

**Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office**



David Sudnow

*Social Problems*, Vol. 12, No. 3 (Winter, 1965), 255-276.

Stable URL:

<http://links.jstor.org/sici?sici=0037-7791%28196524%2912%3A3%3C255%3ANCSTOT%3E2.0.CO%3B2-K>

*Social Problems* is currently published by University of California Press.

---

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/about/terms.html>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/journals/ucal.html>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

---

JSTOR is an independent not-for-profit organization dedicated to creating and preserving a digital archive of scholarly journals. For more information regarding JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## NORMAL CRIMES: SOCIOLOGICAL FEATURES OF THE PENAL CODE IN A PUBLIC DEFENDER OFFICE

DAVID SUDNOW

*Washington University*

Two stances toward the utility of official classificatory schema for criminological research have been debated for years. One position, which might be termed that of the "revisionist" school, has it that the categories of the criminal law, e.g., "burglary," "petty theft," "homicide," etc., are not "homogeneous in respect to causation."<sup>1</sup> From an inspection of penal code descriptions of crimes, it is argued that the way persons seem to be assembled under the auspices of criminal law procedure is such as to produce classes of criminals who are, at least on theoretical grounds, as dissimilar in their social backgrounds and styles of activity as they are similar. The entries in the penal code, this school argues, require revision if sociological use is to be made of categories of crime and a classificatory scheme of etiological relevance is to be devel-

oped. Common attempts at such revision have included notions such as "*white collar crime*," and "*systematic check forger*," these conceptions constituting attempts to institute sociologically meaningful specifications which the operations of criminal law procedure and statutory legislation "fail" to achieve.

The other major perspective toward the sociologist's use of official categories and the criminal statistics compiled under their heading derives less from a concern with etiologically useful schema than from an interest in understanding the actual operations of the administrative legal system. Here, the categories of the criminal law are not regarded as useful or not, as objects to be either adopted, adapted, or ignored; rather, they are seen as constituting the basic conceptual equipment with which such people as judges, lawyers, policemen, and probation workers organize their everyday activities. The study of the actual use of official classification systems by actually employed administrative personnel regards the penal code as data, to be preserved intact; its use, both in organizing the work of legal representation, accusation, adjudication, and prognostication, and in compiling tallies of legal occurrences, is to be examined as one would examine any social activity. By sociologically regarding, rather than criticizing, rates of statistics and the categories employed to assemble them, one learns, it is promised, about the "rate producing agencies" and the assembling process.<sup>2</sup>

While the former perspective, the

---

This investigation is based on field observations of a Public Defender Office in a metropolitan California community. The research was conducted while the author was associated with the Center for the Study of Law and Society, University of California, Berkeley. I am grateful to the Center for financial support. Erving Goffman, Sheldon Messinger, Harvey Sacks, and Emanuel Schegloff contributed valuable suggestions and criticisms to an earlier draft.

<sup>1</sup> D. R. Cressey, "Criminological Research and the Definition of Crimes," *American Journal of Sociology*, Vol. 61 (No. 6), 1951, p. 548. See also, J. Hall, *Theft, Law and Society*, second edition, Indianapolis: Bobbs-Merrill, 1952; and E. Sutherland, *Principles of Criminology*, review, New York: Lippincott, 1947, p. 218. An extensive review of "typological developments" is available in D. C. Gibbons and D. L. Garrity, "Some Suggestions for the Development of Etiological and Treatment Theory in Criminology," *Social Forces*, Vol. 38 (No. 1) 1959.

---

<sup>2</sup> The most thorough statement of this position, borrowing from the writings of

"revisionist" position, has yielded several fruitful products, the latter stance (commonly identified with what is rather loosely known as the "labelling" perspective), has been on the whole more promissory than productive, more programmatic than empirical. The present report will examine the operations of a Public Defender system in an effort to assess the warrant for the continued theoretical and empirical development of the position argued by Kitsuse and Cicourel. It will address the question: what of import for the sociological analysis of legal administration can be learned by describing the actual way the penal code is employed in the daily activities of legal representation? First, I shall consider the "guilty plea" as a way of handling criminal cases, focusing on some features of the penal code as a description of a population of defendants. Then I shall describe the Public Defender operation with special attention to the way defendants are represented. The place of the guilty plea and penal code in this representation will be examined. Lastly, I shall briefly analyze the fashion in which the Public Defender prepares and conducts a "defense." The latter section will attempt to indicate the connection between certain prominent organizational features of the Public Defender system and the penal code's place in the routine operation of that system.

#### GUILTY PLEAS, INCLUSION, AND NORMAL CRIMES

It is a commonly noted fact about the criminal court system generally, that the greatest proportion of cases are "settled" by a guilty plea.<sup>3</sup> In the

Harold Garfinkel, can be found in the recent critical article by J. I. Kitsuse and A. V. Cicourel, "A Note on the Official Use of Statistics," *Social Problems*, Vol. 11, No. 2 (Fall, 1963) pp. 131-139.

<sup>3</sup> See D. J. Newman, "Pleading Guilty for Considerations," 46 J. Crim. L. C. and

county from which the following material is drawn, over 80 per cent of all cases "never go to trial." To describe the method of obtaining a guilty plea disposition, essential for the discussion to follow, I must distinguish between what shall be termed "necessarily-included-lesser-offenses" and "situationally-included-lesser-offenses." Of two offenses designated in the penal code, the lesser is considered to be that for which the length of required incarceration is the shorter period of time. *Inclusion* refers to the relation between two or more offenses. The "necessarily-included-lesser-offense" is a strictly legal notion:

Whether a lesser offense is included in the crime charged is a question of law to be determined solely from the definition and corpus delicti of the offense charged and of the lesser offense. . . . If all the elements of the corpus delicti of a lesser crime can be found in a list of all the elements of the offense charged, then only is the lesser included in the greater.<sup>4</sup>

Stated alternatively:

The test in this state of necessarily included offenses is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.<sup>5</sup>

The implied negative is put: could Smith have committed A and not B? If the answer is yes, then B is not necessarily included in A. If the answer is no, B is necessarily included. While in a given case a battery might be committed in the course of a robbery, battery is not necessarily included in robbery. Petty theft is necessarily included in robbery but not in burglary. Burglary primarily involves the "intent" to acquire another's goods

P.S. Also, M. Schwartz, *Cases and Materials on Professional Responsibility and the Administration of Criminal Justice*, San Francisco: Matthew Bender and Co., 1961, esp. pp. 79-105.

<sup>4</sup> C. W. Fricke, *California Criminal Law*, Los Angeles: The Legal Book Store, 1961, p. 41.

<sup>5</sup> *People v. Greer*, 30 Cal. 2d, 589.

illegally (e.g., by breaking and entering); the consummation of the act need not occur for burglary to be committed. Theft, like robbery, requires that some item be stolen.

I shall call *lesser* offenses that are not necessarily but "only" *actually* included, "situationally-included-lesser-offenses." By statutory definition, necessarily included offenses are "actually" included. By actual here, I refer to the "way it occurs as a course of action." In the instance of necessary inclusion, the "way it occurs is irrelevant. With situational inclusion, the "way it occurs" is definitive. In the former case, no particular course of action is referred to. In the latter, the scene and progress of the criminal activity would be analyzed.

The issue of necessary inclusion has special relevance for two procedural matters:

- A. A man cannot be charged and/or convicted of two or more crimes any one of which is necessarily included in the others, unless the several crimes occur on separate occasions.

If a murder occurs, the defendant cannot be charged and/or convicted of both "homicide" and "intent to commit a murder," the latter of which is necessarily included in first degree murder. If, however, a defendant "intends to commit a homicide" against one person and commits a "homicide" against another, both offenses may be properly charged. While it is an extremely complex question as to the scope and definition of "in the course of," in most instances the rule is easily applied.

- B. The judge cannot instruct the jury to consider as alternative crimes of which to find a defendant guilty, crimes that are not necessarily included in the charged crime or crimes.

If a man is charged with "statutory rape" the judge may instruct the jury to consider as a possible alternative conviction "contributing to the delinquency of a minor," as this offense is

necessarily included in "statutory rape." He cannot however suggest that the alternative "intent to commit murder" be considered and the jury cannot find the defendant guilty of this latter crime, unless it is charged as a distinct offense in the complaint.

