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Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver

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NOTE

COMPARISON OF PUBLIC DEFENDERS' AND PRIVATE ATTORNEYS' RELATIONSHIPS WITH THE PROSECUTION IN THE CITY OF DENVER*

I. THE ISSUES AS DEFINED IN LEGAL LITERATURE

AS an institution, the public defender has long been the subject of controversy. Traditionally, "the state" denoted only the prosecution. Neither clients nor legal commentators have wholeheartedly accepted the proposition that the state might also comprise the defense. Proponents of public defender systems have successfully demonstrated their economy and efficiency. What remains debatable is a defender's ability to remain autonomous from the prosecutorial arm of the state and give his allegiance solely to the defendant. The most critical question is whether creation of a public defense bureaucracy leads to its amalgamation into a single system for efficiently processing the accused. Unfortunately, investigation of the issue has only recently started to descend from the abstract to the empirical.

Typical of early debates, which generated much heat but little light, was an exchange of opinion published in the *American Bar Association Journal* in 1956.[1] Relying exclusively on "pure reason,"[2] Judge Edward Dimock wrote, "We should never yield one inch of ground in the struggle against the creation of a police state where the government, when it prosecutes a man, purports also to defend him."[3] A Cook County, Illinois judge and public defender were indignant. Their response was based upon the solemn oath that a public defender took to represent the indigent defendant to the best of his legal ability.[4] They elaborated little beyond their insistence that "there is a

* This study was performed during a summer internship program administered by the University of Texas Criminal Justice Project. The project places law students as interns with various criminal justice agencies throughout the nation. In the summer of 1971, the author was assigned to the Denver office of the Colorado Public Defender System. This Note is the result of that assignment.

[1] Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A.J. 219 (1956); Harrington & Getty, *The Public Defender: A Progressive Step Towards Justice*, 42 A.B.A.J. 1139 (1956).

[2] Dimock, *supra* note 1, at 221.

[3] *Id.* at 220.

[4] Harrington & Getty, *supra* note 1, at 1139.

distinct cleavage between the court, the prosecuting officials, and the Public Defender, in exactly the same sense and degree that would exist between the same parties and private counsel."[5]

A pair of articles carried some 5 years later in the *Minnesota Law Review* shed little additional light upon the question.[6] Although choosing such captions as "Impartial Search for the Truth,"[7] and admitting that "[i]t often happens that those who are unable to help themselves . . . are the least deserving of help,"[8] a Los Angeles public defender stated that, because of their concern with developing their own professional skills, public defenders in California had reputations for fighting with as much zeal and skill as any private attorney.[9] In the same volume, a state judge was unrestrained in his praise of the Los Angeles defender system, stating that he saw no tendency for the public defender's close relationship with the prosecution to dampen ardent advocacy. Instead, he felt that rapport with the prosecution could be an advantage to the defender in that he was in a better position to obtain bargains for deserving clients,[10] although no attempt was made to explain how such an ideal defense position was maintained.

Private criminal defense attorneys have been skeptical of the quality of defense provided by agents of the state, but usually their opinions have been based upon theory rather than experience. A survey taken by 100 criminal lawyers by Arthur Lewis Wood showed that those who did not practice in a city where a public defender system existed were prone to oppose it on theoretical grounds. The responses most frequently received were that the system was socialistic and that a public defender would not defend vigorously.[11] Greater insight into the nature of a public defender's relationship with the prosecution was revealed in an interview with noted defense attorney Edward Bennett Williams:

> In a public defender system there is a strong tendency to settle problems of human liberty on a mass-production, impersonal basis, the way a claims adjuster, for example, settles cases.
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> . . . .

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[5] *Id.* at 1140.

[6] Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715 (1961); David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753 (1961).

[7] Cuff, *supra* note 6, at 720.

[8] *Id.* at 734.

[9] *Id.* at 731.

[10] David, *supra* note 6, at 766.

[11] A. WOOD, CRIMINAL LAWYER 193-94 (1967).

> The public defender and the prosecutor are trying cases against each other every day. They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time get to be good friends. The biggest concern of the wrestlers is to be sure they do not hurt each other too much.[12]

Not until *Gideon v. Wainwright*[13] made concern with public defender systems more immediate did empirical research into the peculiarities of the institution begin to take place. From these studies have come two basic complaints against public defenders: (1) They cooperate with the prosecution to the detriment of their clients; and, (2) Even if they are not co-opted into the prosecutorial establishment, their clients are convinced that they are.

The first of these charges was presented most convincingly by David Sudnow in an article based upon his observations of a public defender office in California.[14] Sudnow's description was distressing. While the private attorney's primary concern was his client, the public defender focused his attention upon perpetuating his relationships with other functionaries in the courtroom. Given his caseload and his confinement to a single courtroom, there was little opportunity for communication with his clients. Contact was limited to a few minutes before each appearance in court, where discussion was solely for the purpose of arriving at an appropriate plea bargain. The public defender took it for granted that his clients were guilty and were to be treated accordingly. Moreover, he assumed the basic morality of those responsible for conviction. Public defenders went to trial only when forced to do so by clients who did not know "what was good for them," and then they merely went through the motions of complying with correct legal procedure.

