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## Covert Contingencies in the Right to the Assistance of Counsel

Abraham S. Blumberg\*

*On the basis of a sociological survey showing that a very large percentage of guilty pleas are induced by defense counsel, Professor Blumberg concludes that criminal justice is not structured on the adversary model which the Supreme Court's right to counsel decisions presuppose. He submits that the primary loyalty of defense counsel is to the criminal court "system," the informal organization of court officials on which they depend for their professional existence. He suggests further that the additional attorneys which will be required to implement the right to counsel decisions will simply serve to make the "system" more efficient in utilizing covert evasions of due process and in producing an even greater number of guilty pleas.*

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### I. INTRODUCTION

Three recent Supreme Court decisions dealing with the role of the lawyer have been hailed as destined to effect profound changes in the administration of criminal law in America. The first of these, *Gideon v. Wainwright*,<sup>1</sup> requires states and localities to furnish counsel for indigent persons charged with a felony. The *Gideon* ruling raised an interesting question: what is the precise point in time at which a

\* B.A., Brooklyn College, 1942; LL.B., Columbia University, 1947; Ph.D., New School for Social Research, 1965; Member of New York Bar, admitted 1947; Member of United States Supreme Court Bar, admitted 1961; presently Assistant Professor, Dep't of Sociology, State University of New York at Stony Brook; effective Sept., 1967, Associate Professor of Sociology and Law, John Jay College, City University of New York.

1. 372 U.S. 335 (1963). This decision represented the climax of a line of cases with respect to the right to the assistance of counsel. Earlier, *Powell v. Alabama*, 287 U.S. 45 (1932), had held that the right to counsel applied to the states via the due process clause of the fourteenth amendment. Later cases such as *Betts v. Brady*, 316 U.S. 455 (1942), and *Bute v. Illinois*, 333 U.S. 649 (1948), restricted the *Powell* case to capital cases and to those instances where the defendant was incapable of making an adequate defense due to age, ignorance or intellectual limitations, etc. An exhaustive historical analysis of the fourteenth amendment and the

suspect is entitled to a lawyer?<sup>2</sup> The answer came relatively quickly in *Escobedo v. Illinois*,<sup>3</sup> which aroused a storm of controversy.

Danny Escobedo confessed to the murder of his brother-in-law after the police had refused to allow retained counsel to see him, although his lawyer was present in the station house and asked to confer with his client. In a five to four decision, the Supreme Court asserted that when the process of police investigation shifts from merely investigatory to 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."<sup>4</sup> Escobedo's confession was rendered inadmissible, triggering a national debate among police, district attorneys, judges, lawyers, and other law enforcement officials, which continues unabated,<sup>5</sup> about the value and propriety of confessions in criminal cases.<sup>6</sup>

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Bill of Rights will be found in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Since the *Gideon* decision, there is evidence that its holding will be extended to indigent persons charged with misdemeanors—and ultimately even to traffic cases and other minor offenses. For a popular account of this development see LEWIS, *GIDEON'S TRUMPET*, (1964). For a scholarly historical analysis see BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955). For a more recent comprehensive review and discussion see Note, *Counsel at Interrogation*, 73 YALE L.J. 1000 (1964).

Under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964), indigents accused in the federal courts will be defended by federally paid 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 BROWNELL, *LEGAL AID IN THE UNITED STATES* (1961). See also VON MEHREN, *EQUAL JUSTICE FOR THE ACCUSED* (1959).

2. In the case of federal defendants the issue has been 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 United States Commissioner, where he will be told of his rights to remain silent and to assistance of counsel which will be furnished, if he is indigent, under the Criminal Justice Act of 1964. For a richly documented work in connection with the general area of the Bill of Rights, see SOWLE, *POLICE POWER AND INDIVIDUAL FREEDOM* (1962).

3. 378 U.S. 478 (1964).

4. *Id.* at 492.