It is crucial to note that these restrictions apply only to (a) the relation between several charged offenses in a formal allegation, and (b) the alternatives allowable in a jury instruction. At any time before a case "goes to trial," alterations in the charging complaint may be made by the district attorney. The issue of necessary inclusion has no required bearing on (a) what offense(s) will be charged initially by the prosecutor, (b) what the relation is between the charge initially made and "what happened," or (c) what modifications may be made after the initial charge and the relation between initially charged offenses and those charged in modified complaints. It is this latter operation, the modification of the complaint, that is central to the guilty plea disposition.

Complaint alterations are made when a defendant agrees to plead guilty to an offense and thereby avoid a trial. The alteration occurs in the context of a "deal" consisting of an offer from the district attorney to alter the original charge in such a fashion that a lighter sentence will be incurred with a guilty plea than would be the case if the defendant were sentenced on the original charge. In return for this manipulation, the defendant agrees to plead guilty. The arrangement is proposed in the following format: "if you plead guilty to this new lesser offense, you will get less time in prison than if you plead not guilty to the original, greater charge and lose the trial." The decision must then be made whether or not the chances of obtaining complete acquittal at trial are great enough to warrant the risk of a loss and higher sentence if found guilty on

the original charge. As we shall see below, it is a major job of the Public Defender, who mediates between the district attorney and the defendant, to convince his "client" that the chances of acquittal are too slight to warrant this risk.

If a man is charged with "drunkenness" and the Public Defender and Public Prosecutor (hereafter P.D. and D.A.) prefer not to have a trial, they seek to have the defendant agree to plead guilty. While it is occasionally possible, particularly with first offenders, for the P.D. to convince the defendant to plead guilty to the originally charged offense, most often it is felt that some "exchange" or "consideration" should be offered, i.e., a lesser offense charged.

To what offense can "drunkenness" be reduced? There is no statutorily designated crime that is necessarily included in the crime of "drunkenness." That is, if any of the statutorily required components of drunk behavior (its *corpus delicti*) are absent, there remains no offense of which the resultant description is a definition. For drunkenness there is, however, an offense that while not necessarily included is "typically-situationally-included," i.e., "typically" occurs as a feature of the way drunk persons are seen to behave—"disturbing the peace." The range of possible sentences is such that, of the two offenses, "disturbing the peace" cannot call for as long a prison sentence as "drunkenness." If, in the course of going on a binge, a person does so in such a fashion that "disturbing the peace" may be employed to describe some of his behavior, it would be considered as an alternative offense to offer in return for a guilty plea. A central question for the following analysis will be: in what fashion would he have to behave so that disturbing the peace would be considered a suitable reduction?

If a man is charged with "molesting

a minor," there are not any necessarily included lesser offenses with which to charge him. Yet an alternative charge—"loitering around a schoolyard"—is often used as a reduction. As above, and central to our analysis the question is: what would the defendant's behavior be such that "loitering around a schoolyard" would constitute an appropriate alternative?

If a person is charged with "burglary," "petty theft" is not necessarily included. Routinely, however, "petty theft" is employed for reducing the charge of burglary. Again, we shall ask: what is the relation between burglary and petty theft and the *manner in which the former occurs* that warrants this reduction?

Offenses are regularly reduced to other offenses the latter of which are not necessarily or situationally included in the former. As I have already said the determination of whether or not offense X was situationally included in Y involves an analysis of the course of action that constitutes the criminal behavior. I must now turn to examine this mode of behavioral analysis.

When encountering a defendant who is charged with "assault with a deadly weapon," the P.D. asks: "what can this offense be reduced to so as to arrange for a guilty plea? As the reduction is only to be proposed by the P.D. and accepted or not by the D.A., his question becomes "what reduction will be allowable?" (As shall be seen below, the P.D. and D.A. have institutionalized a common orientation to allowable reductions.) The method of reduction involves, as a general feature, the fact that the particular case in question is scrutinized to decide its membership in a class of similar cases. But *the penal code does not provide the reference for deciding the correspondence between the instant event and the general case; that is, it does not define the classes of offense types.* To decide, for purposes of finding a

suitable reduction, if the instant case involves a "burglary," reference is not made to the statutory definition of "burglary." To decide what the situationally included offenses are in the instant case, the instant case is not analyzed as a *statutorily* referable course of action; rather, reference is made to a *non-statutorily* conceived class "burglary" and offenses that are typically situationally included in it, taken as a class of behavioral events. Stated again: in searching an instant case to decide what to *reduce it to*, there is no analysis of the statutorily referable elements of the instant case; instead, its membership in a class of events, the features of which cannot be described by the penal code, must be decided. An example will be useful. If a defendant is charged with burglary and the P.D. is concerned to propose a reduction to a lesser offense, he might search the elements of the burglary at hand to decide what other offenses were committed. The other offenses he might "discover" would be of two sorts: those necessarily and those situationally included. In attempting to decide those other offenses situationally included in the instant event, the instant event might be analyzed as a statutorily referable course of action. Or, as is the case with the P.D., the instant case might be analyzed to decide if it is a "burglary" in common with other "burglaries" conceived of in terms other than those provided by the statute.

Burglaries are routinely reduced to petty theft. If we were to analyze the way burglaries typically occur, petty theft is neither situationally or necessarily included; when a burglary is committed, money or other goods are seldom illegally removed from some person's body. If we therefore analyzed burglaries, employing the penal code as our reference, and then searched the P.D.'s records to see how burglaries are reduced in the guilty plea, we could not establish a rule that

would describe the transformation between the burglary cases statutorily described and the reductions routinely made (i.e., to "petty theft"). The rule must be sought elsewhere, in the character of the non-statutorily defined class of "burglaries," which I shall term *normal burglaries*.

#### NORMAL CRIMES

In the course of routinely encountering persons charged with "petty theft," "burglary," "assault with a deadly weapon," "rape," "possession of marijuana," etc., the P.D. gains knowledge of the typical manner in which offenses of given classes are committed, the social characteristics of the persons who regularly commit them, the features of the settings in which they occur, the types of victims often involved, and the like. He learns to speak knowledgeably of "burglars," "petty thieves," "drunks," "rapists," "narcos," etc., and to attribute to them personal biographies, modes of usual criminal activity, criminal histories, psychological characteristics, and social backgrounds. The following characterizations are illustrative:

Most ADWs (assault with deadly weapon) start with fights over some girl.

These sex fiends (child molestation cases) usually hang around parks or schoolyards. But we often get fathers charged with these crimes. Usually the old man is out of work and stays at home when the wife goes to work and he plays around with his little daughter or something. A lot of these cases start when there is some marital trouble and the woman gets mad.

I don't know why most of them don't rob the big stores. They usually break into some cheap department store and steal some crummy item like a \$9.95 record player you know.

Kids who start taking this stuff (narcotics) usually start out when some buddy gives them a cigarette and they smoke it for kicks. For some reason they always get caught in their cars, for speeding or something.

They can anticipate that point when persons are likely to get into trouble:

Dope addicts do O.K. until they lose a job or something and get back on the streets and, you know, meet the old boys. Someone tells them where to get some and there they are.

In the springtime, that's when we get all these sex crimes. You know, these kids play out in the schoolyard all day and these old men sit around and watch them jumping up and down. They get their ideas.

The P.D. learns that some kinds of offenders are likely to repeat the same offense while others are not repeat violators or, if they do commit crimes frequently, the crimes vary from occasion to occasion:

You almost never see a check man get caught for anything but checks—only an occasional drunk charge.

Burglars are usually multiple offenders, most times just burglaries or petty thefts.

Petty thefts get started for almost anything—joy riding, drinking, all kinds of little things.

These narcos are usually through after the second violation or so. After the first time some stop, but when they start on the heavy stuff, they've had it.