A later study of the public defender's performance in juvenile court showed that Sudnow's characterization applied to other arenas in other cities.[15] Although Platt, Schechter, and Tiffany denied that the defender was co-opted into a juvenile court superstructure, their entire article refutes their conclusion — if any reasonable meaning is given to the term "co-optation."[16] They described the public defender as a member of a

[12] D. McDONALD, THE LAW: INTERVIEWS WITH EDWARD BENNETT WILLIAMS AND BETHEL M. WEBSTER 9-10 (1962).
[13] 372 U.S. 335 (1963).
[14] Sudnow, *Normal Crimes: Sociological Features of the Penal Code in A Public Defender Office*, 12 SOCIAL PROB. 255 (1965).
[15] Platt, Schechter & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619 (1968).
[16] Indeed, they repeatedly analogize the situations they observe with descriptions made by Abraham S. Blumberg, who first applied the word "co-optation" in this context. Blumberg, *The Practice of Law as Con-*

political community and a court employee. As such he wants to avoid confrontations which will discredit his membership in the court community. For management of his huge caseload, he is dependent upon cooperation from all other court personnel. In return, he must be careful not to obstruct their efficient processing of cases. He has a reciprocal arrangement with the district attorney whereby each informs the other of the details of his case. Necessary relations are preserved whatever their cost to an individual client: "The court functionaries see themselves as colleagues rather than adversaries . . . ."[17] From their observations, the authors speculated on the child's impression of his representation. They concluded, "The structural demands under which the public defender operates make it apparent to his clients that he is not 'their' advocate — dedicated to the best defense possible."[18] Apparently, the children had fewer illusions than did the authors as to "their" attorneys' allegiances. The few who were quoted in the article thought of the defender as no more than the man who talked to the judge about their disposition.

Research which has dealt directly with the client's attitude toward the public defender has been in accord with the speculations by Platt, Schechter, and Tiffany. A study conducted during the winter of 1970-71 involving 72 interviews with men charged with felonies in Connecticut revealed the dissatisfaction of those represented by the public defender.[19] The suspicions voiced by the accused concerning the interaction between the defender and the prosecutor bore striking resemblance to the criticisms advanced by more sophisticated legal commentators. The way the public defender behaved toward them and his position as employee of the state led most clients to think of him as a "middleman" or even "the prosecutor's assistant." The author summarized the feelings of those he interviewed:

> In particular, most of those who were represented by Public Defenders thought their major adversary in the bargaining process to be not the prosecutor or the judge, but rather their own attorney, for he was the man with whom they had to bargain. They saw him as the surrogate of the prosecutor — a member of "their little syndicate" — rather than as their own representative.[20]

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fidence Game: Organizational Co-optation of a Profession, 1 LAW & SOC'Y REV. 15 (No. 2, 1967).

[17] Platt, Schechter & Tiffany, *supra* note 15, at 631.

[18] *Id.* at 633.

[19] Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (No. 4, 1971).

[20] *Id.* at 6.

When the respondents were asked if they felt that their lawyer had been on their side, almost all represented by private attorneys said "yes" — but the bulk of those represented by public defenders said "no." The author explained the attitude of the public defender's clients not in terms of the lawyer's performance but in terms of the indigent's assumption that one cannot get something for nothing. The problem was considered one of creating the appearance of justice.

The charges of both clients and legal commentators have been answered in three ways. First, some writers have denied that the public defender is co-opted into the system.[21] Second, others have asserted that cooperative defense attorneys are no more common in public than in private practice.[22] Finally, a few studies have indicated that the entire "adversary" system of criminal justice is little more than a facade for efficiently processing the accused — and that the public defender system is but a conspicuous example of criminal law as it is practiced.[23]

A survey reported in a preliminary summary of Lee Silverstein's monumental work, *Defense of the Poor in Criminal Cases in American State Courts,* demonstrated that judges, prosecutors, and defenders in counties which had public defender offices denied that the public defender's adversariness was in any way lessened by his position.[24] All three groups almost unanimously disagreed with the assertion that a public defender could not be completely independent. The great majority of defenders responded in the negative when asked if the prosecution cooperated more with them than with retained counsel. The majority of judges and district attorneys surveyed stated that the performance of public defenders in their areas was equal to or compared favorably with that of retained counsel.[25]

A comparative study of public defenders and private attorneys in Cook County, Illinois, revealed dissimilarities in their styles of operation as well as differences in the areas in which each group experienced its successes and failures.[26] Yet, from studying their data the authors concluded, "overall, the differences suggest less that one kind of counsel is better than another

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[21] *See, e.g.,* L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS — A PRELIMINARY SUMMARY (1964).

[22] *See, e.g.,* Skolnick, *Social Control in the Adversary System,* 11 J. CONFLICT RESOLUTION 52 (1967).

