. 436 (1966).

cases move toward decision in the Supreme Court in the near future. They are of peripheral interest and not of immediate concern in this paper. However, the *Gideon, Escobedo,* and *Miranda* cases pose interesting general questions. In all three decisions, the Supreme Court reiterates the traditional legal conception of a defense lawyer based on the ideological perception of a criminal case as an *adversary, combative* proceeding, in which counsel for the defense assiduously musters all the admittedly limited resources at his command to *defend* the accused.[6] The fundamental question remains to be answered: Does the Supreme Court's conception of the role of counsel in a criminal case square with social reality?

The task of this paper is to furnish some preliminary evidence toward the illumination of that question. Little empirical understanding of the function of defense counsel exists; only some ideologically oriented generalizations and commitments. This paper is based upon observations made by the writer during many years of legal practice in the criminal courts of a large metropolitan area. No claim is made as to its methodological rigor, although it does reflect a conscious and sustained effort for participant observation.

COURT STRUCTURE DEFINES ROLE OF DEFENSE LAWYER

The overwhelming majority of convictions in criminal cases (usually over 90 per cent) are not the product of a combative, trial-by-jury process at all, but instead merely involve the sentencing of the individual after a negotiated, bargained-for plea of guilty has been entered.[7]

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6. Even under optimal circumstances a criminal case is a very much one-sided affair, the parties to the "contest" being decidedly unequal in strength and resources. See A. S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149–99 (1960).

7. F. J. DAVIS et al., SOCIETY AND THE LAW: NEW MEANINGS FOR AN OLD PROFESSION 301 (1962); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 297 (1947).

D. J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice,* 46 J. CRIM. L. C. & P.S. 780–90 (1954). Newman's data covered only one year, 1954, in a midwestern community, however, it is in general confirmed by my own data drawn from a far more populous area, and from what is one of the major criminal courts in the country, for a period of fifteen years from 1950 to 1964 inclusive. The English experience tends also to confirm American data, see N. WALKER, CRIME AND PUNISHMENT IN BRITAIN: AN ANALYSIS OF THE PENAL SYSTEM (1965). See also D. J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966),

Although more recently the overzealous role of police and prosecutors in producing pretrial confessions and admissions has achieved a good deal of notoriety, scant attention has been paid to the organizational structure and personnel of the criminal court itself. Indeed, the extremely high conviction rate produced without the features of an adversary trial in our courts would tend to suggest that the "trial" becomes a perfunctory reiteration and validation of the pretrial interrogation and investigation.[8]

The institutional setting of the court defines a role for the defense counsel in a criminal case radically different from the one traditionally depicted.[9] Sociologists and others have focused their attention on the deprivations and social disabilities of such variables as race, ethnicity, and social class as being the source of an accused person's defeat in a criminal court. Largely overlooked is the variable of the court organization itself, which possesses a thrust, purpose, and direction of its own. It is grounded in pragmatic values, bureaucratic priorities, and administrative instruments. These exalt maximum production and the particularistic career designs of organizational incumbents, whose occupational and career commitments tend to generate a set of priorities. These priorities exert a higher claim than the stated ideological goals of "due process of law," and are often inconsistent with them.

Organizational goals and discipline impose a set of demands and conditions of practice on the respective professions in the criminal court, to which they respond by abandoning their ideological and professional commitments to the accused client, in the service of these higher claims of the court organization. All court personnel, including the

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for a comprehensive legalistic study of the guilty plea sponsored by the American Bar Foundation. The criminal court as a social system, an analysis of "bargaining" and its functions in the criminal court's organizational structure, are examined in my forthcoming book, THE CRIMINAL COURT: A SOCIOLOGICAL PERSPECTIVE, to be published by Quadrangle Books, Chicago.

8. G. FEIFER, JUSTICE IN MOSCOW (1965). The Soviet trial has been termed "an appeal from the pretrial investigation" and Feifer notes that the Soviet "trial" is simply a recapitulation of the data collected by the pretrial investigator. The notions of a trial being a "tabula rasa" and presumptions of innocence are wholly alien to Soviet notions of justice. . . . "the closer the investigation resembles the finished script, the better . . ." *Id.* at 86.

9. For a concise statement of the constitutional and economic aspects of the right to legal assistance, see M. G. PAULSEN, EQUAL JUSTICE FOR THE POOR MAN (1964); for a brief traditional description of the legal profession see P. A. Freund, *The Legal Profession*, Daedalus 689–700 (1963).

accused's own lawyer, tend to be coopted to become agent-mediators[10] who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty.

Of all the occupational roles in the court the only private individual who is officially recognized as having a special status and concomitant obligations is the lawyer. His legal status is that of "an officer of the court" and he is held to a standard of ethical performance and duty to his client as well as to the court. This obligation is thought to be far higher than that expected of ordinary individuals occupying the various occupational statuses in the court community. However, lawyers, whether privately retained or of the legal-aid, public defender variety, have close and continuing relations with the prosecuting office and the court itself through discreet relations with the judges via their law secretaries or "confidential" assistants. Indeed, lines of communication, influence and contact with those offices, as well as with the Office of the Clerk of the court, Probation Division, and with the press, are essential to present and prospective requirements of criminal law practice. Similarly, the subtle involvement of the press and other mass media in the court's organizational network is not readily discernible to the casual observer. Accused persons come and go in the court system schema, but the structure and its occupational incumbents remain to carry on their respective career, occupational and organizational enterprises. The individual stridencies, tensions, and conflicts a given accused person's case may present to all the participants are overcome, because the formal and informal relations of all the groups in the court setting require it. The probability of continued future relations and interaction must be preserved at all costs.