5. For some measure of the intensity of the controversy see Finley, *Who is on Trial—The Police? The Courts? or the Criminally Accused*, J CRIM. L., G. & P.S. 379 (1966).

6. See N.Y. Times, Nov. 20, 1965, p. 1, col. 5, 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 to April, 1965, fewer than 10% involved confessions. See Sobel, *The Exclusionary Rules in the Law of Confessions: A Legal Perspective—A Practical Perspective* (pts. 1-6), N.Y.L.J., Nov. 15-21, 1965. 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, col. 2. Concise discussions of the issue are to be found in Dowling, *Escobedo and Beyond: The Need for a Fourteenth*

Subsequently, on June 13, 1966, in another five to four decision, the Court underscored the principle enunciated in *Escobedo* in the case of *Miranda v. Arizona*.<sup>7</sup> An accused must be advised of his right to remain silent and to have an attorney. 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.

In the *Gideon*, *Escobedo*, and *Miranda* cases, the Supreme Court reiterated the traditional legal conception of a defense lawyer. As counsel in an *adversary, combative* proceeding, he assiduously musters all the admittedly limited resources at his command to *defend* the accused.<sup>8</sup> But does the Supreme Court's conception of the role of counsel in a criminal case square with social reality? Is the Court's assumption warranted that in these cases defense counsel will conduct a combative, adversary defense of the accused?

The varied organizational contexts in which the defense counsel acts, and in which the dimensions of his role are structured, have not been considered by the Court in these cases. Perhaps at the "gatehouse" level (police, prosecution) it would be a simple matter for any lawyer to advise a client to remain silent. But at the "mansion" level (criminal court) there is a very limited understanding of the real functions of defense counsel.<sup>9</sup> Much judicial attention has traditionally been focused upon the oppressive features of the gatehouse level of the criminal process, with but scant attention given to the mansion where it is assumed, other things being equal, the ends of due process

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*Amendment Code of Criminal Procedure*, 56 J. CRIM. L., C. & P.S. 143 (1965); Robinson, *Massiah, Escobedo and Rationales For the Exclusion of Confessions*, *Id.* at 412.

7. 384 U.S. 436 (1966).

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

9. I am here employing the metaphors utilized by Yale Kamisar in contrasting the questionable procedures of the police (gatehouse) with the orderly, protective measures in the mansion (courtroom). See KAMISAR, INBAU & ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* 19-20 (1965). Similar "ideal types" are employed by Herbert L. Packer who has recently analyzed our system of criminal justice in terms of a two-model process. The first is designated a "Crime Control Model." This version of criminal justice is characterized by a presumption of guilt, assembly line speed and efficiency in processing large numbers of defendants. The Crime Control Model balances the interests of the individual and society, and it is the individual interests which often have to give way. The other system is termed the Due Process Model. Here we find the system of criminal justice to be a legalistic obstacle course consisting of "quality inputs" which is anticipated will serve the needs and rights of individual defendants. Individualization in terms of quality at the expense of quantity is emphasized in this model of criminal justice. After indicating that a really efficient system of criminal justice based on the Crime Control Model would be repressive, Packer concludes that the trend in America is toward the Due Process Model. See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

will be served. However, the Supreme Court, in seeking to protect the rights of a defendant in a criminal case, has in these decisions failed to take into account three crucial aspects of life in the courts which may tend to render the more liberal rules ineffectual. The decisions tend to overlook:

- 1) The informal structure of courts as characterized by bureaucratic goals other than the formal, traditional goals of due process.
- 2) The real nature of the relationship of lawyers and other professionals with the court organization.
- 3) The actual dimensions of the lawyer-client relationship in the criminal court, as opposed to the "glamorous" and "heroic" one depicted in the movies, TV, novels, and the press.

It is the purpose of this paper to attempt to clarify some of these features of court organization both as they relate to the legal profession and as they structure it.