I shall call *normal crimes* those occurrences whose typical features, e.g., the ways they usually occur and the characteristics of persons who commit them (as well as the typical victims and typical scenes), are known and attended to by the P.D. For any of a series of offense types the P.D. can provide some form of proverbial characterization. For example, *burglary* is seen as involving regular violators, no weapons, low-priced items, little property damage, lower class establishments, largely Negro defendants, independent operators, and a non-professional orientation to the crime. *Child molesting* is seen as typically entailing middle-aged strangers or lower class middle-aged fathers (few women), no actual physical penetration or severe tissue damage, mild fondling, petting, and stimulation, bad marriage circumstances, multiple offenders with the same offense repeatedly committed, a child com-

plainant, via the mother, etc. *Narcotics* defendants are usually Negroes, not syndicated, persons who start by using small stuff, hostile with police officers, caught by some form of entrapment technique, etc. *Petty thefts* are about 50-50 Negro-white, unplanned offenses, generally committed on lower class persons and don't get much money, don't often employ weapons, don't make living from thievery, usually younger defendants with long juvenile assaultive records, etc. *Drunkenness* offenders are lower class white and Negro, get drunk on wine and beer, have long histories of repeated drunkenness, don't hold down jobs, are usually arrested on the streets, seldom violate other penal code sections, etc.

Some general features of the normal crime as a way of attending to a category of persons and events may be mentioned:

1. The focus, in these characterizations, is not on particular individuals, but offense types. If asked "What are burglars like?" or "How are burglaries usually committed?", the P.D. does not feel obliged to refer to particular burglars and burglaries as the material for his answer.

2. The features attributed to offenders and offenses are often not of import for the statutory conception. In burglary, it is "irrelevant" for the statutory determination whether or not much damage was done to the premises (except where, for example, explosives were employed and a new statute could be invoked). Whether a defendant breaks a window or not, destroys property within the house or not, etc., does not affect his statutory classification as a burglar. While for robbery the presence or absence of a weapon sets the degree, whether the weapon is a machine gun or pocket knife is "immaterial." Whether the residence or business establishment in a burglary is located in a higher income area of the city is of no issue for

the code requirements. And, generally, the defendant's race, class position, criminal history (in most offenses), personal attributes, and particular style of committing offenses are features specifically not definitive of crimes under the auspices of the penal code. For deciding "Is this a 'burglary' case I have before me," however, the P.D.'s reference to this range of non-statutorily referable personal and social attributes, modes of operation, etc., is crucial for the arrangement of a guilty plea bargain.

3. The features attributed to offenders and offenses are, in their content, specific to the community in which the P.D. works. In other communities and historical periods the lists would presumably differ. Narcotics violators in certain areas, for example, are syndicated in dope rackets or engage in systematic robbery as professional criminals, features which are not commonly encountered (or, at least, evidence for which is not systematically sought) in this community. Burglary in some cities will more often occur at large industrial plants, banking establishments, warehouses, etc. The P.D. refers to the population of defendants in the county as "our defendants" and qualifies his prototypical portrayals and knowledge of the typically operative social structures, "for our county." An older P.D., remembering the "old days," commented:

We used to have a lot more rapes than we do now, and they used to be much more violent. Things are duller now in . . .

4. Offenses whose normal features are readily attended to are those which are routinely encountered in the courtroom. This feature is related to the last point. For embezzlement, bank robbery, gambling, prostitution, murder, arson, and some other uncommon offenses, the P.D. cannot readily supply anecdotal and proverbial characterizations. While there is some change in the frequencies of offense-

type convictions over time, certain offenses are continually more common and others remain stably infrequent. The troubles created for the P.D. when offenses whose features are not readily known occur, and whose typicality is not easily constructed, will be discussed in some detail below.

5. Offenses are ecologically specified and attended to as normal or not according to the locales within which they are committed. The P.D. learns that burglaries usually occur in such and such areas of the city, petty thefts around this or that park, ADWs in these bars. Ecological patterns are seen as related to socio-economic variables and these in turn to typical modes of criminal and non-criminal activities. Knowing where an offense took place is thus, for the P.D., knowledge of the likely persons involved, the kind of scene in which the offense occurred, and the pattern of activity characteristic of such a place:

Almost all of our ADWs are in the same half a dozen bars. These places are Negro bars where laborers come after hanging around the union halls trying to get some work. Nobody has any money and they drink too much. Tempers are high and almost anything can start happening.

6. One further important feature can be noted at this point. Its elaboration will be the task of a later section. As shall be seen, the P.D. office consists of a staff of twelve full time attorneys. Knowledge of the properties of offense types of offenders, i.e., their normal, typical, or familiar attributes, constitutes the mark of any given attorney's competence. A major task in socializing the new P.D. deputy attorney consists in teaching him to recognize these attributes and to come to do so naturally. The achievement of competence as a P.D. is signalled by the gradual acquisition of professional command not simply of local penal code peculiarities and courtroom folklore, but, as importantly, of relevant features of the social structure and



criminological wisdom. His grasp of that knowledge over the course of time is a key indication of his expertise. Below, in our brief account of some relevant organizational properties of the P.D. system, we shall have occasion to re-emphasize the competence-attesting aspects of the attorney's proper use of established sociological knowledge. Let us return to the mechanics of the guilty plea procedure as an example of the operation of the notion of normal crimes.

Over the course of their interaction and repeated "bargaining" discussions, the P.D. and D.A. have developed a set of unstated recipes for reducing original charges to lesser offenses. These recipes are specifically appropriate for use in instances of normal crimes and in such instances alone. "Typical" burglaries are reduced to petty theft, "typical" ADWs to simple assault, "typical" child molestation to loitering around a schoolyard, etc. The character of these recipes deserves attention.

The specific content of any reduction, i.e., what particular offense class X offenses will be reduced to, is such that the reduced offense may bear no obvious relation (neither situationally nor necessarily included) to the originally charged offense. The reduction of burglary to petty theft is an example. The important relation between the reduced offense and the original charge is such that the reduction from one to the other is considered "reasonable." At this point we shall only state what seems to be the general principle involved in deciding this reasonableness. The underlying premises cannot be explored at the present time, as that would involve a political analysis beyond the scope of the present report.

*Both P.D. and D.A. are concerned to obtain a guilty plea wherever possible and thereby avoid a trial. At the same time, each party is concerned that the defendant "receive his due." The*

*reduction of offense X to Y must be of such a character that the new sentence will depart from the anticipated sentence for the original charge to such a degree that the defendant is likely to plea guilty to the new charge and, at the same time, not so great that the defendant does not "get his due."*

In a homicide, while battery is a necessarily included offense, it will not be considered as a possible reduction. For a conviction of second degree murder a defendant could receive a life sentence in the penitentiary. For a battery conviction he would spend no more than six months in the county jail. In a homicide, however, "felony manslaughter," or "assault with a deadly weapon," whatever their relation to homicide as regards inclusion, would more closely approximate the sentence outcome that could be expected on a trial conviction of second degree murder. These alternatives would be considered. For burglary, a typically situationally included offense might be "disturbing the peace," "breaking and entering" or "destroying public property." "Petty theft," however, constitutes a reasonable lesser alternative to burglary as the sentence for petty theft will often range between six months and one year in the county jail and burglary regularly does not carry higher than two years in the state prison. "Disturbing the peace" would be a thirty-day sentence offense.

While the present purposes make the exposition of this calculus unnecessary, it can be noted and stressed that the particular content of the reduction does not necessarily correspond to a relation between the original and altered charge that could be described in either the terms of necessary or situational inclusion. Whatever the relation between the original and reduced charge, its essential feature resides in the spread between sentence likelihoods and the reasonableness of that spread, i.e., the balance it strikes

between the defendant "getting his due" and at the same time "getting something less than he might so that he will plead guilty."

The procedure we want to clarify now, at the risk of some repetition, is the manner in which an instant case is examined to decide its membership in a class of "crimes such as this" (the category *normal crimes*). Let us start with an obvious case, burglary. As the typical reduction for burglary is petty theft and as petty theft is neither situationally nor necessarily included in burglary, the examination of the instant case is clearly not undertaken to decide whether petty theft is an appropriate statutory description. The concern is to establish the relation between the instant burglary and the normal category "burglaries" and, having decided a "sufficient correspondence," to now employ petty theft as the proposed reduction.