This is particularly true of the "lawyer regulars" *i.e.*, those defense lawyers, who by virtue of their continuous appearances in behalf of defendants, tend to represent the bulk of a criminal court's non-indigent case workload, and those lawyers who are not "regulars," who appear almost casually in behalf of an occasional client. Some of the "lawyer regulars" are highly visible as one moves about the major urban centers of the nation, their offices line the back streets of the courthouses, at times sharing space with bondsmen. Their political "visibility" in terms of local club house ties, reaching into the judge's chambers and prose-

10. I use the concept in the general sense that Erving Goffman employed it in his ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961).

cutor's office, are also deemed essential to successful practitioners. Previous research has indicated that the "lawyer regulars" make no effort to conceal their dependence upon police, bondsmen, jail personnel. Nor do they conceal the necessity for maintaining intimate relations with all levels of personnel in the court setting as a means of obtaining, maintaining, and building their practice. These informal relations are the *sine qua non* not only of retaining a practice, but also in the negotiation of pleas and sentences.[11]

The client, then, is a secondary figure in the court system as in certain other bureaucratic settings.[12] He becomes a means to other ends of the organization's incumbents. He may present doubts, contingencies, and pressures which challenge existing informal arrangements or disrupt them; but these tend to be resolved in favor of the continuance of the organization and its relations as before. There is a greater community of interest among all the principal organizational structures and their incumbents than exists elsewhere in other settings. The accused's lawyer has far greater professional, economic, intellectual and other ties to the various elements of the court system than he does to his own client. In short, the court is a closed community.

This is more than just the case of the usual "secrets" of bureaucracy which are fanatically defended from an outside view. Even all elements of the press are zealously determined to report on that which will not offend the board of judges, the prosecutor, probation, legal-aid, or other officials, in return for privileges and courtesies granted in the past and to be granted in the future. Rather than any view of the matter in terms of some variation of a "conspiracy" hypothesis, the simple explanation is one of an ongoing system handling delicate tensions, managing the trauma produced by law enforcement and administration, and re-

11. A. L. Wood, *Informal Relations in the Practice of Criminal Law*, 62 AM. J. SOC. 48–55 (1956); J. E. CARLIN, LAWYERS ON THEIR OWN 105–09 (1962); R. GOLDFARB, RANSOM—A CRITIQUE OF THE AMERICAN BAIL SYSTEM 114–15 (1965). In connection with relatively recent data as to recruitment to the legal profession, and variables involved in the type of practice engaged in, will be found in J. Ladinsky, *Careers of Lawyers, Law Practice, and Legal Institutions*, 28 AM. SOC. REV. 47–54 (1963). See also S. WARKOV & J. ZELAN, LAWYERS IN THE MAKING (1965).

12. There is a real question to be raised as to whether in certain organizational settings, a complete reversal of the bureaucratic-ideal has not occurred. That is, it would seem, in some instances the organization appears to exist to serve the needs of its various occupational incumbents, rather than its clients. A. ETZIONI, MODERN ORGANIZATIONS 94–104 (1964).

quiring almost pathological distrust of "outsiders" bordering on group paranoia.

The hostile attitude toward "outsiders" is in large measure engendered by a defensiveness itself produced by the inherent deficiencies of assembly line justice, so characteristic of our major criminal courts. Intolerably large caseloads of defendants which must be disposed of in an organizational context of limited resources and personnel, potentially subject the participants in the court community to harsh scrutiny from appellate courts, and other public and private sources of condemnation. As a consequence, an almost irreconcilable conflict is posed in terms of intense pressures to process large numbers of cases on the one hand, and the stringent ideological and legal requirements of "due process of law," on the other hand. A rather tenuous resolution of the dilemma has emerged in the shape of a large variety of bureaucratically ordained and controlled "work crimes," short cuts, deviations, and outright rule violations adopted as court practice in order to meet production norms. Fearfully anticipating criticism on ethical as well as legal grounds, all the significant participants in the court's social structure are bound into an organized system of complicity. This consists of a work arrangement in which the patterned, covert, informal breaches, and evasions of "due process" are institutionalized, but are, nevertheless, denied to exist.

These institutionalized evasions will be found to occur to some degree, in all criminal courts. Their nature, scope and complexity are largely determined by the size of the court, and the character of the community in which it is located, *e.g.*, whether it is a large, urban institution, or a relatively small rural county court. In addition, idiosyncratic, local conditions may contribute to a unique flavor in the character and quality of the criminal law's administration in a particular community. However, in most instances a variety of stratagems are employed–some subtle, some crude, in effectively disposing of what are often too large caseloads. A wide variety of coercive devices are employed against an accused-client, couched in a depersonalized, instrumental, bureaucratic version of due process of law, and which are in reality a perfunctory obeisance to the ideology of due process. These include some very explicit pressures which are exerted in some measure by all court personnel, including judges, to plead guilty and avoid trial. In many instances the sanction of a potentially harsh sentence is utilized as the visible alternative to pleading guilty, in the case of

recalcitrants. Probation and psychiatric reports are "tailored" to organizational needs, or are at least responsive to the court organization's requirements for the refurbishment of a defendant's social biography, consonant with his new status. A resourceful judge can, through his subtle domination of the proceedings, impose his will on the final outcome of a trial. Stenographers and clerks, in their function as record keepers, are on occasion pressed into service in support of a judicial need to "rewrite" the record of a courtroom event. Bail practices are usually employed for purposes other than simply assuring a defendant's presence on the date of a hearing in connection with his case. Too often, the discretionary power as to bail is part of the arsenal of weapons available to collapse the resistance of an accused person. The foregoing is a most cursory examination of some of the more prominent "short cuts" available to any court organization. There are numerous other procedural strategies constituting due process deviations, which tend to become the work style artifacts of a court's personnel. Thus, only court "regulars" who are "bound in" are really accepted; others are treated routinely and in almost a coldly correct manner.