[23] *See, e.g.,* Oak & Lehman, *Lawyers for the Poor,* in THE SCALES OF JUSTICE 91 (A. Blumberg ed. 1970).

[24] L. SILVERSTEIN, *supra* note 21.

[25] *Id.* at 13-16.

[26] Oak & Lehman, *supra* note 23.

than that they perform somewhat different roles in the overall operation of the criminal justice system."[27] Dispositions for cases handled by public defenders were distinguished and explained with reasons other than the defenders' cooperation with the state. For example, the authors suggested that the 14 percent higher guilty plea rate for clients of public defenders could be caused by private attorneys' feelings of obligation to go to trial to earn their fees or by public defenders' obtaining better bargains for their clients. Public defenders were found to win 50 percent of the cases which they take to trial, as compared with a 31 percent acquittal rate for private attorneys. Their overall conviction rate was nearly the same: 91 percent for public defenders and 93 percent for private attorneys. The authors reasoned that a defendant against whom the evidence and the law were clear might be better served by a public defender's bargain than by a private attorney's propensity to go to trial.[28]

Jerome Skolnick rejected the categorical classifications of public defenders as cooperative and private attorneys as aggressive. After extensive observation of both public and private attorneys' perfomances in a single community, he concluded that "the public defender, as an institution, does not significantly differ from other 'cooperative' defense attorneys."[29] He found that the layman's notion of adversariness was rarely in the client's best interest and that clients of cooperative attorneys usually obtained lighter dispositions. He implied that Sudnow, in his study of the same community,[30] tended to confuse ability with hostility, when in fact the ablest private defense attorneys were no less cooperative with the prosecutors than were the public defenders. To district attorneys, it mattered not so much whether a public defender was handling a case as whether it was being handled by a "cooperative" defense attorney — a category that included more private attorneys than public defenders. Skolnick's observations revealed that the notion of teamwork between the public defender and the district attorney broke down often enough to be notable and probably was disrupted more often than were the district attorney's relations with leading private defense attorneys. Differences between the practices of private attorneys and public defenders were attributed not so much to *their* attitudes as to the atti-

[27] *Id.* at 94.
[28] *Id.* at 95-103.
[29] Skolnick, *supra* note 22, at 53.
[30] Sudnow, *supra* note 14.

tudes of their clients — the clients of public defenders being harder to "control" and thereby more often forcing them to defend hopeless cases.[31]

II. The Purpose, Scope, and Methodology of the Study

From the survey of the literature just completed, five primary issues surrounding the public defender are apparent. First, what is the public defender's relationship with the other actors in the criminal justice system? In particular, what is his relationship with the prosecution? What effects do such relationships have on the quality of defense provided by the public defender? Second, what is the nature of discovery procedures, both formal and informal, utilized by the public defender? Third, what are the conditions under which the public defender is effective in plea bargaining? Fourth, what are the characteristics of the client/defender relationship, and what effect does this relationship have on quality of representation? Fifth, to what extent may a governmental agency such as the public defender achieve political autonomy from the state?

The purpose of this study is to examine each of these five issues in the context of the Denver public defender. The mode of examination is to draw comparisons wherever possible between private defense attorneys and public defenders regarding their relationships to the larger scheme of criminal justice. It is these relationships which are represented by the five issues to be examined.

To achieve this purpose, the author chose a methodology tailored to the relationships. Since these relationships are highly informal with most interactions occurring in private, direct observation was not feasible. Instead, a questionnaire and interview technique combined with participant observation were employed as the chief sources of information.

The early stages of the study were spent observing and communicating with the public defenders. During this period, the author became quite familiar with the varied personalities and approaches of the individuals, and obtained a broad working knowledge of the Denver criminal justice system. Subsequently, a detailed questionnaire covering nearly every aspect of a criminal attorney's relationship with the prosecution was compiled, and copies of this questionnaire were given to 10 public defenders. Five defenders were lawyers assigned to felony courts who had worked their way up through other

[31] Skolnick, *supra* note 22, at 60-68.

stages of criminal defense. Four defenders were new attorneys whose experiences were confined to county courts. The final defender practiced almost exclusively in the juvenile area. Each public defender was provided with an explanation of the research, an hour spool of recording tape, and a questionnaire and was asked to dictate his responses onto the tape. The answers were later transcribed and analyzed. Nine of the respondents cooperated fully. As a basis of comparison, nine private criminal lawyers were interviewed personally and asked questions corresponding to those to which the public defenders responded.

Using these approaches of comparative reporting and participant observation, some significant insights are gained into the relationships comprising the criminal justice system in Denver. Moreover, these approaches permit the author to explore the issues of public defense current in the literature in the more concrete context of a particular public defender office. Before such issues are examined, however, it is essential to have an appreciation of the fundamental operation of the system under study.

III. THE CHARACTERISTICS OF PUBLIC AND PRIVATE CRIMINAL DEFENSE IN DENVER[32]

The Denver Public Defender Office was established in 1966, and functioned as a city agency through 1969. A statewide public defender system was created by the Colorado legislature in 1969,[33] and the Denver office was assimilated into the statewide system on January 1, 1970. As one of the 18 regional offices in the state, the Denver Public Defender now operates as an agency of the judicial branch of the state government.