## II. METHODS

The data for this study are drawn from a major American criminal court system which, for convenience, I will call Metropolitan Court. It is not a single court, but a series of interrelated criminal courts dealing with criminal charges ranging from minor infractions of the law to felonies. Metropolitan Court is one of the largest criminal courts in the country in terms of case volume and personnel employed. The data have a national applicability because many of the organizational and occupational characteristics found in the Metropolitan Court setting are also featured in criminal courts throughout the country.

Much of the data were gathered during the course of nearly twenty years of work experience in almost every activity related to the administration of the criminal law, including the practice of criminal law. For almost five years prior to the close of that period, when it became apparent to me that I wanted to set down my observations about aspects of the American system of criminal justice, I began systematically to interview most of the personnel and officials conducting business in Metropolitan Court. During that latter interval, approximately two hundred persons were interviewed and re-interviewed to test my observations and conclusions. Thus, most of the lawyers, probation officers, court clerks, psychological and psychiatric personnel, district attorneys, and other officials, such as parole officers, who may only occasionally conduct business in Metropolitan Court, were observed and interviewed. More than two thousand psychiatric and

probation reports were read. Over seven hundred felony defendants were interviewed in detail about their court experience. Approximately three hundred trials, and over fifteen hundred pleas of guilty to a lesser offense including some of the preliminary negotiations involved were observed. In addition, during the summers of 1960 through 1965, criminal courts in some of the major urban areas of the country were visited, as well as several rural courts in the New England area.

### III. COURT ORGANIZATION AS A VARIABLE CONTRIBUTING TO CRIMINAL CONVICTION

There is by now ample evidence that the overwhelming majority of convictions in criminal cases (often over 90%) 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.<sup>10</sup> 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 tends to suggest that the "trial" becomes a perfunctory reiteration and validation of the pretrial interrogation and investigation.<sup>11</sup>

In that institutional setting, the actual role of defense counsel in a criminal case is radically different from the one traditionally depicted.<sup>12</sup> 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

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10. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., C. & P.S. 780 (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 one of the largest 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 WALKER, *CRIME AND PUNISHMENT IN BRITAIN: AN ANALYSIS OF THE PENAL SYSTEM* (1965). See also NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966); SILVERSTEIN, *DEFENSE OF THE POOR* 90 (1965).

11. FEIFER, *JUSTICE IN MOSCOW* (1965). The Soviet trial has been termed by Feifer "an appeal from the pretrial investigation," and he 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.

12. For a concise statement of the constitutional and economic aspects of the right to legal assistance, see PAULSEN, *EQUAL JUSTICE FOR THE POOR MAN* (1964). For a brief traditional description of the legal profession see Freund, *The Legal Profession*, in DAEDALUS 689 (1963).

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 values, bureaucratic priorities and administrative instruments, all of which exalt maximum production and the particularistic designs for career enhancement of organizational incumbents. Their occupational and career commitments tend to generate a set of priorities, exerting a higher claim than the stated ideological goal of "due process of law," and is often inconsistent with such a goal.

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 the higher claims of the court organization. All the court personnel, including the accused's own lawyer, are co-opted to become agent-mediators<sup>13</sup> who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty.

#### IV. THE SOCIAL STRUCTURE OF THE CRIMINAL COURT

##### A. The "Lawyer Regulars"

At the outset, one must distinguish between 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," but 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 clubhouse ties, reaching into the judges' chambers and prosecutors' offices, is 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, and the necessity for maintaining intimate relations with all levels of personnel connected with the court 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.<sup>14</sup> Of all the occupational roles in the court the only private

13. I use the concept in the general sense Coffman employed in GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961).

14. CARLIN, *LAWYERS ON THEIR OWN* 105-09 (1962); GOLDFARB, *RANSOM—A CRITIQUE OF THE AMERICAN BAIL SYSTEM* 114-15 (1965); Wood, *Informal Relations in the Practice of Criminal Law*, 62 AM. J. SOC. 48 (1956). In connection with relatively recent data on recruitment to the legal profession, and variables involved

individual who is officially recognized as having a special status and concomitant obligations is the lawyer. His legal status is that of "officer of the court," and he is held to a standard of ethical performance and duty both to his client and 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 the latter's law secretaries or "confidential" assistants. Indeed, lines of communication, influence and contact with those offices, as well as with the clerk of the court, probation division, and 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, which are present in the physical setting, is not readily discernible to the casual observer. Accused persons come and go in the court system scheme, but the structure and its occupational incumbents remain to carry on their respective career, occupational and organizational enterprises. The individual 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.