The defense attorneys, therefore, whether of the legal-aid, public defender variety, or privately retained, although operating in terms of pressures specific to their respective role and organizational obligations, ultimately are concerned with strategies which tend to lead to a plea. It is the rational, impersonal elements involving economies of time, labor, expense and a superior commitment of the defense counsel to these rationalistic values of maximum production[13] of court organization that prevail, in his relationship with a client. The lawyer "regulars" are frequently former staff members of the prosecutor's office and utilize the prestige, know-how and contacts of their former affiliation as part

13. Three relatively recent items reported in the New York Times, tend to underscore this point as it has manifested itself in one of the major criminal courts. In one instance the Bronx County Bar Association condemned "mass assembly-line justice," which "was rushing defendants into pleas of guilty and into convictions, in violation of their legal rights." N.Y. Times, March 10, 1965, p. 51. Another item, appearing somewhat later that year reports a judge criticizing his own court system (the New York Criminal Court), that "pressure to set statistical records in disposing of cases had hurt the administration of justice." N.Y. Times, Nov. 4, 1965, p. 49. A third, and most unusual recent public discussion in the press was a statement by a leading New York appellate judge decrying "instant justice" which is employed to reduce court calendar congestion ". . . converting our courthouses into counting houses . . ., as in most big cities where the volume of business tends to overpower court facilities." N.Y. Times, Feb. 5, 1966, p. 58.

of their stock in trade. Close and continuing relations between the lawyer "regular" and his former colleagues in the prosecutor's office generally overshadow the relationship between the regular and his client. The continuing colleagueship of supposedly adversary counsel rests on real professional and organizational needs of a *quid pro quo,* which goes beyond the limits of an accommodation or *modus vivendi* one might ordinarily expect under the circumstances of an otherwise seemingly adversary relationship. Indeed, the adversary features which are manifest are for the most part muted and exist even in their attenuated form largely for external consumption. The principals, lawyer and assistant district attorney, rely upon one another's cooperation for their continued professional existence, and so the bargaining between them tends usually to be "reasonable" rather than fierce.

FEE COLLECTION AND FIXING

The real key to understanding the role of defense counsel in a criminal case is to be found in the area of the fixing of the fee to be charged and its collection. The problem of fixing and collecting the fee tends to influence to a significant degree the criminal court process itself, and not just the relationship of the lawyer and his client. In essence, a lawyer-client "confidence game" is played. A true confidence game is unlike the case of the emperor's new clothes wherein that monarch's nakedness was a result of inordinate gullibility and credulity. In a genuine confidence game, the perpetrator manipulates the basic dishonesty of his partner, the victim or mark, toward his own (the confidence operator's) ends. Thus, "the victim of a con scheme must have some larceny in his heart." [14]

Legal service lends itself particularly well to confidence games. Usually, a plumber will be able to demonstrate empirically that he has performed a service by clearing up the stuffed drain, repairing the leaky faucet or pipe—and therefore merits his fee. He has rendered, when summoned, a visible, tangible boon for his client in return for the requested fee. A physician, who has not performed some visible surgery or otherwise engaged in some readily discernible procedure in connection with a patient, may be deemed by the patient to have "done nothing" for him. As a consequence, medical practitioners may simply

14. R. L. Gasser, *The Confidence Game,* 27 FED. PROB. 47 (1963).

prescribe or administer by injection a placebo to overcome a patient's potential reluctance or dissatisfaction in paying a requested fee, "for nothing."

In the practice of law there is a special problem in this regard, no matter what the level of the practitioner or his place in the hierarchy of prestige. Much legal work is intangible either because it is simply a few words of advice, some preventive action, a telephone call, negotiation of some kind, a form filled out and filed, a hurried conference with another attorney or an official of a government agency, a letter or opinion written, or a countless variety of seemingly innocuous, and even prosaic procedures and actions. These are the basic activities, apart from any possible court appearance, of almost all lawyers, at all levels of practice. Much of the activity is not in the nature of the exercise of the traditional, precise professional skills of the attorney such as library research and oral argument in connection with appellate briefs, court motions, trial work, drafting of opinions, memoranda, contracts, and other complex documents and agreements. Instead, much legal activity, whether it is at the lowest or highest "white shoe" law firm levels, is of the brokerage, agent, sales representative, lobbyist type of activity, in which the lawyer acts for someone else in pursuing the latter's interests and designs. The service is intangible.[15]

The large scale law firm may not speak as openly of their "contacts," their "fixing" abilities, as does the lower level lawyer. They trade instead upon a facade of thick carpeting, walnut panelling, genteel low pressure, and superficialities of traditional legal professionalism. There are occasions when even the large firm is on the defensive in connection with the fees they charge because the services rendered or results obtained do not appear to merit the fee asked.[16] Therefore, there is a recurrent problem in the legal profession in fixing the amount of fee, and in justifying the basis for the requested fee.