Although the numbers fluctuate monthly, there were 19 full-time salaried attorneys, four investigators, one social worker, one law student, and five secretaries employed by the Denver office at the time of this study. With the exception of murder cases, the workload was handled by means of a "zone defense"; *i.e.*, attorneys were not assigned to clients — they were assigned to courtrooms. The courtrooms consisted of four district courts which handled felony trials, two county courts which held felony preliminary hearings (plus an additional court for mur-

[32] Shortly after this study was completed, many changes were made in the administration of the public defender office. The following description, therefore, is only applicable to the period covered by this research (Summer 1971). It is hoped that by the time of publication some of the problems described in this article will have been remedied by these changes.

[33] COLO. REV. STAT. ANN. §§ 39-21-1 to -5 (Supp. 1969).

der preliminary hearings), three county courts for state misdemeanors, two county courts for city ordinance violations, and two juvenile courts. Ordinarily, two attorneys were assigned to each of the six felony courts, and one attorney was assigned to each county court and each juvenile court. Initial appearances were handled by paralegal help, if handled at all. New attorneys served lineup duty in weekly shifts. Attorneys assigned to county courts rarely met their clients prior to arraignment, at which time a plea was entered. A somewhat greater probability existed that an accused felon would have spoken to an attorney prior to his preliminary hearing. Motions for preliminary hearings were filed as a matter of course. If an acceptable plea bargain was not reached at the preliminary hearing level, the defendant would find that he had a new lawyer when he appeared in the trial court, or perhaps sooner if the public defender handling his case paid a hurried visit to the county jail. Three months often passed before one charged with a felony met the defender ultimately responsible for his case.

Defenders were assigned to their courtrooms on a semipermanent basis. There was no procedure for rotation of assignments; rather, a defender was moved only when a reallocation of resources was necessary. Usually this was caused by someone leaving or entering the employ of the office. In order to fill a vacancy or accommodate a new arrival, more than a single reassignment was often required. A vacancy at the district court level was usually the occasion for promotion and redistribution of talent within the ranks. The high rate of turnover in the office was the major factor which prevented an attorney from being assigned to the same judge and the same courtroom indefinitely. In fact, it was not uncommon for a new lawyer to advance from county court, the bottom of the totem pole, to felony trials in district court, the top, within 9 months. The only desirable effect of such turnover was the fluidity it necessarily entailed in courtroom assignments. Between personnel shakeups, a defender was moved from a courtroom only if he so displeased the court that the judge insisted upon his transfer. On the other hand, certain public defenders were so compatible with the judges of the court to which they were assigned that this "marriage" survived all changes within the defender office. District attorneys in felony trial courts were also assigned for an indefinite term. Therefore, the most serious offenses were handled by the same two district attorneys and

the same two public defenders working with the same judge week after week. In the county courts and at the preliminary hearing level, deputy district attorneys were rotated on a monthly basis, thus presenting some barrier to the formation of symbiotic relationships.

Yet in every courtroom the public defender was a permanent fixture. Nearly 85 percent of the defendants who appeared in any criminal court in Denver were represented by the public defender. Counsel table was virtually the public defender's office, into which a private attorney only occasionally intruded. A defender had no control over his own caseload. Theoretically, the pubilc defender office made the initial determination of indigency subject to review by the court.[34] Actually, the court very rarely questioned representation by the public defender. Indeed, it appeared that anyone who wanted to be represented by the public defender was assumed to be unable to afford private counsel. Also, the court refused to consider the defender's caseload as having any influence upon qualification for representation. The few public defender efforts to limit their own caseloads were sharply rebuked by the judges. As a result, nearly every attorney had over 100 case assignments pending at any given time.

Frequently, an attorney not long out of law school with no previous trial experience was thrown into a courtroom on a "sink or swim" basis. He went through no orientation program and received no supervision, instruction, or meaningful evaluation. He was hired to fill a vacancy in a courtroom. Fill it he must, with little help from others occupied with their own work.[35] During the period of this study, no regular organizational or strategy meetings were conducted. Conferences were convened only to solve specific administrative problems, although biweekly seminars were reportedly held during the winter months. This lack of training, supervision, and coordination contrasted sharply with the organization of the district attorney's office.

The relatively small private criminal bar in Denver seemed to sustain itself quite well with the 15 to 20 percent of the defendants who could afford their services. There were very few marginal practitioners. No "jailhouse crew" was discern-

[34] *Id.* § 39-21-3(3) (Supp. 1969).