In scrutinizing the present burglary case, the P.D. seeks to establish that "this is a burglary just like any other." If that correspondence is not established, regardless of whether or not petty theft in fact was a feature of the way the crime was enacted, the reduction to petty theft would not be proposed. *The propriety of proposing petty theft as a reduction does not derive from its in-fact-existence in the present case, but is warranted or not by the relation of the present burglary to "burglaries," normally conceived.*

In a case of "child molestation" (officially called "lewd conduct with a minor"), the concern is to decide if this is a "typical child molestation case." While "loitering around a schoolyard" is frequently a feature of the way such crimes are instigated, establishing that the present defendant *did in fact loiter around a schoolyard* is secondary to the more general question "Is this a typical child molestation case?" What appears as a contradiction must be clarified by examining the status of "loitering around a

schoolyard" as a typical feature of such child molestations. The typical character of "child molesting cases" does not stand or fall on the fact that "loitering around a schoolyard" is a feature of the way they are in fact committed. It is *not* that "loitering around a schoolyard" as a *statutorily referable behavior sequence* is part of typical "child molesting cases" but that "loitering around a schoolyard" as a *socially distinct mode of committing child molestations typifies the way such offenses are enacted*. "Strictly speaking," i.e., under the auspices of the statutory *corpus delicti*, "loitering around a schoolyard," requires *loitering, around, a schoolyard*; if one loiters around a ball park or a public recreation area, he "cannot," within a proper reading of the statute, be charged with loitering around a *schoolyard*. Yet "loitering around a schoolyard," as a feature of the typical way such offenses as child molestations are committed, has the status not of a description of the way in *fact* (*fact*, statutorily decided) it occurred or typically occurs, but "the-kind-of-social-activity-typically-associated-with-such-offenses." It is not its statutorily conceived features but its socially relevant attributes that gives "loitering around a schoolyard" its status as a feature of the class "normal child molestations." Whether the defendant loitered around a schoolyard or a ball park, and whether he loitered or "was passing by," "loitering around a schoolyard" as a reduction will be made if the defendant's activity was such that "he was hanging around some public place or another" and "was the kind of guy who hangs around schoolyards." As a component of the class of normal child molestation cases (of the variety where the victim is a stranger), "loitering around a schoolyard" typifies a mode of committing such offenses, the class of "such persons who do such things as hang around schoolyards and the like." A large variety of

actual offenses could thus be nonetheless reduced to "loitering" if, as kinds of social activity, "loitering," conceived of as typifying a way of life, pattern of daily activity, social psychological circumstances, etc., characterized the conduct of the defendant. The young P.D. who would object "You can't reduce it to 'loitering'—he didn't really 'loiter,'" would be reprimanded: "Fella, you don't know how to use that term; he might as well have 'loitered'—it's the same kind of case as the others."

Having outlined the formal mechanics of the guilty plea disposition, I shall now turn to depict the routine of representation that the categories of crime, imbued with elaborate knowledge of the delinquent social structure, provide for. This will entail a brief examination of pertinent organizational features of the P.D. system.

#### PUBLIC "DEFENSE"

Recently, in many communities, the burden of securing counsel has been taken from the defendant.<sup>6</sup> As the accused is, by law, entitled to the aid of counsel, and as his pocketbook is often empty, numerous cities have felt obliged to establish a public defender system. There has been little resistance to this development by private attorneys among whom it is widely felt that the less time they need spend in the criminal courts, where practice is least prestigious and lucrative, the better.<sup>7</sup>

Whatever the reasons for its development, we now find, in many

urban places, a public defender occupying a place alongside judge and prosecutor as a regular court employee. In the county studied, the P.D. mans a daily station, like the public prosecutor, and "defends" all who come before him. He appears in court when court begins and his "clientele," composed without regard for his preferences, consists of that residual category of persons who cannot afford to bring their own spokesmen to court. In this county, the "residual" category approximates 65 per cent of the total number of criminal cases. In a given year, the twelve attorneys who comprise the P.D. Office "represent" about 3,000 defendants in the municipal and superior courts of the county.

While the courtroom encounters of private attorneys are brief, businesslike and circumscribed, interactionally and temporally, by the particular cases that bring them there, the P.D. attends to the courtroom as his regular work place and conveys in his demeanor his place as a member of its core personnel.

While private attorneys come and leave court with their clients (who are generally "on bail"), the P.D. arrives in court each morning at nine, takes his station at the defense table, and deposits there the batch of files that he will refer to during the day. When, during morning "calendar,"<sup>8</sup> a private attorney's case is called, the P.D. steps back from the defense table, leaving his belongings in place there, and temporarily relinquishes his station. No private attorney has enough defendants in a given court on a given day to claim a right to make a desk of the defense table. If the P.D. needs some information from his central office, he uses the clerk's telephone, a privilege that few private lawyers feel at home enough to take. In the course

<sup>6</sup> For general histories of indigent defender systems in the United States, see The Association of the Bar of the City of New York, *Equal Justice for the Accused*, Garden City, New York: 1959; and E. A. Brownell, *Legal Aid in the United States*, Rochester, New York: The Lawyers Cooperative Publishing Company, 1951.

<sup>7</sup> The experience of the Public Defender system is distinctly different in this regard from that of the Legal Aid Societies, which, I am told, have continually met very strong opposition to their establishment by local bar associations.

<sup>8</sup> "Calendar part" consists of that portion of the court day, typically in the mornings, when all matters other than trials are heard, e.g., arraignments, motions, continuances, sentencing, probation reports, etc.

of calendar work, a lawyer will often have occasion to request a delay or "continuance" of several days until the next stage of his client's proceedings. The private attorney addresses the prosecutor via the judge to request such an alteration; the P.D. talks directly over to the D.A.:

Private attorney: "If the prosecutor finds it convenient your Honor, my client would prefer to have his preliminary hearing on Monday, the 24th."

Judge: "Is that date suitable to the district attorney?"

Prosecutor: "Yes, your honor."

Private attorney: "Thank you, your Honor."

Public Defender: "Bob (D.A.), how about moving Smith's prelim up to the 16th?"

Prosecutor: "Well, Jim, we've got Jones on that afternoon."

Public Defender: "Let's see, how's the 22nd?"

Prosecutor: "That's fine, Jim, the 22nd."

If, during the course of a proceeding, the P.D. has some minor matter to tend to with the D.A., he uses the time when a private attorney is addressing the bench to walk over to the prosecutor's table and whisper his requests, suggestions or questions. The P.D. uses the prosecutor's master calendar to check on an upcoming court date; so does the D.A. with the P.D.'s. The D.A. and P.D. are on a first name basis and throughout the course of a routine day interact as a team of co-workers.

While the central focus of the private attorney's attention is his client, the courtroom and affairs of court constitute the locus of involvements for the P.D. The public defender and public prosecutor, each representatives of their respective offices, jointly handle the greatest bulk of the court's daily activity.

The P.D. office, rather than assign its attorneys to clients, employs the arrangement of stationing attorneys in different courts to "represent" all those who come before that station. As defendants are moved about from court-

room to courtroom throughout the course of their proceedings (both from municipal to superior courtrooms for felony cases, and from one municipal courtroom to another when there is a specialization of courts, e.g., jury, non-jury, arraignment, etc.), the P.D. sees defendants only at those places in their paths when they appear in the court he is manning. A given defendant may be "represented" by one P.D. at arraignment, another at preliminary hearing, a third at trial and a fourth when sentenced.

At the first interview with a client (initial interviews occur in the jail where attorneys go, *en masse*, to "pick up new defendants" in the afternoons) a file is prepared on the defendant. In each file is recorded the charge brought against the defendant and, among other things, his next court date. Each evening attorneys return new files to the central office where secretaries prepare court books for each courtroom that list the defendants due to appear in a given court on a given day. In the mornings, attorneys take the court books from the office and remove from the central file the files of those defendants due to appear in "their court" that day.