Although the fee at times amounts to what the traffic and the conscience of the lawyer will bear, one further observation must be made with regard to the size of the fee and its collection. The defendant in a criminal case and the material gain he may have acquired during the course of his illicit activities are soon parted. Not infrequently the ill gotten fruits of the various modes of larceny are sequestered by a

15. C. W. MILLS, WHITE COLLAR 121–29 (1951); J. E. Carlin *supra*, note 11.
16. E. O. SMIGEL, THE WALL STREET LAWYER 309 (1964).

defense lawyer in payment of his fee. Inexorably, the amount of the fee is a function of the dollar value of the crime committed, and is frequently set with meticulous precision at a sum which bears an uncanny relationship to that of the net proceeds of the particular offense involved. On occasion, defendants have been known to commit additional offenses while at liberty on bail, in order to secure the requisite funds with which to meet their obligations for payment of legal fees. Defense lawyers condition even the most obtuse clients to recognize that there is a firm interconnection between fee payment and the zealous exercise of professional expertise, secret knowledge, and organizational "connections" in their behalf. Lawyers, therefore, seek to keep their clients in a proper state of tension, and to arouse in them the precise edge of anxiety which is calculated to encourage prompt fee payment. Consequently, the client attitude in the relationship between defense counsel and an accused is in many instances a precarious admixture of hostility, mistrust, dependence, and sycophancy. By keeping his client's anxieties aroused to the proper pitch, and establishing a seemingly causal relationship between a requested fee and the accused's ultimate extrication from his onerous difficulties, the lawyer will have established the necessary preliminary groundwork to assure a minimum of haggling over the fee and its eventual payment.

In varying degrees, as a consequence, all law practice involves a manipulation of the client and a stage management of the lawyer-client relationship so that at least an *appearance* of help and service will be forthcoming. This is accomplished in a variety of ways, often exercised in combination with each other. At the outset, the lawyer-professional employs with suitable variation a measure of sales-puff which may range from an air of unbounding selfconfidence, adequacy, and dominion over events, to that of complete arrogance. This will be supplemented by the affectation of a studied, faultless mode of personal attire. In the larger firms, the furnishings and office trappings will serve as the backdrop to help in impression management and client intimidation. In all firms, solo or large scale, an access to secret knowledge, and to the seats of power and influence is inferred, or presumed to a varying degree as the basic vendible commodity of the practitioners.

The lack of visible end product offers a special complication in the course of the professional life of the criminal court lawyer with respect to his fee and in his relations with his client. The plain fact is that an accused in a criminal case always "loses" even when he has

been exonerated by an acquittal, discharge, or dismissal of his case. The hostility of an accused which follows as a consequence of his arrest, incarceration, possible loss of job, expense and other traumas connected with his case is directed, by means of displacement, toward his lawyer. It is in this sense that it may be said that a criminal lawyer never really "wins" a case. The really satisfied client is rare, since in the very nature of the situation even an accused's vindication leaves him with some degree of dissatisfaction and hostility. It is this state of affairs that makes for a lawyer-client relationship in the criminal court which tends to be a somewhat exaggerated version of the usual lawyer-client confidence game.

At the outset, because there are great risks of nonpayment of the fee, due to the impecuniousness of his clients, and the fact that a man who is sentenced to jail may be a singularly unappreciative client, the criminal lawyer collects his fee *in advance.* Often, because the lawyer and the accused both have questionable designs of their own upon each other, the confidence game can be played. The criminal lawyer must serve three major functions, or stated another way, he must solve three problems. First, he must arrange for his fee; second, he must prepare and then, if necessary, "cool out" his client in case of defeat[17] (a highly likely contingency); third, he must satisfy the court organization that he has performed adequately in the process of negotiating the plea, so as to preclude the possibility of any sort of embarrassing incident which may serve to invite "outside" scrutiny.

In assuring the attainment of one of his primary objectives, his fee, the criminal lawyer will very often enter into negotiations with the accused's kin, including collateral relatives. In many instances, the accused himself is unable to pay any sort of fee or anything more than a token fee. It then becomes important to involve as many of the accused's kin as possible in the situation. This is especially so if the attorney hopes to collect a significant part of a proposed substantial fee. It is not uncommon for several relatives to contribute toward the

17. Talcott Parsons indicates that the social role and function of the lawyer can be therapeutic, helping his client psychologically in giving him necessary emotional support at critical times. The lawyer is also said to be acting as an agent of social control in the counseling of his client and in the influencing of his course of conduct. See T. PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 382 et seq. (1954); E. Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, in HUMAN BEHAVIOR AND SOCIAL PROCESSES 482–505 (A. Rose ed., 1962). Goffman's "cooling out" analysis is especially relevant in the lawyer-accused client relationship.

fee. The larger the group, the greater the possibility that the lawyer will collect a sizable fee by getting contributions from each.

A fee for a felony case which ultimately results in a plea, rather than a trial, may ordinarily range anywhere from $500 to $1,500. Should the case go to trial, the fee will be proportionately larger, depending upon the length of the trial. But the larger the fee the lawyer wishes to exact, the more impressive his performance must be, in terms of his stage managed image as a personage of great influence and power in the court organization. Court personnel are keenly aware of the extent to which a lawyer's stock in trade involves the precarious stage management of an image which goes beyond the usual professional flamboyance, and for this reason alone the lawyer is "bound in" to the authority system of the court's organizational discipline. Therefore, to some extent, court personnel will aid the lawyer in the creation and maintenance of that impression. There is a tacit commitment to the lawyer by the court organization, apart from formal etiquette, to aid him in this. Such augmentation of the lawyer's stage managed image as this affords, is the partial basis for the *quid pro quo* which exists between the lawyer and the court organization. It tends to serve as the continuing basis for the higher loyalty of the lawyer to the organization; his relationship with his client, in contrast, is transient, ephemeral and often superficial.