### B. *The Client and the Press*

The client, then, is a secondary figure in the court system as in certain other bureaucratic settings.<sup>15</sup> He becomes a means to other, larger ends of the organization's incumbents. Doubts, contingencies, and pressures that he may present, which challenge existing informal arrangements or are disruptive of them, tend to be resolved in favor of the continuance of the organization and the maintenance of 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

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in the type of practice engaged in, see Ladinsky, *Careers of Lawyers, Law Practice, and Legal Institutions*, 28 AM. SOCIOLOGICAL REV. 47 (1963). See also WARKOV & ZELAN, *LAWYERS IN THE MAKING* (1965).

15. 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. ETZIONI, *MODERN ORGANIZATIONS* 94-104 (1964).



various elements of the court system than he does to his own client. The court system is a closed community. This is more than just the case of the usual "secrets" of bureaucracy which are fanatically defended from outside view. Even all elements of the press are zealously determined to report only 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 a continuing system dealing with delicate, tension- and trauma-producing law enforcement and administration, which requires a pathological distrust of "outsiders" bordering on group paranoia.

### C. *Outsiders*

The virtually hostile attitude toward "outsiders" is in large measure engendered by a defensiveness 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. A rather tenuous resolution of the dilemma has emerged in the shape of a large variety of bureaucratically ordained and controlled short cuts, deviations, and outright rule violations on the part of court occupational incumbents, from judges to stenographers, 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 the evasions of "due process" are institutionalized, but are, nevertheless, denied to exist.

### D. *Institutionalized Evasions of Due Process*

These institutionalized evasions occur to some degree in all criminal courts. Their nature, scope and complexity will be 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 a unique flavor to 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 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 the case of recalcitrants the sanction of a potentially harsh sentence is frequently utilized as the visible alternative to pleading guilty. 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 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 being treated routinely and in an almost coldly correct manner.<sup>16</sup>

#### V. THE ROLE OF THE DEFENSE ATTORNEY

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 guilty plea. It is the rational, impersonal elements involving economies of time, labor, expense, and a superior commitment of defense counsel to these rationalistic values of maximum production of court organization that prevail, rather than any particularistic, affective ties an

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16. A more detailed examination of the criminal court as a social system, an analysis of “bargaining” and its functions in the criminal court's organizational structure, are set out in my forthcoming book, *Criminal Justice*, to be published by Quadrangle Books, Chicago, Ill., Fall, 1967.

accused may have reasonably expected to be the character of his relationship with his lawyer.<sup>17</sup> The lawyer "regulars" are frequently former staff members of the prosecutor's office and utilize the charisma, "know-how," and contacts of their former affiliation as part of their stock in trade. But an accused and his kin, as with others outside the court community, are unable to apprehend the nature and dimensions of the close and continuing relations between the lawyer "regular" and his former colleagues in the prosecutor's office. Their continuing collegueship is based on real professional and organizational needs of a *quid pro quo*, which go beyond the limits of an accommodation or *modus vivendi* one might ordinarily expect under the circumstances of a seemingly adversary relationship. Indeed, the adversary features 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 usually tends to be "reasonable" rather than fierce.