There is little communication between P.D. and client. After the first interview, the defendant's encounters with the P.D. are primarily in court. Only under special circumstances (to be discussed below) are there contacts between lawyers and defendants in the jail before and after appearances in court. The bulk of "preparation for court" (either trials or non-trial matters) occurs at the first interview. The attorney on station, the "attending attorney," is thus a stranger to "his client," and vice versa. Over the course of his proceedings, a defendant will have several attorneys (in one instance a man was "represented" by eight P.D.'s on a charge of simple assault). Defendants who come to court find a lawyer they don't know conducting

their trials, entering their motions, making their pleas, and the rest. Often there is no introduction of P.D. to defendant; defendants are prepared to expect a strange face:

Don't be surprised when you see another P.D. in court with you on Tuesday. You just do what he tells you to. He'll know all about your case.

P.D.s seldom talk about particular defendants among themselves. When they converse about trials, the facts of cases, etc., they do so not so much for briefing, e.g., "This is what I think you should do when you 'get him'," but rather as small talk, as "What have you got going today." The P.D. does not rely on the information about a case he receives from a previous attending attorney in order to know how to manage his "representation." Rather, the file is relied upon to furnish all the information essential for making an "appearance." These appearances range from morning calendar work (e.g., arraignments, motions, continuances, etc.) to trials on offenses from drunkenness to assault with a deadly weapon. In the course of a routine day, the P.D. will receive his batch of files in the morning and, seeing them for the first time that day, conduct numerous trials, preliminary hearings, calendar appearances, sentencing proceedings, etc. They do not study files overnight. Attorneys will often only look over a file a half hour or so before the jury trial begins.

#### THE FIRST INTERVIEW

As the first interview is often the only interview and as the file prepared there is central for the continuing "representation" of the defendant by other attorneys, it is important to examine these interviews and the file's contents. From the outset, the P.D. attends to establishing the typical character of the case before him and thereby instituting routinely employed reduction arrangements. The defendants appearance, e.g., his race, demean-

or, age, style of talk, way of attending to the occasion of his incarceration, etc., provides the P.D. with an initial sense of his place in the social structure. Knowing only that the defendant is charged with section 459 (Burglary) of the penal code, the P.D. employs his conception of typical burglars against which the character of the present defendant is assessed.

... he had me fooled for a while. With that accent of his and those Parliaments he was smoking I thought something was strange. It turned out to be just another burglary. You heard him about New York and the way he had a hold on him there that he was running away from. I just guess N.Y. is a funny place, you can never tell what kinds of people get involved in crimes there.

The initial fact of the defendant's "putting in a request to see the P.D." establishes his lower position in the class structure of the community:

We just never get wealthier people here. They usually don't stay in jail overnight and then they call a private attorney. The P.D. gets everything at the bottom of the pile.

Searching over the criminal history (past convictions and arrests) the defendant provides when preliminary face sheet data is recorded in the file, the P.D. gets a sense of the man's typical pattern of criminal activity. It is not the particular offenses for which he is charged that are crucial, but the constellation of prior offenses and the sequential pattern they take:

I could tell as soon as he told me he had four prior drunk charges that he was just another of these skid row bums. You could look at him and tell.

When you see a whole string of forgery counts in the past you pretty much know what kind of case you're dealing with. You either get those who commit an occasional forgery, or those that do nothing but. . . . With a whole bunch of prior checks (prior forgery convictions) you can bet that he cashes little ones. I didn't even have to ask for the amount you know. I seldom come across one over a hundred bucks.

From the looks of him and the way he

said "I wasn't doing anything, just playing with her," you know, its the usual kind of thing, just a little diddling or something. We can try to get it out on a simple assault.

When a P.D. puts questions to the defendant he is less concerned with recording nuances of the instant event (e.g., how many feet from the bar were you when the cops came in, did you break into the back gate or the front door), than with establishing its similarity with "events of this sort." That similarity is established, not by discovering statutorily relevant events of the present case, but by locating the event in a sociologically constructed class of "such cases." The first questions directed to the defendant are of the character that answers to them either confirm or throw into question the assumed typicality. First questions with ADWs are of the order: "How long had you been drinking before this all started?"; with "child molestation cases": "How long were you hanging around before this began?"; with "forgery" cases: Was this the second or third check you cashed in the same place?"

We shall present three short excerpts from three first interviews. They all begin with the first question asked after preliminary background data is gathered. The first is with a 288 (child molestation), the second with a 459 (burglary) and the last with a 11530 (possession of marijuana). Each interview was conducted by a different Public Defender. In each case the P.D. had no information about the defendant or this particular crime other than that provided by the penal code number:

288

P.D.: O.K., why don't you start out by telling me how this thing got started?

Def.: Well, I was at the park and all I did was to ask this little girl if she wanted to sit on my lap for awhile and you know, just sit on my lap. Well, about twenty minutes later I'm walkin' down

the street about a block away from the park and this cop pulls up and there the same little girl is, you know, sitting in the back seat with some dame. The cop asks me to stick my head in the back seat and he asks the kid if I was the one and she says yes. So he puts me in the car and takes a statement from me and here I am in the joint. All I was doin was playin with her a little. . . .

P.D.: (interrupting) . . . O.K. I get the story, let's see what we can do. If I can get this charge reduced to a misdemeanor then I would advise you to plead guilty, particularly since you have a record and that wouldn't look too well in court with a jury.

(the interview proceeded for another two or three minutes and the decision to plead guilty was made)

459

P.D.: Why don't you start by telling me where this place was that you broke into?

Def.: I don't know for sure . . . I think it was on 13th street or something like that.

P.D.: Had you ever been there before?

Def.: I hang around that neighborhood you know, so I guess I've been in the place before, yeah.

P.D.: What were you going after?

Def.: I don't know, whatever there was so's I could get a little cash. Man, I was pretty broke that night.

P.D.: Was anyone with you?

Def.: No, I was by myself.

P.D.: How much did you break up the place?

Def.: I didn't do nothing. The back window was open a little bit see and I just put my hand in there and opened the door. I was just walking in when I heard police comin so I turn around and start to run. And, they saw me down the block and that was that.

P.D.: Were you drunk at the time?

Def.: I wasn't drunk, no, I maybe had a drink or two that evening but I wasn't drunk or anything like that.

11530

P.D.: Well Smith, why don't you tell me where they found it (the marijuana)?

Def.: I was driving home from the drug-store with my friend and this cop car pulls me up to the side. Two guys get out, one of them was wearing a uniform and the other

was a plain clothes man. They told us to get out of the car and then they searched me and then my friend. Then this guy without the uniform he looked over into the car and picked up this thing from the back floor and said something to the other one. Then he asked me if I had any more of the stuff and I said I didn't know what he was talking about. So he wrote something down on a piece of paper and made me sign it. Then he told my friend to go home and they took me down here to the station and booked me on possession of marijuana. I swear I didn't have no marijuana.

P.D.: You told me you were convicted of possession in 1959.

Def.: Yeah, but I haven't touched any of the stuff since then. I don't know what it was doing in my car, but I haven't touched the stuff since that last time.

P.D.: You ought to know it doesn't make any difference whether or not they catch you using, just so as they find it on your possession or in a car, or your house, or something.

Def.: Man, I swear I don't know how it got there. Somebody must have planted it there.

P.D.: Look, you know as well as I do that with your prior conviction and this charge now that you could go away from here for five years or so. So just calm down a minute and let's look at this thing reasonably. If you go to trial and lose the trial, you're stuck. You'll be in the joint until you're 28 years old. If you plead to this one charge without the priors then we can get you into jail maybe, or a year or two at the most in the joint. If you wait until the preliminary hearing and then they charge the priors, boy you've had it, its too late.

Def.: Well how about a trial?

(After ten minutes, the defendant decided to plead guilty to one charge of possession, before the date of the preliminary hearing)

Let us consider, in light of the previous discussion, some of the features of these interviews.