DEFENSE LAWYER AS DOUBLE AGENT

The lawyer has often been accused of stirring up unnecessary litigation, especially in the field of negligence. He is said to acquire a vested interest in a cause of action or claim which was initially his client's. The strong incentive of possible fee motivates the lawyer to promote litigation which would otherwise never have developed. However, the criminal lawyer develops a vested interest of an entirely different nature in his client's case: to limit its scope and duration rather than do battle. Only in this way can a case be "profitable." Thus, he enlists the aid of relatives not only to assure payment of his fee, but he will also rely on these persons to help him in his agent-mediator role of convincing the accused to plead guilty, and ultimately to help in "cooling out" the accused if necessary.

It is at this point that an accused-defendant may experience his first sense of "betrayal." While he had perhaps perceived the police and prosecutor to be adversaries, or possibly even the judge, the accused

is wholly unprepared for his counsel's role performance as an agent-mediator. In the same vein, it is even less likely to occur to an accused that members of his own family or other kin may become agents, albeit at the behest and urging of other agents or mediators, acting on the principle that they are in reality helping an accused negotiate the best possible plea arrangement under the circumstances. Usually, it will be the lawyer who will activate next of kin in this role, his ostensible motive being to arrange for his fee. But soon latent and unstated motives will assert themselves, with entreaties by counsel to the accused's next of kin, to appeal to the accused to "help himself" by pleading. *Gemeinschaft* sentiments are to this extent exploited by a defense lawyer (or even at times by a district attorney) to achieve specific secular ends, that is, of concluding a particular matter with all possible dispatch.

The fee is often collected in stages, each installment usually payable prior to a necessary court appearance required during the course of an accused's career journey. At each stage, in his interviews and communications with the accused, or in addition, with members of his family, if they are helping with the fee payment, the lawyer employs an air of professional confidence and "inside-dopesterism" in order to assuage anxieties on all sides. He makes the necessary bland assurances, and in effect manipulates his client, who is usually willing to do and say the things, true or not, which will help his attorney extricate him. Since the dimensions of what he is essentially selling, organizational influence and expertise, are not technically and precisely measurable, the lawyer can make extravagant claims of influence and secret knowledge with impunity. Thus, lawyers frequently claim to have inside knowledge in connection with information in the hands of the D.A., police, probation officials or to have access to these functionaries. Factually, they often do, and need only to exaggerate the nature of their relationships with them to obtain the desired effective impression upon the client. But, as in the genuine confidence game, the victim who has participated is loathe to do anything which will upset the lesser plea which his lawyer has "conned" him into accepting.[18]

18. The question has never been raised as to whether "bargain justice," "copping a plea," or justice by negotiation is a constitutional process. Although it has become the most central aspect of the process of criminal law administration, it has received virtually no close scrutiny by the appellate courts. As a consequence, it is relatively free of legal control and supervision. But, apart from any questions of the legality of bargaining, in terms of the pressures and devices that are employed which tend to violate due process of law, there remain ethical and practical questions. The system

In effect, in his role as double agent, the criminal lawyer performs an extremely vital and delicate mission for the court organization and the accused. Both principals are anxious to terminate the litigation with a minimum of expense and damage to each other. There is no other personage or role incumbent in the total court structure more strategically located, who by training and in terms of his own requirements, is more ideally suited to do so than the lawyer. In recognition of this, judges will cooperate with attorneys in many important ways. For example, they will adjourn the case of an accused in jail awaiting plea or sentence if the attorney requests such action. While explicitly this may be done for some innocuous and seemingly valid reason, the tacit purpose is that pressure is being applied by the attorney for the collection of his fee, which he knows will probably not be forthcoming if the case is concluded. Judges are aware of this tactic on the part of lawyers, who, by requesting an adjournment, keep an accused incarcerated awhile longer as a not too subtle method of dunning a client for payment. However, the judges will go along with this, on the ground that important ends are being served. Often, the only end served is to protect a lawyer's fee.

The judge will help an accused's lawyer in still another way. He will lend the official aura of his office and courtroom so that a lawyer can stage manage an impression of an "all out" performance for the accused in justification of his fee. The judge and other court personnel will serve as a backdrop for a scene charged with dramatic fire, in which the accused's lawyer makes a stirring appeal in his behalf. With a show of restrained passion, the lawyer will intone the virtues of the accused and recite the social deprivations which have reduced him to his present state. The speech varies somewhat, depending on whether the accused has been convicted after trial or has pleaded guilty. In the main, however, the incongruity, superficiality, and ritualistic character of the total performance is underscored by a visibly impassive, almost bored reaction on the part of the judge and other members of the court retinue.

Afterward, there is a hearty exchange of pleasantries between the lawyer and district attorney, wholly out of context in terms of the sup-

of bargain-counter justice is like the proverbial iceberg, much of its danger is concealed in secret negotiations and its least alarming feature, the final plea, being the one presented to public view. See A. S. TREBACH, THE RATIONING OF JUSTICE 74–94 (1964); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865–95 (1964).

posed adversary nature of the preceding events. The fiery passion in defense of his client is gone, and the lawyers for both sides resume their offstage relations, chatting amiably and perhaps including the judge in their restrained banter. No other aspect of their visible conduct so effectively serves to put even a casual observer on notice, that these individuals have claims upon each other. These seemingly innocuous actions are indicative of continuing organizational and informal relations, which, in their intricacy and depth, range far beyond any priorities or claims a particular defendant may have.[19]

Criminal law practice is a unique form of private law practice since it really only appears to be private practice.[20] Actually it is bureaucratic practice, because of the legal practitioner's enmeshment in the authority, discipline, and perspectives of the court organization. Private practice, supposedly, in a professional sense, involves the maintenance of an organized, disciplined body of knowledge and learning; the individual practitioners are imbued with a spirit of autonomy and service, the earning of a livelihood being incidental. In the sense that the lawyer in the criminal court serves as a double agent, serving higher organizational rather than professional ends, he may be deemed to be engaged in bureaucratic rather than private practice. To some extent the lawyer-client "confidence game," in addition to its other functions, serves to conceal this fact.