#### A. *The Fixing and Collecting of the Fee*

1. *The Lack of a Visible Product.*—The real key to the comprehension of the role of defense counsel in a criminal case is to be found in the fixing of the fee to be charged and its collection. The problem of fixing and collecting the fee tends to influence the criminal court process itself to a significant degree, not just the relationship of the lawyer and his client. In essence, a lawyer-client "confidence game" is played.<sup>18</sup> In many of the so-called "server-served" relationships for a fee, which include not only the practice of law, medicine, or dentistry, but also plumbing, there is not always a visible end-product or tangible service involved. 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

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17. Three relatively recent items reported in the *New York Times* 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, col. 1. 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, col. 1. 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, col. 2.

18. For a precise description of the phenomenon of the "con game" see Gasser, *The Confidence Game*, *Fed. Prob.*, Dec., 1963, p. 47.

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 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 in its dimensions because it is either 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 any of 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 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, furnishing an intangible service.<sup>19</sup>

The attorneys in large-scale law firms may not speak as openly of their "contacts," their "fixing" abilities, as do the lower-level lawyers. For the large-firm lawyers trade instead upon a facade of thick carpeting, walnut panelling, genteel low pressure, and superficialities of traditional legal professionalism.<sup>20</sup> There are occasions when even the large firm is on the defensive in connection with the fees it charges because the services rendered or results obtained do not appear to merit the fee asked.<sup>21</sup> 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

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19. CARLIN, *op. cit. supra* note 14, *passim*; MILLS, WHITE COLLAR 121-29 (1951).

20. For some of the characteristics of the "white shoe" law firm see Smigel, *The Impact of Recruitment on the Organization of the Large Law Firm*, 25 AM. SOCIOLOGICAL REV. 56 (1960).

21. SMIGEL, THE WALL STREET LAWYER 309 (1964).

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 various modes of larceny are sequestered by a 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 bearing an uncanny relationship to that of the net proceeds of the 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's 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 all 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.<sup>22</sup> 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 unbounded self-confidence, 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 implied or presumed in varying degree as the basic vendible commodity of the practitioners.

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22. For a systematic analysis of the "stage management" of persons and events see GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

The lack of a 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.

2. *Methods of Fee Collection.*—At the outset, because there are great risks of nonpayment of the fee, due to the impecuniousness of his clients, and because of the fact that a man who is sentenced to jail may be a singularly unappreciative client, the criminal lawyer collects his fees *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<sup>23</sup> (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 the occurrence 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 various members of the accused's kin group, 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 group as possible

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23. 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 counselling of his client and in the influencing of his course of conduct. PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 382 (1954). See Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, in *HUMAN BEHAVIOR AND SOCIAL PROCESSES* 482 (Rose ed. 1962). Goffman's "cooling out" analysis is especially relevant in the lawyer-client relationship.

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 fee. The larger the group, the greater the possibility that the lawyer will collect a sizable fee by exacting contributions from a diverse number of individuals.

A fee for a felony case which ultimately results in a guilty plea, rather than a trial, may ordinarily range anywhere from 500 dollars to 1,500 dollars. 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 of 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 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.

#### B. *The Defense Attorney as Agent-Mediator*

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 fees motivates the lawyer to promote litigation which otherwise would never have developed. The criminal lawyer develops a vested interest of an entirely different nature in his client's case: not to promote the litigation, but to limit its scope and duration. 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 him 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 a 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 kin group 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 pragmatic 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 and/or with members of his kin group (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 selling—organizational influence and expertise—are not 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 district attorney, police, and probation officials, or to have access to these functionaries. Factually, they often do, and need only to exaggerate the nature of these relationships 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.<sup>24</sup>

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24. 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 relatively little close scrutiny by the appellate courts. As a consequence, it is relatively free of legal control and supervision. But in terms of the pressures and devices that are employed which tend to violate due process of law, apart from any questions of the legality of bargaining, there remain ethical and practical questions. The system of bargain-counter justice is like the proverbial iceberg, much of its danger being concealed in secret negotiations; and its least alarming feature, the final plea, is the one presented to public view. See 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 (1964).