[35] One public defender took issue with this analysis. He admitted that there was little *formal* instruction but he insisted that advice and information were readily available to new attorneys willing to *ask* for it. He saw the office as a source of expertise from which a diligent novice could benefit.

ible as in many cities where legal service to the indigent is not so complete. Few criminal lawyers relied upon big-volume practices. They did not often find themselves forced to engage in coercive fee collection measures. Most occupied spacious offices that would be considered prestigious by standards of criminal lawyers in general. They were not resentful of the large amount of business preempted by the public defender. Instead, they were glad to be relieved of the problems inherent in serving those who could not really afford a private defense. In addition, perhaps because of the substantial compensation allowed in Colorado,[36] private attorneys rarely tried to avoid court appointments which resulted when the public defender had conflicts of interest.

IV. Compatibility of Relationships Between Defense, Prosecution, and the Court

To a man, the private attorneys agreed that good relationships in the criminal justice system made for better client service and not merely more pleasant working conditions. The responses of public defenders were not as unqualified. They saw complexities in relationships with judges and district attorneys with whom they dealt for 6 hours every working day that were not important to attorneys who entered their courtrooms only a few times each month. Broadly speaking, the public defender has to combine with other functionaries assigned to that courtroom in order to create a working environment. His relationships depend largely upon how his personality meshes with others involved:

> I think that each person must mold himself and his approach to everything to fit his personality. Some people may succeed by being antagonistic to everyone. Others may succeed by being complacent. Everybody has to do it in his own way. My approach is to be friendly, but not too friendly. To be polite, but not in the pocket of someone. The first thing to consider is what benefit can your client derive from this. (P.D. 1)[37]

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[36] Colo. Rev. Stat. Ann. § 39-21-5 (Supp. 1969).

[37] Numbers identify individual attorneys interviewed. "P.A." designates private attorneys; "P.D.," public defenders.

P.D. 1 through P.D. 5 were assigned to felony cases. For the most part, they were attorneys with experience in every phase of criminal defense in Denver. Their answers, therefore, are based upon a wider perspective than are those of the other four P.D.'s. Usually they spoke from personal experience, having been confronted with the problems dealt with in the questionnaire. On the other hand, the newer attorneys assigned to misdemeanors or preliminary hearings could only speculate on their reactions to situations which they had not encountered. P.D. 8 had faced most of the problems inquired about but within the different context of juvenile court.

The experience of every private attorney interviewed seemed to be at least as broad as that of the felony division public defenders. Only

Quite understandably, most defenders function best when there is a certain degree of harmony in the courtroom. Unlike the private attorney who can dispose of his case and then collect himself in more pleasant surroundings, the public defender must stay to handle the remainder of the day's docket. A volatile courtroom atmosphere may be of little concern to a private attorney if it does not interfere with his client's disposition. But a public defender confined to unpleasant surroundings may find his energy drained and his effectiveness diminished. New and inexperienced defenders are especially handicapped when they are paired with heavy-handed judges or prosecutors. One young attorney spent 2 months being bullied in county court only to be transferred to the most domineering judge in preliminary hearings:

> The first judge I worked with — we couldn't agree on anything. He wouldn't even let me in his chambers. Constant friction. Consequently my clients suffered — just because the situation was so abrasive that it was impossible for me to do a good job for them.
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> . . . .
>
> Like any job, your success to a certain extent is dependent upon other people and what they can do for you. Good relations could make a big difference. Take my situation right now with Judge [X] in preliminary hearings. He really likes to run them through. It makes it very difficult in the courtroom. You don't have time to advise your client, much less discuss the case with him. (P.D. 6)

Even self-assured public defenders apparently unconcerned with such frustrations were usually convinced that the client suffered when his attorney had bad relationships with the opposition:

> The question is whether the type of relationship that a public defender has with the system affects the quality of defense provided. I think that it does. . . . I've heard the D.A.'s mention on several occasions that these two would not receive the sweat off the D.A.'s you-know-what. This means that they start into a case with added weight that lawyers who have not so antagonized their opponents do not have. . . .
>
> In the great majority of cases you're dead on the facts. Then it's a question of getting the best bargain for your client. If you've antagonized or alienated the D.A.'s, you're going to get him nailed. (P.D. 2)

The defender whose style was most disparaged by other members of the office was convinced that his approach was ef-

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the intensity of their contact with a given area was less than that of any public defender to whom that area had been specifically assigned.

This explanation is offered as a warning against comparing individual attorneys. The only comparison attempted is the general one between public defenders and private attorneys as groups.

fective. He asserted that he treated the judges, police, and district attorneys as enemies, and as such, he was prepared for them to win a few victories. This was the only type of relationship in which he was interested:

> Good relationships with the criminal justice system are meaningless to me. They are certainly of minimal importance if their function is to expedite justice, as they call it. Members of the system function basically out of fear and superstition. I try to antagonize the district attorneys since they are as susceptible to fear, if not more so, than other members of the group. . . . The effect of my kind of relationship can cut both ways, as seen in [a case in which he turned down a 14-year sentence offered by the prosecution, only to have his client get a *much* heavier sentence after trial]. This is the kind of risk that I'm willing to run. It didn't work in this case. But otherwise you end up being a cop-out artist, and we have enough of those. (P.D. 4)