1. In each case the information sought is not "data" for organizing the particular facts of the case for deciding proper penal code designations

(or with a view toward undermining the assignment of a designation in an anticipated trial). In the 288 instance, the P.D. interrupted when he had enough information to confirm his sense of the case's typicality and construct a typifying portrayal of the present defendant. The character of the information supplied by the defendant was such that it was specifically lacking detail about the particular occurrences, e.g., the time, place, what was said to the girl, what precisely did the defendant do or not do, his "state of mind," etc. The defendant's appearance and prior record (in this case the defendant was a fifty-five year old white, unemployed, unskilled laborer, with about ten prior drunk arrests, seven convictions, and two prior sex offense violations) was relied upon to provide the sense of the present occasion. The P.D. straightforwardly approached the D.A. and arranged for a "contributing to the delinquency of a minor" reduction. In the burglary case, the question, "Had you ever been there before?", was intended to elicit what was received, e.g., that the place was a familiar one to the defendant. Knowing that the place was in the defendant's neighborhood establishes its character as a skid row area business; that the First Federal Bank was not entered has been confirmed. "What were you going after?", also irrelevant to the 459 section of the penal code, provides him with information that there was no special motive for entering this establishment. The question, "Was anyone with you?", when answered negatively, placed the event in the typical class of "burglaries" as solitary, non-coordinated activities. The remaining questions were directed as well to confirming the typical character of the event, and the adequacy of the defendant's account is not decided by whether or not the P.D. can now decide whether the statutory definition of the contemplated reduction or the original charge

is satisfied. Its adequacy is determined by the ability with which the P.D. can detect its normal character. The accounts provided thus may have the character of anecdotes, sketches, phrases, etc. In the first instance, with the 288, the prior record and the defendant's appearance, demeanor and style of talking about the event was enough to warrant his typical treatment.

2. The most important feature of the P.D.'s questioning is the presupposition of guilt that makes his proposed questions legitimate and answerable at the outset. To pose the question, "Why don't you start by telling me where this place was that you broke into?" as a lead question, the P.D. takes it that the defendant is guilty of a crime and that the crime for which he is charged probably describes what essentially occurred.

The P.D.'s activity is seldom geared to securing acquittals for clients. He and the D.A., as co-workers in the same courts, take it for granted that the persons who come before the courts are guilty of crimes and are to be treated accordingly:

Most of them have records as you can see. Almost all of them have been through our courts before. And the police just don't make mistakes in this town. That's one thing about—, we've got the best police force in the state.

As we shall argue below, the way defendants are "represented," (the station manning rather than assignment of counselors to clients), the way trials are conducted, the way interviews are held and the penal code employed—all of the P.D.'s work is premised on the supposition that people charged with crimes have committed crimes.

This presupposition makes such first questions as "Why don't you start by telling me where this place was . . ." reasonable questions. When the answer comes: "What place? I don't know what you are talking about," the defendant is taken to be a phony, making

an "innocent pitch." The conceivable first question: "Did you do it?", is not asked because it is felt that this gives the defendant the notion that he can try an "innocent pitch":

I never ask them, "did you do it?", because on one hand I know they did and mainly because then they think that they can play games with us. We can always check their records and usually they have a string of offenses. You don't have to, though, because in a day or two they change their story and plead guilty. Except for the stubborn ones.

Of the possible answers to an opening question, bewilderment, the inability to answer or silence are taken to indicate that the defendant is putting the P.D. on. For defendants who refuse to admit anything, the P.D. threatens:

Look, if you don't want to talk, that's your business. I can't help you. All I can say is that if you go to trial on this beef you're going to spend a long time in the joint. When you get ready to tell me the story straight, then we can see what can be done.

If the puzzlement comes because the wrong question is asked, e.g., "There wasn't any fight—that's not the way it happened," the defendant will start to fill in the story. The P.D. awaits to see if, how far, and in what ways the instant case is deviant. If the defendant is charged with burglary and a middle class establishment was burglarized, windows shattered, a large payroll sought after and a gun used, then the reduction to petty theft, generally employed for "normal burglaries," would be more difficult to arrange.

Generally, the P.D. doesn't have to discover the atypical kinds of cases through questioning. Rather, the D.A., in writing the original complaint, provides the P.D. with clues that the typical recipe, given the way the event occurred, will not be allowable. Where the way it occurs is such that it does not resemble normal burglaries and the routinely used penalty would reduce it *too far* commensurate with the



way the crime occurred, the D.A. frequently charges various situationally included offenses, indicating to the P.D. that the procedure to employ here is to suggest "dropping" some of the charges, leaving the originally charged greatest offense as it stands.

In the general case he doesn't charge all those offenses that he legally might. He might charge "child molesting" and "loitering around a school-yard" but typically only the greater charge is made. The D.A. does so so as to provide for a later reduction that will appear particularly lenient in that it seemingly involves a *change* in the charge. Were he to charge both molesting and loitering, he would be obliged, moreover, should the case come to trial, to introduce evidence for both offenses. The D.A. is thus always constrained not to set overly high charges or not situationally included multiple offenses by the possibility that the defendant will not plead guilty to a lesser offense and the case will go to trial. Of primary importance is that he doesn't charge multiple offenses so that the P.D. will be in the best position vis-à-vis the defendant. He thus charges the first complaint so as to provide for a "setup."

The alteration of charges must be made in open court. The P.D. requests to have a new plea entered:

P.D.: Your honor, in the interests of justice, my client would like to change his plea of not guilty to the charge of burglary and enter a plea of guilty to the charge of petty theft.

Judge: Is this new plea acceptable to the prosecution?

D.A.: Yes, your honor.

The prosecutor knows beforehand that the request will be made, and has agreed in advance to allow it.

I asked a P.D. how they felt about making such requests in open court, i.e., asking for a reduction from one offense to another when the latter is obviously not necessarily included and

often (as is the case in burglary-to-petty theft) not situationally included. He summarized the office's feeling:

... in the old days, ten or so years ago, we didn't like to do it in front of the judge. What we used to do when we made a deal was that the D.A. would dismiss the original charge and write up a new complaint altogether. That took a lot of time. We had to re-arraign him all over again back in the muni court and everything. Besides, in the same courtroom, everyone used to know what was going on anyway. Now, we just ask for a change of plea to the lesser charge regardless of whether its included or not. Nobody thinks twice about asking for petty theft on burglary, or drunkenness on car theft, or something like that. It's just the way it's done.

Some restrictions are felt. Assaultive crimes (e.g., ADW, simple assault, attempted murder, etc.) will not be reduced to or from "money offenses" (burglary, robbery, theft) unless the latter involve weapons or some violence. Also, victimless crimes (narcotics, drunkenness) are not reduced to or from assaultive or "money offenses," unless there is some factual relation, e.g., drunkenness with a fight might turn out to be simple assault reduced to drunkenness.

For most cases that come before their courts, the P.D. and D.A. are able to employ reductions that are formulated for handling typical cases. While some burglaries, rapes, narcotics violations and petty thefts, are instigated in strange ways and involve atypical facts, some manipulation in the way the initial charge is made can be used to set up a procedure to replace the simple charge-alteration form of reducing.

#### RECALCITRANT DEFENDANTS

Most of the P.D.'s cases that "have to go to trial" are those where the P.D. is not able to sell the defendant on the "bargain." These are cases for which reductions are available, reductions that are constructed on the basis of the typicality of the offense

and allowable by the D.A. These are normal crimes committed by "stubborn" defendants.

So-called "stubborn" defendants will be distinguished from a second class of offenders, those who commit *crimes which are atypical in their character (for this community, at this time, etc.) or who commit crimes which while typical (recurrent for this community, this time, etc.) are committed atypically*. The manner in which the P.D. and D.A. must conduct the representation and prosecution of these defendants is radically different. To characterize the special problems the P.D. has with each class of defendants, it is first necessary to point out a general feature of the P.D.'s orientation to the work of the courts that has hitherto not been made explicit. This orientation will be merely sketched here.

As we noticed, the defendant's guilt is not attended to. That is to say, the presupposition of guilt, as a *presupposition*, does not say "You are guilty" with a pointing accusatory finger, but "You are guilty, you know it, I know it, so let's get down to the business of deciding what to do with you." When a defendant agrees to plead guilty, he is not *admitting* his guilt; when asked to plead guilty, he is not being asked, "Come on, admit it, you know you were *wrong*," but rather, "Why don't you be sensible about this thing?" What is sought is not a *confession*, but reasonableness.

The presupposition of guilt as a way of attending to the treatment of defendants has its counterpart in the way the P.D. attends to the entire court process, prosecuting machinery, law enforcement techniques, and the community.