### *C. Cooperation Between the Judge and the Defense Attorney*

In effect, in his role as double agent, the criminal lawyer performs a 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 this may be done for some seemingly valid reason, the real 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 of lawyers who, by requesting an adjournment, keep an accused incarcerated longer as a not-too-subtle method of dunning a client for payment. However, judges usually go along with this, on the ground that important ends of justice are being served. Often, the only end being served is to protect a lawyer's fee.

In still another way the judge helps an accused's lawyer. 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. There is a speech which 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 unrelated to the supposedly adversary nature of the preceding events.

The fiery passion in defense of his client gone, 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. Their 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.<sup>25</sup>

## VI. THE BUREAUCRATIC PRACTICE OF CRIMINAL LAW

Criminal law practice is a unique form of private law practice since it really only appears to be private practice.<sup>26</sup> Actually, it is bureaucratic practice, because of the lawyer's enmeshment in the authority, discipline, and perspectives of the court organization. Supposedly, private practice, 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 is incidental. In the sense that the lawyer in the criminal court is 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.<sup>27</sup>

### A. The "Cop-out" Ceremony—Formal Entry of Guilty Plea

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 guilty

25. For a conventional summary statement of some of the inevitable conflicting loyalties encountered in the practice of law see, CHEATHAM, *CASES ON THE LEGAL PROFESSION* 70-79 (1955).

26. 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. CARLIN, *op. cit. supra* note 14, at 192; SMIGEL, *op. cit. supra* note 21, at 304-05. It is increasingly 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." SANDBURG, *THE PEOPLE*, YES 154 (1936).

27. While there is at times some element 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 Wood, *Professional Ethics Among Criminal Lawyers*, 7 *SOC. PROB.* 70 (1959). However, large "downtown" elite firms also engage in these dubious activities to some degree. The difference is that the latter firms enjoy a good deal of immunity from these charges because of their near monopoly of the more desirable types of practice, and their great influence in the political, economic and professional realms of power. See also CARLIN, *LAWYERS' ETHICS passim* (1966).

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.

#### B. *The Probation Interview—Defendant's Post-Plea Concept of Self*

For the accused, however, 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.<sup>28</sup> The transformation, however, is ephemeral, in that he will quickly reassert his innocence in private. What is important is that he accept his defeat, publicly proclaim it, and find some measure of pacification in it.<sup>29</sup> Almost immediately after his plea, a defendant will generally be interviewed by a representative of the probation division in connection with a pre-sentence 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

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28. 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 serve the interests and requirements of guilty persons, who are thereby presented with formal alternatives of compensation by way of a more favorable plea and sentence. 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. Going to trial is not always a feasible possibility; in addition, there is the problem of conviction-prone juries.

29. "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.'" Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 424 (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 feigned the role of the "guilty person" his hearers will engage in the fantasy that he is contrite, and thereby merits a lesser penalty. One of the essential functions of the criminal lawyer is that he coach and direct his accused-client in the 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.

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<sup>30</sup> during 1962, 1963 and 1964 in connection with their statements during pre-sentence probation interviews following their plea of guilty:

TABLE I  
DEFENDANT RESPONSES AS TO GUILT OR INNOCENCE  
AFTER PLEADING  
YEARS—1962, 1963, 1964

NO.—724 NATURE OF RESPONSE		NO. OF DEFENDANTS	%
INNOCENT (Manipulated)	"The lawyer or judge, police or DA 'conned' me."	86	(11.9)
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	(20.3)
INNOCENT (Advice of counsel)	"Followed my lawyer's advice."	92	(12.7)
INNOCENT (Defiant)	"Framcd."—betrayed by "Complainant," "Police," "Squealers," "Lawyer," "Friends," "Wife," "Girlfriend."	33	( 4.6)
INNOCENT (Adverse social data)	Blames probation officer or psychiatrist for "Bad Report," in cases where there was pre-pleading investigation.	15	( 2.1)
GUILTY	"But I should have gotten a better deal." Blames lawyer, DA, police, judge.	74	(10.2)
GUILTY	"Won't say anything further."	21	( 2.9)
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	(34.2)
NO RESPONSE		8	( 1.1)
TOTAL		724	100.0%