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19. For a conventional summary statement of some of the inevitable conflicting loyalties encountered in the practice of law, see E. E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION 70–79 (2d ed. 1955).

20. Some lawyers at either end of the continuum of law practice appear to have grave doubts as to whether it is indeed a profession at all. J. E. Carlin, *op. cit. supra* note 11, at 192; E. O. Smigel *supra*, note 16, at 304–305. Increasingly, it is perceived as a business with widespread evasion of the Canons of Ethics, duplicity and chicanery being practiced in an effort to get and keep business. The poet, Carl Sandburg, epitomized this notion in the following vignette: "Have you a criminal lawyer in this burg?" "We think so but we haven't been able to prove it on him." C. SANDBURG, THE PEOPLE, YES 154 (1936).

Thus, while there is a considerable amount of dishonesty present in law practice involving fee splitting, thefts from clients, influence peddling, fixing, questionable use of favors and gifts to obtain business or influence others, this sort of activity is most often attributed to the "solo," private practice lawyer. See A. L. Wood, *Professional Ethics Among Criminal Lawyers*, SOCIAL PROBLEMS 70–83 (1959). However, to some degree, large scale "downtown" elite firms also engage in these dubious activities. The difference is that the latter firms enjoy a good deal of immunity from these harsh charges because of their institutional and organizational advantages, in terms of near monopoly over more desirable types of practice, as well as exerting great influence in the political, economic and professional realms of power.

THE CLIENT'S PERCEPTION

The "cop-out" ceremony, in which the court process culminates, is not only invaluable for redefining the accused's perspectives of himself, but also in reiterating publicly in a formally structured ritual the accused person's guilt for the benefit of significant "others" who are observing. The accused not only is made to assert publicly his guilt of a specific crime, but also a complete recital of its details. He is further made to indicate that he is entering his plea of guilt freely, willingly, and voluntarily, and that he is not doing so because of any promises or in consideration of any commitments that may have been made to him by anyone. This last is intended as a blanket statement to shield the participants from any possible charges of "coercion" or undue influence that may have been exerted in violation of due process requirements. Its function is to preclude any later review by an appellate court on these grounds, and also to obviate any second thoughts an accused may develop in connection with his plea.

However, for the accused, the conception of self as a guilty person is in large measure a temporary role adaptation. His career socialization as an accused, if it is successful, eventuates in his acceptance and redefinition of himself as a guilty person.[21] However, the transformation is ephemeral, in that he will, in private, quickly reassert his innocence. Of importance is that he accept his defeat, publicly proclaim it, and find some measure of pacification in it.[22] Almost immediately after his

21. This does not mean that most of those who plead guilty are innocent of any crime. Indeed, in many instances those who have been able to negotiate a lesser plea, have done so willingly and even eagerly. The system of justice-by-negotiation, without trial, probably tends to better serve the interests and requirements of guilty persons, who are thereby presented with formal alternatives of "half a loaf," in terms of, at worst, possibilities of a lesser plea and a concomitant shorter sentence as compensation for their acquiescence and participation. Having observed the prescriptive etiquette in compliance with the defendant role expectancies in this setting, he is rewarded. An innocent person, on the other hand, is confronted with the same set of role prescriptions, structures and legal alternatives, and in any event, for him this mode of justice is often an ineluctable bind.

22. "Any communicative network between persons whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types will be called a 'status degradation ceremony.'" H. Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420–24 (1956). But contrary to the conception of the "cop out" as a "status degradation ceremony," is the fact that it is in reality a charade, during the course of which an accused must project an appropriate and acceptable amount of guilt, penitence and remorse. Having adequately

plea, a defendant will generally be interviewed by a representative of the probation division in connection with a presentence report which is to be prepared. The very first question to be asked of him by the probation officer is: "Are you guilty of the crime to which you pleaded?" This is by way of double affirmation of the defendant's guilt. Should the defendant now begin to make bold assertions of his innocence, despite his plea of guilty, he will be asked to withdraw his plea and stand trial on the original charges. Such a threatened possibility is, in most instances, sufficient to cause an accused to let the plea stand and to request the probation officer to overlook his exclamations of innocence. The table that follows is a breakdown of the categorized responses of a random sample of male defendants in Metropolitan Court[23] during 1962, 1963, and 1964 in connection with their statements during presentence probation interviews following their plea of guilty.

It would be well to observe at the outset, that of the 724 defendants who pleaded guilty before trial, only 43 (5.94 per cent) of the total group had confessed prior to their indictment. Thus, the ultimate judicial process was predicated upon evidence independent of any confession of the accused.[24]

As the data indicate, only a relatively small number (95) out of the total number of defendants actually will even admit their guilt, following the "cop-out" ceremony. However, even though they have

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feigned the role of the "guilty person," his hearers will engage in the fantasy that he is contrite, and thereby merits a lesser plea. It is one of the essential functions of the criminal lawyer that he coach and direct his accused-client in that role performance. Thus, what is actually involved is not a "degradation" process at all, but is instead, a highly structured system of exchange cloaked in the rituals of legalism and public professions of guilt and repentance.

23. The name is of course fictitious. However, the actual court which served as the universe from which the data were drawn, is one of the largest criminal courts in the United States, dealing with felonies only. Female defendants in the years 1950 through 1964 constituted from 7–10% of the totals for each year.