For P.D. and D.A. it is a routinely encountered phenomenon that persons in the community regularly commit criminal offenses, are regularly brought before the courts, and are regularly

transported to the state and county penal institutions. To confront a "criminal" is, for D.A. and P.D., no special experience, nothing to tell their wives about, nothing to record as outstanding in the happenings of the day. Before "their court" scores of "criminals" pass each day.

The morality of the courts is taken for granted. The P.D. assumes that the D.A., the police, judge, the narcotics agents and others all conduct their business as it must be conducted and in a proper fashion. That the police may hide out to deceive petty violators; that narcotics agents may regularly employ illicit entrapment procedures to find suspects; that investigators may routinely arrest suspects before they have sufficient grounds and only later uncover warrantable evidence for a formal booking; that the police may beat suspects; that judges may be "tough" because they are looking to support for higher office elections; that some laws may be specifically prejudicial against certain classes of persons—whatever may be the actual course of charging and convicting defendants—all of this is taken, as one P.D. put it, "as part of the system and the way it has to be." And the P.D. is part of the team.

While it is common to overhear private attorneys call judges "bastards," policemen "hoodlums" and prosecutors "sadists," the P.D., in the presence of such talk, remains silent. When the P.D. "loses" a case—and we shall see that *losing* is an adequate description only for some circumstances—he is likely to say "I knew *he* couldn't win." Private attorneys, on the other hand, will not hesitate to remark, as one did in a recent case, "You haven't got a fucking chance in front of that son-of-a-bitch dictator." In the P.D. office, there is a total absence of such condemnation.

The P.D. takes it for granted and attends to the courts in accord with

the view that "what goes on in this business is what goes on and what goes on is the way it should be." It is rare to hear a public defender voice protest against a particular law, procedure, or official. One of the attorneys mentioned that he felt the new narcotics law (which makes it mandatory that a high minimum sentence be served for "possession or sale of narcotics") wasn't too severe "considering that they wanted to give them the chair." Another indicated that the more rigid statute "will probably cure a lot of them because they'll be in for so long." One P.D. feels that wire-tapping would be a useful adjunct to police procedure. It is generally said, by everyone in the office, that "... is one of the best cities in the state when it comes to police."

In the P.D.'s interviews, the defendant's guilt only becomes a topic when the defendant himself attempts to direct attention to his innocence. Such attempts are never taken seriously by the P.D. but are seen as "innocent pitches," as "being wise," as "not knowing what is good for him." Defendants who make "innocent pitches" often find themselves able to convince the P.D. to have trials. The P.D. is in a professional and organizational bind in that he requires that his "clients" agree with whatever action he takes "on their behalf":

Can you imagine what might happen if we went straight to the D.A. with a deal to which the client later refused to agree? Can you see him in court screaming how the P.D. sold him out? As it is, we get plenty of letters purporting to show why we don't do our job. Judges are swamped with letters condemning the P.D. Plenty of appeals get started this way.

Some defendants don't buy the offer of less time as constituting sufficient grounds for avoiding a trial. To others, it appears that "copping out" is worse than having a trial regardless of the consequences for the length of sentence. The following remarks, taken from

P.D. files, illustrate the terms in which such "stubborn" defendants are conceived:

Def wants a trial, but he is dead. In lieu of a possible 995, DA agreed to put note in his file recommending a deal. This should be explored and encouraged as big break for Def.

Chance of successful defense negligible. Def realizes this but says he ain't going to cop to no strong-arm. See if we can set him straight.

Dead case. Too many witnesses and . . . used in two of the transactions. However, Def is a very squirmy jailhouse lawyer and refuses to face facts.

Possibly the DA in Sup/Ct could be persuaded into cutting her loose if she took the 211 and one of the narco counts. If not, the Def, who is somewhat recalcitrant and stubborn, will probably demand a JT (jury trial).

The routine trial, generated as it is by the defendant's refusal to make a lesser plea, is the "defendant's fault":

What the hell are we supposed to do with them. If they can't listen to good reason and take a bargain, then it's their tough luck. If they go to prison, well, they're the ones who are losing the trials, not us.

When the P.D. enters the courtroom, he takes it that he is going to lose, e.g., the defendant is going to prison. When he "prepares" for trial, he doesn't prepare to "win." There is no attention given to "how am I going to construct a defense in order that I can get this defendant free of the changes against him." In fact, he doesn't "prepare for trial" in any "ordinary" sense (I use the term *ordinary* with hesitation; what *preparation for trial* might in fact involve with other than P.D. lawyers has not, to my knowledge, been investigated.)

For the P.D., "preparation for trial" involves, essentially, learning what "burglary cases" are like, what "rape cases" are like, what "assaults" are like. The P.D.'s main concern is to conduct his part of the proceedings in accord with complete respect for proper legal procedure. He raises ob-

jections to improper testimony; introduces motions whenever they seem called for; demands his "client's rights" to access to the prosecution's evidence before trial (through so-called "discovery proceedings"); cross examines all witnesses; does not introduce evidence that he expects will not be allowable; asks all those questions of all those people that he must in order to have addressed himself to the task of insuring that the *corpus delicti* has been established; carefully summarizes the evidence that has been presented in making a closing argument. Throughout, at every point, he conducts his "defense" in such a manner that no one can say of him "He has been negligent, there are grounds for appeal here." He systematically provides, in accord with the prescriptions of due process and the fourteenth amendment, a completely proper, "adequate legal representation."

At the same time, the district attorney, and the county which employs them both, can rely on the P.D. not to attempt to morally degrade police officers in cross examination; not to impeach the state's witnesses by trickery; not to attempt an exposition of the entrapment methods of narcotics agents; not to condemn the community for the "racial prejudice that produces our criminals" (the phrase of a private attorney during closing argument); not to challenge the prosecution of "these women who are trying to raise a family without a husband" (the statement of another private attorney during closing argument on a welfare fraud case); in sum, not to make an issue of the moral character of the administrative machinery of the local courts, the community or the police. He will not cause any serious trouble for the routine motion of the court conviction process. Laws will not be challenged, cases will not be tried to test the constitutionality of procedures and statutes, judges will not be personally degraded, police will be free from

scrutiny to decide the legitimacy of their operations, and the community will not be condemned for its segregative practices against Negroes. The P.D.'s defense is completely proper, in accord with correct legal procedure, and specifically amoral in its import, manner of delivery, and perceived implications for the propriety of the prosecution enterprise.

In "return" for all this, the district attorney treats the defendant's guilt in a matter-of-fact fashion, doesn't get hostile in the course of the proceedings, doesn't insist that the jury or judge "throw the book," but rather "puts on a trial" (in their way of referring to their daily tasks) in order to, with a minimum of strain, properly place the defendant behind bars. Both prosecutor and public defender thus protect the moral character of the other's charges from exposure. Should the P.D. attend to demonstrating the innocence of his client by attempting to undermine the legitimate character of police operations, the prosecutor might feel obliged in return to employ devices to degrade the moral character of the P.D.'s client. Should the D.A. attack defendants in court, by pointing to the specifically immoral character of their activities, the P.D. might feel obligated, in response, to raise into relief the moral texture of the D.A.'s and police's and community's operations. Wherever possible, each holds the other in check. But the "check" need not be continuously held in place, or even attended to self consciously, for both P.D. and D.A. trust one another implicitly. The D.A. knows, with certainty, that the P.D. will not make a closing argument that resembles the following by a private attorney, from which I have paraphrased key excerpts:

If it hadn't been for all the publicity that this case had in our wonderful local newspapers, you wouldn't want to throw the book at these men.

If you'd clear up your problems with

the Negro in . . . maybe you wouldn't have cases like this in your courts.

(after sentence was pronounced) Your honor, I just would like to say one thing—that I've never heard or seen such a display of injustice as I've seen here in this court today. It's a sad commentary on the state of our community if people like yourself pay more attention to the local political machines than to the lives of our defendants. I think you are guilty of that, your Honor.

(At this last statement, one of the P.D.s who was in the courtroom turned to me and said, "He sure is looking for a contempt charge").