30. The actual court which served as the universe from which these data were drawn is one of the largest criminal courts in the United States, dealing with

It would be well to observe at the outset that of the 724 defendants who pleaded guilty before trial, only 43 (5.9%) 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.<sup>31</sup>

As the data indicate, only a relatively small number (95) out of the total number of defendants will even admit their guilt, following the "cop-out" ceremony. Even though they affirmed their guilt, however, 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 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, it must be stressed, were largely concerned with underscoring 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 assert their innocence only per-

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felonies only. Female defendants in the years 1950 through 1964 constituted from 7 to 10% of the totals for each year.

31. My own data in this connection appear to support Sobel's conclusion, see note 6 *supra*, and appear 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 opprobrious crime. For an illustration of this feature of the bargaining process in a court utilizing a public defender office see Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 *SOCIAL PROBLEMS* 255 (1964).

functorily and in general refer to some adverse aspect of their situation which they believed tended negatively to 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. It was a shorthand method of invoking a catch phrase to preclude any further discussion of an otherwise seemingly inconsistent position.

The largest single group of defendants (248) were basically fatalistic. They only verbalized weak suggestions of their innocence in rather halting terms, wholly without conviction. By the same token, they did 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's 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, in most instances they invoked 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.

### C. *The Role of Agent-Mediator in Defendant's Guilty Plea*

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 those who made such a suggestion was most influential in affecting their final decision to plead.

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.<sup>32</sup> As

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32. 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 BARTH, *LAW ENFORCEMENT VERSUS THE LAW* (1963), for a journalist's account embodying this point of view. See also SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966), for a sociologist's excellent study of the role of the police in criminal law administration. For a somewhat

Table II indicates, it is actually the defendant's own counsel who is 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 still 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 group, he lives astride both worlds and can serve the ends of the two as well as his own.<sup>33</sup>

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

TABLE II

## 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 ( .6)	26 ( 3.6)
DISTRICT ATTORNEY	67 ( 9.3)	116 (16.0)
DEFENSE COUNSEL	407 (56.2)	411 (56.7)
PROBATION OFFICER	14 ( 1.9)	3 ( .4)
PSYCHIATRIST	8 ( 1.1)	1 ( .1)
RELATIVE (WIFE)	34 ( 4.7)	120 (16.6)
FRIENDS AND OTHER RELATIVES	21 ( 2.9)	14 ( 1.9)
POLICE	14 ( 1.9)	4 ( .6)
FELLOW INMATES	119 (16.4)	14 ( 1.9)
OTHERS	28 ( 3.9)	5 ( .7)
"NO RESPONSE"	8 ( 1.1)	10 ( 1.4)
TOTAL	724 100.0%	724 99.9% <sup>o</sup>

<sup>o</sup> Rounded to nearest tenth.

While an accused's wife, for example, may be influential in making him more amenable to a plea, her agent-mediator role has usually been sparked and initiated by defense counsel. Further, although a number of first suggestions of a plea came from an accused's fellow

technical discussion of American police procedures, see LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965).

<sup>33</sup> Aspects of the lawyer's ambivalences with regard to the expectancies of the various groups who have claims upon him are discussed in a paper by Hubert J. O'Gorman, "The Ambivalence of Lawyers," Eastern Sociological Association Meeting, April 10, 1965.

jail inmates, he tended to rely largely on his counsel as an ultimate source of influence in his final decision.

#### D. *The Stage at Which Defense Counsel Suggested Guilty Plea*

Since the defense counsel is a crucial figure in the total organizational scheme in constituting a new set of perspectives for the accused, the same sample of defendants was 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 (who may eventually be privately retained by the accused).