While most public defenders did not share the attitude of the public defender quoted above, they were conscious of limits as to how close their relationships with the system could be and still be of benefit to the client. The young attorneys were especially afraid of being "used" by the judge or of having their allegiance questioned by the client. The older attorneys were confident that they could not be manipulated, but this confidence was not always shared by others in the office:

> Obviously a defender's relationship with the district attorneys and judges can be very detrimental to the client if that relationship becomes too close. A close relationship with a judge, for example, can result in a dampening of necessary aggressiveness in dealing with that judge, and perhaps an unconscious desire to please. Probably the biggest danger of a close relationship with the district attorney is reliance upon what he says about a given case. It is probably in this area where some attorneys in this office gain the reputation of cop-outs. Because of the everyday necessity of being in a given court, usually with the same judge and same prosecutors, it is altogether too easy to transmit an image of close comaraderie that should never be transmitted, and probably should never exist. Even if there is not a subconscious effect upon the attorney himself, the loss of confidence in the attorney-client relationship has great impact on the ability of the attorney to fully represent the client. (P.D. 3)

To the question, "Which is more important in your practice of criminal law: knowledge of the law or contacts in the criminal justice system?," half the private attorneys responded that contacts were more important. Presented the same question, no public defender chose "contacts." It was apparent that the word with its normal connotation had little applicability to the work of public defenders. Private attorneys may operate to a certain extent in a world that functions on "who you know." Public defenders definitely do not:

> I'm not quite sure what you mean by "contacts." In the first place, my contacts are very limited. I certainly have no "friends" in the D.A.'s office — someone to whom I can go for a special deal. I have been in the courtroom with [only two deputy D.A.'s]. Those are my contacts. I work only with them. It's impossible for me to go above their heads. (P.D.2)

Although a public defender's contacts are very limited, he comes to know those within the limits of his courtroom to an extent far beyond the means of a private attorney. Most defenders felt that working in such close proximity to their opponents gave them an advantage because they learned the idiosyncrasies of the other parties involved and could plan their tactics accordingly. In this, they saw not only expediency but the means to seize every opportunity for a defensive maneuver:

> You understand what the procedures are. You understand what the judge and the district attorney are likely to do under certain circumstances, and you try to bring about those circumstances which are most favorable to your client. (P.D. 5)
>
> I've talked to D.A.'s about this. They've told me that they know we know what can be expected. We know how far we can push a case. They know that we will hold out until the last, because we know when they'll have to give in. We deal with them every day. We watch them every day. Even when we don't have a case, we're right there watching them.
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> Being in this constant contact with the D.A.'s has some effect. [One deputy D.A.] is very much aware of my problems [New lawyer alone in felony court]. He sympathizes with my caseload and my difficulty in dealing with certain clients. And I think he unconsciously bends to try to balance out the difficulty that I'm confronting. (P.D. 2)

The district attorneys were very reluctant to help other defenders in the office. For the latter, proximity only seemed to increase the friction between themselves and their adversaries. Two attorneys used the cliche, "Familiarity breeds contempt." They may have meant that their exposure to the system had increased their contempt for it, but less aggressive members of the office agreed that the reverse was also true.

Several attorneys perceived the countervailing forces at work between parties confined to the same courtroom. While the defender is sizing up the opposition, he is also being sized up. One said, "I think that there could only be a disadvantage in that our ways become known to them, so that they can wait for the opportunity to counteract our moves." (P.D. 1) There is the added detriment that a public defender can come to be thought of as part of the courtroom woodwork:

> I think our continual presence can become so mundane for a

> judge and a D.A. that they don't give the attention to our cases that they give to those of private attorneys. Call it the cry of human intellect for novelty or what you will, I get this feeling. It comes from seeing private attorneys treated with more courtesy than P.D.'s by the bench, from having D.A.'s plea bargain first with private attorneys — little things like that. (P.D. 8)

Asked to choose which relationship was most important for them: that with the police, that with the district attorney's office, or that with the judges, only three private attorneys would make a general statement. Two said that their relationships with the district attorney's office were most important, and one chose police relations. The only clear-cut sentiment among the public defenders was that their relationships with the police were of very minor importance. Of the defenders who would make a choice, four picked the district attorneys, and four picked the judges. It is understandable that public defenders feel the weight of a judge's power more since most of their day is spent under his direct control. Still, most of the work of the court is hammered out between the P.D. and the D.A.:

> Public defenders and district attorneys in large measure run the courts. They're the main wheels in the system of criminal justice. The only time the judge plays a critical role is when plea negotiation breaks down — when the district attorney and the public defender look at each other and realize that they're going to have to let the judge resolve it. (P.D. 2)

The public defenders were asked whether they preferred to be on close terms with the district attorneys in their courtroom. There was a split of opinion among those questioned. In general, the more experienced attorneys handling felony cases said that they would rather not be on close terms with the prosecutors. At the extreme was the following response:

> Under no circumstances do I want to be on close terms with the D.A. in the courtroom. I want this system to remain an adversary one. I will not talk with them at recess. I will not discuss anything with them when the jury might be present. I don't want any inference to be made by anyone that we are friends on the outside or anything other than antagonists. Our relations aren't important to me at all. They don't want to try cases. I do. They know that. So they'll offer me a better deal. I'd rather have them fear me. I don't want to talk with them except when I have to about business. (P.D. 4)

Most newer attorneys, however, liked a cooperative atmosphere:

> Personally, I prefer to be on close terms. It is important for me to be able to work out dispositions, figure out which case is going to go to trial, know what the D.A. has through discovery. I had one district attorney who I could not work with, and as a

> result many hopeless cases which should have been dealt out were not and at this time are still pending trial, merely because I could not talk to him. We did not have any workable relaship whatsoever. I think it's definitely to the client's advantage that I am able to work with the district attorney and to obtain the best possible disposition for him. (P.D. 7)

Public defenders, more than private attorneys, seemed to rely upon cooperation from the district attorneys in small routine matters that could otherwise consume much of their day. Certainly without some administrative cooperation between the public defender's office and the district attorney's office the system would bog down. The two offices were most dependent upon each other for efficient utilization of their limited resources. With neither side having control over its caseload, each sympathized with the other enough not to cause unnecessary inconveniences. The adversaries were most inclined to engage in mutual backscratching in dealing with lesser procedural matters in which a defensive stance could be of little value to the client. It was generally agreed that those defenders who refused to accomodate themselves to the prosecution's administrative difficulties consequently faced very cumbersome, time-consuming practices themselves. At least one public defender, however, felt that the time thus saved was of little significance:

> This cooperation is fine, but it's more and more becoming nonexistent. It doesn't matter anyway. Time is not of the essence, believe me. You spend 70 hours a week. If you were cooperative, you'd spend 60. What the hell difference does 10 hours a week make? (P.D. 1)

The majority of public defenders did not share this attitude. They were eager to get their "housework" over as quickly and painlessly as possible:

> Yes, there are a million little ways: setting dates for court hearings, setting certain cases before certain judges, stipulations, joinder of cases or severance of same, continuances on stipulation, calling ahead of time if you're asking for a continuance so the other side can call off its witnesses, etc., etc. (P.D. 8)
>
> Yes, it is important in little matters — getting mutually agreeable court dates and such. Of course, this can work to a disadvantage if you are too much good friends. If you're set for trial and the district attorney can't get his police officer there, you'll want to get the case dismissed, not continued. You can't get yourself into the position where you're indebted. (P.D. 6)

Social contacts between the prosecutors and the two defense attorney groups were explored to determine if private friendships might offer some indication of the differences in their working relationships with the prosecution. Interviews

indicated that the public-private variable had no casual connection with the extent of their friendships with district attorneys. The only significant factor seemed to be age. Only the young, gregarious public defenders were likely to have social contact with their age group in the district attorney's office. Some were recent graduates of the University of Denver or the University of Colorado law schools and had simply continued their friendships with classmates who took jobs on the other side of the fence. A few felt that their friendships with district attorneys gave them a slight advantage; others saw a possible disadvantage. No significant effect was apparent from such naturally arising friendships:

> My friendships with some of the district attorneys go beyond the courthouse. [One deputy D.A.] has fixed me up with girls. I've played tennis with him. [Another deputy] is a very good friend of mine. I've known him for 6 years. I don't think these friendships hamper my effectiveness at all. I think they help. . . . I'm a longtime friend of [a third deputy]. I play golf with him, party with him, doubledate with him. But we never divulge anything to each other about our cases. Oh, I might ask him why his office does certain things, and he might tell me. If he becomes head of the county court deputies, it will be difficult to achieve a working relationship that doesn't involve our friendship. But friendships don't have to be a problem. Competition is competition. Friendship may help the competition by eliminating personality conflicts. You can argue the issues much more efficiently if you know your adversary and his style. (P.D. 9)

The private attorneys interviewed had well-established practices, and their social lives did not include any district attorneys. Both they and the older public defenders made a distinction between their personal friends and their business contacts with district attorneys confined to the latter category. Their lives had grown apart from their law school classmates, and their association with district attorneys was limited to the courthouse. All denied that they ever cultivated relationships with prosecutors in order to help their practices. Most said, however, that they had a bond with district attorneys from sharing a common experience and that they often enjoyed pleasant conversation together. Only a small minority of public defenders and private attorneys said that they could not get along with "prosecutorial personalities."

Certain public defenders were particularly antagonistic to *any* member of the district attorney's office. They gave no quarter to prosecutors, in or out of the courtroom, and they received none. On such terms with the prosecution were several of the

reputedly best trial lawyers in the public defender's office. Their relationships with the district attorneys, as well as with the police and judges, could only be described as hostile. Others in the office were convinced that the clients of these attorneys suffered because of their egotism and accused them of taking cases to trial purely to satisfy their own self-interests. It was thought that their clients *fell hard* when they lost at trial and that they received inferior plea bargains. On the other hand, the "hostile" attorneys looked down upon other defenders as "cop-out artists." They felt that by their going to trial many defendants were freed, and that those who were not served "easier time" because they went down fighting. They also said that they got better bargains because of their threat at trial.