The P.D. knows how to conduct his trials because he knows how to conduct "assault with deadly weapons" trials, "burglary" trials, "rape" trials, and the rest. The *corpus delicti* here provides him with a basis for asking "proper questions," making the "proper" cross examinations, and pointing out the "proper" things to jurors about "reasonable doubt." He need not extensively gather information about the specific facts of the instant case. Whatever is needed in the way of "facts of the case" arise in the course of the D.A.'s presentation. He employs the "strategy" of directing the same questions to the witness as were put by the D.A. with added emphasis on the question mark, or an inserted "Did you really see . . .?" His "defense" consists of attempting to "bring out" slightly variant aspects of the D.A.'s story by questioning his own witnesses (whom he seldom interviews before beginning trial but who are interviewed by the Office's two "investigators") and the defendant.

With little variation the same questions are put to all defendants charged with the same crimes. The P.D. learns with experience what to expect as the "facts of the case." These facts, in their general structure, portray social circumstances that he can anticipate by virtue of his knowledge of the normal features of offense categories and types of offenders. The "details"

of the instant case are "discovered" over the course of hearing them in court. In this regard, the "information" that "comes out" is often as new to him as to the jury.

Employing a common sense conception of what criminal lawyers behave like in cross examination and argument, and the popular portrayal of their demeanor and style of addressing adversary witnesses, the onlooker comes away with the sense of having witnessed not a trial at all, but a set of motions, a perfunctorily carried off event. A sociological analysis of this sense would require a systematic attempt to describe the features of adversary trial conduct.

#### A NOTE ON SPECIAL CASES

To conduct trials with "stubborn" defendants, so-called, is no special trouble. Here trials are viewed as a "waste of time." Murders, embezzlements, multiple rape cases (several defendants with one victim), large scale robberies, dope ring operations, those cases that arouse public attention and receive special notice in the papers—these are cases whose normal features are not constructed and for which, even were a guilty plea available, both parties feel uncomfortably obliged to bring issues of moral character into the courtroom. The privacy of the P.D.-D.A. conviction machinery through the use of the guilty plea can no longer be preserved. Only "normal defendants" are accorded this privacy. The pressure for a public hearing, in the sense of "bringing the public in to see and monitor the character of the proceedings," must be allowed to culminate in a full blown jury trial. There is a general preference in the P.D. office to handle routine cases without a jury, if it must go to trial at all. In the special case the jury must be employed and with them a large audience of onlookers, newspaper men, and daily paper coverage must be tolerated.

To put on a fight is a discomfiting task for persons who regularly work together as a team. Every effort is made to bind off the event of a special case by heightened interaction outside the courtroom. In the routine case, with no jury or at least no press coverage, the whole trial can be handled as a backstage operation. With special cases there can be no byplay conversation in the courtroom between D.A. and P.D., and no leaving court together, arm in arm. Metaphorically, two persons who regularly dance together must now appear, with the lights turned on, to be fighting.

The P.D. Office reserves several of its attorneys to handle such cases. By keeping the regular personnel away from particular courtrooms, their routine interactions with the D.A. can be properly maintained. An older, more experienced attorney, from each side, comes to court to put on the show. The device of so handling the assignment of attorneys to cases serves to mark off the event as a special occasion, to set it outside the regular ordering of relationships that must resume when the special, and dreaded, case becomes a statistic in the penal institution records.

With the special cases, the client-attorney assignment procedure is instituted. The head of the P.D. Office, along with a coterie of older attorneys, goes to the first interview in the jail, and these same attorneys, or some of them, take over the case and stay with it, handling its development with kid gloves. The concern to provide "adequate legal representation" may be relegated to a back seat. Both P.D. and D.A. must temporarily step outside their typical modes of mutual conduct and yet, at the same time, not permanently jeopardize the stability of their usual teamlike relationship.

#### SOME CONCLUSIONS

An examination of the use of the penal code by actually practicing at-

torneys has revealed that categories of crime, rather than being "unsuited" to sociological analysis, are so employed as to make their analysis crucial to empirical understanding. What categories of crime are, i.e., who is assembled under this one or that, what constitute the behaviors inspected for deciding such matters, what "etiologically significant" matters are incorporated within their scope, is not, the present findings indicate, to be decided on the basis of an *a priori* inspection of their formally available definitions. The sociologist who regards the category "theft" with penal code in hand and proposes necessary, "theoretically relevant" revisions, is constructing an imagined use of the penal code as the basis for his criticism. For in their actual use, categories of crime, as we have reiterated continuously above, are, at least for this legal establishment, the shorthand reference terms for that knowledge of the social structure and its criminal events upon which the task of practically organizing the work of "representation" is premised. That knowledge includes, embodied within what burglary, petty theft, narcotics violations, child molestation and the rest *actually stand for*, knowledge of modes of criminal activity, ecological characteristics of the community, patterns of daily slum life, psychological and social biographies of offenders, criminal histories and futures; in sum, practically tested criminological wisdom. The operations of the Public Defender system, and it is clear that upon comparative analysis with other legal "firms" it would be somewhat distinctive in character, are routinely maintained via the proper use of categories of crime for everyday decision making. The proprieties of that use are not described in the state criminal code, nor are the operations of reduction, detailed above.

A cautionary word is required. It will appear as obvious that the system

of providing "defense" to indigent persons described above is not representative of criminal defense work generally. How the penal code is employed, i.e., how behaviors are scrutinized under its jurisdiction and dispensations made via operations performed on its categories, in other kinds of legal establishments, has not been investigated here. The present case, albeit apparently specialized, was

chosen as an example only. It may well be that, in certain forms of legal work, the penal code as a statutory document is accorded a much different and more "rigorous" scrutiny. The legalistic character of some criminal prosecutions leads one to suspect that the "letter of the law" might constitute a key reference point in preparing for a criminal defense, aiming for acquittal, or changing a statutory regulation.

## POLICEMAN AS PHILOSOPHER, GUIDE AND FRIEND

ELAINE CUMMING, IAN CUMMING AND LAURA EDELL

*Mental Health Research Unit, Syracuse, New York*

This is the fourth report from a group of studies designed to throw some light upon the division of labor among the social agents whose central role is concerned with maintaining social integration by controlling various forms of deviant behavior.<sup>1</sup>

This research was supported in part by NIMH Grant M-4735, Principal Investigator, Elaine Cumming. Acknowledgment is made of the assistance of the staff of the Mental Health Research Unit and its Director, Dr. John Cumming. Our particular thanks are extended to the officers and men of the Syracuse Police Force whose cooperation made this study possible. At the time of the field work, Chief Harold Kelly extended his cooperation to us; since his retirement, Chief Patrick Murphy has helped us to interpret findings, although we are solely responsible for the conclusions drawn.

<sup>1</sup> Earlier reports include: Elaine Cumming, "Phase Movement in the Support and Control of the Psychiatric Patient," *Journal of Health and Human Behavior*, 3 (Winter, 1962), pp. 235-241; Isabel McCaffrey, Elaine Cumming and Claire Rudolph, "Mental Disorders in Socially Defined Populations," *American Journal of Public Health*, 53 (July, 1963), pp. 1025-1030; Elaine Cumming and Charles Harrington, "Clergyman as Counselor," *American Journal of Sociology*, LXIX (November, 1963), pp. 234-243.

<sup>2</sup> This assumption is derived in part

In earlier reports, we have adopted the convention of looking at social agents and agencies in terms of their relatively supportive or relatively controlling character. We have assumed that it is difficult for an agent to exercise both support and control at the same time and that any agent tends, therefore, to specialize in one or the other aspect of the integrative process.<sup>2</sup> Even when he is specialized, such an agent may be considered controlling when he is compared with some agents, and supportive when compared with others. Thus, the probation officer is more on the client's side, that is, supportive to him, than the policeman, but less so than the psychiatrist.

from studies of the division of labor in small groups (see, for example, Bales' "The Equilibrium Problem in Small Groups," in T. Parsons and R. F. Bales, *Working Papers in the Theory of Action*, Glencoe: The Free Press, 1953), and upon theories of role conflict [see, for example, W. J. Goode, "A Theory of Role Strain," *American Sociological Review*, 25 (August, 1960), pp. 483-495.] At another level of analysis, of course, we all control and support one another—by showing disapproval when our expectations are not met and by friendliness, responsiveness, understanding and sympathy when they are.