24. My own data in this connection would appear to support Sobel's conclusion (see note 4 *supra*), and appears to be at variance with the prevalent view, which stresses the importance of confessions in law enforcement and prosecution. All the persons in my sample were originally charged with felonies ranging from homicide to forgery; in most instances the original felony charges were reduced to misdemeanors by way of a negotiated lesser plea. The vast range of crime categories which are available, facilitates the patterned court process of plea reduction to a lesser offense, which is also usually a socially less opprobious crime. For an illustration of this feature of the bargaining process in a court utilizing a public defender office, see D. Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOCIAL PROBLEMS 255–76 (1964).

TABLE 1

Defendant Responses as to Guilt or Innocence After Pleading Guilty

N = 724	Years — 1962, 1963, 1964	
NATURE OF RESPONSE		*N OF DEFENDANTS*
INNOCENT (Manipulated)	"The lawyer or judge, police or D.A. 'conned me' "	86
INNOCENT (Pragmatic)	"Wanted to get it over with" "You can't beat the system" "They have you over a barrel when you have a record"	147
INNOCENT (Advice of counsel)	"Followed my lawyer's advice"	92
INNOCENT (Defiant)	"Framed"— Betrayed by "Complainant," "Police," "Squealers," "Lawyer," "Friends," "Wife," "Girlfriend"	33
INNOCENT (Adverse social data)	Blames probation officer or psychiatrist for "Bad Report," in cases where there was pre-pleading investigation	15
GUILTY	"But I should have gotten a better deal" Blames lawyer, D.A., Police, Judge	74
GUILTY	Won't say anything further	21
FATALISTIC (Doesn't press his "Innocence," won't admit "Guilt")	"I did it for convenience" "My lawyer told me it was only thing I could do" "I did it because it was the best way out"	248
NO RESPONSE		8
TOTAL		724

affirmed their guilt, many of these defendants felt that they should have been able to negotiate a more favorable plea. The largest aggregate of defendants (373) were those who reasserted their "innocence" following their public profession of guilt during the "cop-out" ceremony. These defendants employed differential degrees of fervor, solemnity and credibility, ranging from really mild, wavering assertions of innocence which were embroidered with a variety of stock explanations and rationalizations, to those of an adamant, "framed" nature. Thus, the "Innocent" group, for the most part, were largely concerned with under-

scoring for their probation interviewer their essential "goodness" and "worthiness," despite their formal plea of guilty. Assertion of his innocence at the post plea stage, resurrects a more respectable and acceptable self concept for the accused defendant who has pleaded guilty. A recital of the structural exigencies which precipitated his plea of guilt, serves to embellish a newly proffered claim of innocence, which many defendants mistakenly feel will stand them in good stead at the time of sentence, or ultimately with probation or parole authorities.

Relatively few (33) maintained their innocence in terms of having been "framed" by some person or agent-mediator, although a larger number (86) indicated that they had been manipulated or "conned" by an agent-mediator to plead guilty, but as indicated, their assertions of innocence were relatively mild.

A rather substantial group (147) preferred to stress the pragmatic aspects of their plea of guilty. They would only perfunctorily assert their innocence and would in general refer to some adverse aspect of their situation which they believed tended to negatively affect their bargaining leverage, including in some instances a prior criminal record.

One group of defendants (92), while maintaining their innocence, simply employed some variation of a theme of following "the advice of counsel" as a covering response, to explain their guilty plea in the light of their new affirmation of innocence.

The largest single group of defendants (248) were basically fatalistic. They often verbalized weak suggestions of their innocence in rather halting terms, wholly without conviction. By the same token, they would not admit guilt readily and were generally evasive as to guilt or innocence, preferring to stress aspects of their stoic submission in their decision to plead. This sizable group of defendants appeared to perceive the total court process as being caught up in a monstrous organizational apparatus, in which the defendant role expectancies were not clearly defined. Reluctant to offend anyone in authority, fearful that clear cut statements on their part as to their guilt or innocence would be negatively construed, they adopted a stance of passivity, resignation and acceptance. Interestingly, they would in most instances invoke their lawyer as being the one who crystallized the available alternatives for them, and who was therefore the critical element in their decision-making process.

In order to determine which agent-mediator was most influential in altering the accused's perspectives as to his decision to plead or go

to trial (regardless of the proposed basis of the plea), the same sample of defendants were asked to indicate the person who first suggested to them that they plead guilty. They were also asked to indicate which of the persons or officials who made such suggestion, was most influential in affecting their final decision to plead.

The following table indicates the breakdown of the responses to the two questions:

TABLE 2

Role of Agent-Mediators in Defendant's Guilty Plea

PERSON OR OFFICIAL	FIRST SUGGESTED PLEA OF GUILTY	INFLUENCED THE ACCUSED MOST IN HIS FINAL DECISION TO PLEAD
JUDGE	4	26
DISTRICT ATTORNEY	67	116
DEFENSE COUNSEL	407	411
PROBATION OFFICER	14	3
PSYCHIATRIST	8	1
WIFE	34	120
FRIENDS AND KIN	21	14
POLICE	14	4
FELLOW INMATES	119	14
OTHERS	28	5
NO RESPONSE	8	10
TOTAL	724	724

It is popularly assumed that the police, through forced confessions, and the district attorney, employing still other pressures, are most instrumental in the inducement of an accused to plead guilty.[25] As Table 2 indicates, it is actually the defendant's own counsel who is