TABLE III

STAGE AT WHICH COUNSEL SUGGESTED ACCUSED TO PLEAD

NO.-724 CONTACT	COUNSEL TYPE		
	PRIVATELY RETAINED	LEGAL-AID	ASSIGNED
FIRST	66 (34.7)	237 (48.6)	28 (59.6)
SECOND	83 (43.7)	142 (29.1)	8 (17.0)
THIRD	29 (15.3)	63 (12.9)	4 ( 8.5)
FOURTH OR MORE	12 ( 6.3)	31 ( 6.4)	5 (10.6)
NO RESPONSE	0 ( 0.0)	14 ( 2.9)	2 ( 4.3)
TOTAL	190 100.0%	487 99.9%*	47 100.0%

\* Rounded to nearest tenth.

The overwhelming majority of accused persons, regardless of type of counsel, related a specific incident which indicated an urging or suggestion, during either 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 are apparently more likely to suggest a possible plea at the initial interview as response to pressures of time; and in the case of assigned counsel, the strong possibility that there is no fee involved may be an added impetus to such a suggestion at the first contact.

There is some further evidence in Table III 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 over-demanding role obligation for him, the lawyer engages in the lawyer-client "confidence game" so as to structure more favorably an otherwise onerous role system.<sup>34</sup>

#### VII. CONCLUSIONS—COVERT CONTINGENCIES IN THE RIGHT TO COUNSEL

Based on data which are admittedly tentative and fragmentary, the furor over confessions, whether of the coerced or voluntary variety, appears to be not too meaningful. It is suggested that the process of criminal law enforcement has always depended, and will continue to do so in the foreseeable future, on confessions obtained judicially in open court (*i.e.*, pleas of guilty), rather than on confessions wrung from an accused in the back room of a police station. The *Gideon*, *Escobedo* and *Miranda* decisions have been regarded in legal circles as a most important development in American jurisprudence. No doubt, in time, the various states will make administrative provisions to implement the legal principles established in those cases. Although there has been great enthusiasm expressed in connection with these decisions, my limited data appear to suggest that results at the felony level in the criminal courts will not be significantly different from those which presently obtain in the respective communities affected by these cases. While it is true that at the "gatehouse" occasional defendants may be able to avoid prosecution by standing mute after being advised of their rights, many will, nevertheless, reach the "mansion"—and there we are dealing with an entirely different organizational context.

The organizational, occupational, and structural variables of the criminal court will continue to be present, and perhaps be even further augmented, in addition to any race, class, ethnic or other socio-demographic dimensions which are to be found in the respective jurisdictions. Together, these are formidable. The organizational features which in the pursuit of rationality, efficiency and maximum production tend to promote the present system of criminal justice, will not be easily overcome by additional counsel and similar resources, for

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<sup>34</sup> Goode, *A Theory of Role Strain*, 25 AM. SOCIOLOGICAL REV. 483 (1960);  
Snoek, *Role Strain in Diversified Role Sets*, 71 AM. J. SOC. 363 (1966).

they may in turn be co-opted and become part of the organizational structure, if they are not already.<sup>35</sup> It must always be remembered that the organizational network of the criminal court stands interposed between the most libertarian rules and the accused person. The rules as enunciated by the Supreme Court are based on the supposed existence of an adversary model of criminal justice. But the adversary model has been compromised and modified as inappropriate in terms of the values of maximum production and efficiency that are being sought. The additional resources and personnel which will be required to implement these rules will simply serve to strengthen and increase the efficiency of the present system of criminal justice in producing a greater number of guilty pleas. Courts, like many other modern large-scale organizations, possess a monstrous appetite for the co-optation of entire professional groups as well as individuals. Almost all those coming 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 serve to 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!

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35. 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 from the one originally intended. The ameliorative instruments have been co-opted by the court in order to deal more "efficiently" with a court's caseload, often to the legal disadvantage of an accused person. See ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE passim* (1964). SZASZ, *LAW, LIBERTY AND PSYCHIATRY* (1963). See also Szasz's most recent work, SZASZ, *PSYCHIATRIC JUSTICE* (1965); Diana, *The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures*, 47 J. CRIM. L., C & P.S. 561-69 (1957).