25. Failures, shortcomings and oppressive features of our system of criminal justice have been attributed to a variety of sources including "lawless" police, overzealous district attorneys, "hanging" juries, corruption and political connivance, incompetent judges, inadequacy or lack of counsel, and poverty or other social disabilities of the defendant. See A. BARTH, LAW ENFORCEMENT VERSUS THE LAW (1963), for a journalist's account embodying this point of view; J. H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966), for a sociologist's study of the role of the police in criminal law administration. For a somewhat more detailed, albeit legalistic and somewhat technical discussion of American police procedures, see W. R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

most effective in this role. Further, this phenomenon tends to reinforce the extremely rational nature of criminal law administration, for an organization could not rely upon the sort of idiosyncratic measures employed by the police to induce confessions and maintain its efficiency, high production and overall rational-legal character. The defense counsel becomes the ideal agent-mediator since, as "officer of the court" and confidant of the accused and his kin, he lives astride both worlds and can serve the ends of the two as well as his own.[26]

While an accused's wife, for example, may be influential in making him more amenable to a plea, her agent-mediator role has, nevertheless, usually been sparked and initiated by defense counsel. Further, although a number of first suggestions of a plea came from an accused's fellow jail inmates, he tended to rely largely on his counsel as an ultimate source of influence in his final decision. The defense counsel, being a crucial figure in the total organizational scheme in constituting a new set of perspectives for the accused, the same sample of defendants were asked to indicate at which stage of their contact with counsel was the suggestion of a plea made. There are three basic kinds of defense counsel available in Metropolitan Court: Legal-aid, privately retained counsel, and counsel assigned by the court (but may eventually be privately retained by the accused).

TABLE 3

Stage at Which Counsel Suggested Accused to Plead

N = 724

CONTACT	COUNSEL TYPE: PRIVATELY RETAINED		LEGAL-AID		ASSIGNED		TOTAL	
	N	%	N	%	N	%	N	%
FIRST	66	35	237	49	28	60	331	46
SECOND	83	44	142	29	8	17	233	32
THIRD	29	15	63	13	4	9	96	13
FOURTH OR MORE	12	6	31	7	5	11	48	7
NO RESPONSE	0	0	14	3	2	4	16	2
TOTAL	190	100	487	101*	47	101*	724	100

* Rounded percentage.

26. Aspects of the lawyer's ambivalences with regard to the expectancies of the various groups who have claims upon him, are discussed in H. J. O'Gorman, *The Ambivalence of Lawyers*, paper presented at the Eastern Sociological Association meetings, April 10, 1965.

The overwhelming majority of accused persons, regardless of type of counsel, related a specific incident which indicated an urging or suggestion, either during the course of the first or second contact, that they plead guilty to a lesser charge if this could be arranged. Of all the agent-mediators, it is the lawyer who is most effective in manipulating an accused's perspectives, notwithstanding pressures that may have been previously applied by police, district attorney, judge or any of the agent-mediators that may have been activated by them. Legal-aid and assigned counsel would apparently be more likely to suggest a possible plea at the point of initial interview as response to pressures of time. In the case of the assigned counsel, the strong possibility that there is no fee involved, may be an added impetus to such a suggestion at the first contact.

In addition, there is some further evidence in Table 3 of the perfunctory, ministerial character of the system in Metropolitan Court and similar criminal courts. There is little real effort to individualize, and the lawyer's role as agent-mediator may be seen as unique in that he is in effect a double agent. Although, as "officer of the court" he mediates between the court organization and the defendant, his roles with respect to each are rent by conflicts of interest. Too often these must be resolved in favor of the organization which provides him with the means for his professional existence. Consequently, in order to reduce the strains and conflicts imposed in what is ultimately an overdemanding role obligation for him, the lawyer engages in the lawyer-client "confidence game" so as to structure more favorably an otherwise onerous role system.[27]

CONCLUSION

Recent decisions of the Supreme Court, in the area of criminal law administration and defendant's rights, fail to take into account three crucial aspects of social structure which may tend to render the more libertarian rules as nugatory. The decisions overlook (1) the nature of courts as formal organization; (2) the relationship that the lawyer-regular *actually* has with the court organization; and (3) the character of the lawyer-client relationship in the criminal court (the routine rela-

27. W. J. Goode, *A Theory of Role Strain*, 25 AM. SOC. REV. 483–96 (1960); J. D. Snoek, *Role Strain in Diversified Role Sets*, 71 AM. J. SOC. 363–72 (1966).

tionships, not those unusual ones that are described in "heroic" terms in novels, movies, and TV).

Courts, like many other modern large-scale organizations possess a monstrous appetite for the cooptation of entire professional groups as well as individuals.[28] Almost all those who come within the ambit of organizational authority, find that their definitions, perceptions and values have been refurbished, largely in terms favorable to the particular organization and its goals. As a result, recent Supreme Court decisions may have a long range effect which is radically different from that intended or anticipated. The more libertarian rules will tend to produce the rather ironic end result of augmenting the *existing* organizational arrangements, enriching court organizations with more personnel and elaborate structure, which in turn will maximize organizational goals of "efficiency" and production. Thus, many defendants will find that courts will possess an even more sophisticated apparatus for processing them toward a guilty plea!

28. Some of the resources which have become an integral part of our courts, *e.g.*, psychiatry, social work and probation, were originally intended as part of an ameliorative, therapeutic effort to individualize offenders. However, there is some evidence that a quite different result obtains, than the one originally intended. The ameliorative instruments have been coopted by the court in order to more "efficiently" deal with a court's caseload, often to the legal disadvantage of an accused person. See F. A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964); T. S. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963) and also Szasz's most recent, PSYCHIATRIC JUSTICE (1965); L. Diana, *The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures*, 47 J. CRIM. L. C. & P.S. 561–69 (1957).