Even with this obvious difference of attitude in the office, it was not surprising that every public defender interviewed responded in the affirmative to the question, "Are some public defenders out of favor with the D.A.'s office?" However, it was predictable that there would be a clear split in their answers to the next question, "How did they get that way?" Depending upon with which group they were aligned, they either responded, "by being zealous advocates," or, "by being completely unreasonable."

V. THE NATURE OF DISCOVERY PROCEDURES

Since formal discovery in criminal cases is limited and time-consuming, a major derivative benefit from the maintenance of good terms with the prosecutors is having access to their files for informal discovery. This privilege was extended as a matter of course to all but one of the private attorneys interviewed. For them a file would contain the police offense report and a "supplemental" report. Most said that they were routinely handed the files in all but the most serious cases:

> Yes, they're open to me. . . . But it still depends upon which deputy you are dealing with. The present policy in the D.A.'s office is to leave that decision up to the individual deputy. Today, I'm having a bargaining session in which several cases will be disposed of. I expect the district attorney to just hand me the files on those cases, and we'll take it from there. Sometimes I'll meet a particular deputy who will not show me anything. Sometimes I don't care to see the file anyway, when I know the case and how bad it looks for my client. Actually, the only time I want to see the files is when I'm anticipating a disposition. (P.A. 6)

The majority of private attorneys spoke of informal discovery in the context of plea bargaining. Indeed, it seemed to be the

initial step in negotiations with the prosecution, but they emphasized that the files were not open to everyone to this extent. The one private attorney who denied that he gained informal discovery seemed to be at quite a disadvantage. P.A. 4 said that he could count on the fingers of one hand the times that he has seen the district attorney's files in the past 9 years of his practice. He had no idea that they were available to others and was accustomed to "bargaining blind," without knowledge of the prosecution's case. Most private attorneys had no knowledge of whether public defenders saw the district attorney's files. A few, however, thought that public defenders had more difficulty gaining access than did private attorneys. Conversations with public defenders tended to confirm this opinion, although the responses were qualified. Only three were willing to state that the district attorney's files were open for discovery as a matter of course. In view of their peculiar position, public defenders seemed more cautious about becoming dependent upon the D.A.'s files for their information:

> They're not open in my courtroom. They're very willing to *tell* me what happened. Sometimes they'll let me look at a file. But I never ask them to let me look. I'll ask for specific information and then let them look in the file and then tell it to me. I try very much *not* to look at their files. When they are looking in them, I stand away and let them only tell me what they want me to know. (P.D. 9)

In general, public defenders refused to speak in terms of a broad policy. Instead, they spoke of their experiences in specific courtrooms, with specific district attorneys. The only generalization made was that discovery was harder to gain when a defender advanced to handling felony cases:

> Depends upon the D.A. Depends upon the case. Sometimes I walk over and say, "Can I take a look at this file?" And in certain instances the D.A. will say, "Yes." Now, what are those instances. Well, they're noncontroversial cases. They're not supercriminal cases. They're generally possession cases. . . . I've had open discovery from a lot of D.A.'s. When I was at preliminary hearing level, it was a matter of course. I can't think of a file there ever being closed to me. When I was in misdemeanor courts, never closed. I routinely stood at the D.A.'s lectern and went through the files of my clients and even other lawyers' clients. *Routinely*. This was in misdemeanors. Now, as you go up the scale into the more complex, or supercriminal cases, where the D.A. has the burying inclination, the files become more and more closed . . . . Now quite often my discovery just consists of sneaking peeks. When I'm talking to the district attorney and he's looking at his file, I read fourteen times faster than he reads. He has his file open. I'm standing within a reasonable distance. I read his damn file. (P.D. 2)

In any courtroom, the amount of discovery practiced appeared most dependent upon the personalities involved. Many public defenders were convinced that the district attorneys only opened their files to attorneys whom they liked. Yet the most belligerent public defender in the office spoke of the opportunities that were offered him:

> It's all based upon their fear of going to trial. Whether they hate me or not, they'll open up their file if they can avoid trial. At least on many occasions they will, unless it's a client . . . whom they really want to nail. I think they open them up more frequently for other defenders. But I'm not that interested in their stuff. If we've had a good investigation, our file's better than theirs in many instances. . . . Some D.A.'s will routinely hand me material from their files. Others . . . won't give me the time of day. (P.D. 4)

Both private attorneys and public defenders emphasized the necessary expediency in gaining discovery by informal means:

> It's certainly advantageous to get information from the district attorneys without having to file motions. It creates one hell of a lot of work for our secretaries to have to type the motions and for us to have to write them. It's a lot better to get what we need from the district attorney on the spot, while the client is in the courtroom; while the file is there. (P.D. 9)

Many of the defenders in felony courts, however, thought it dangerous to rely on the prosecution's gratuitous showing of files. Since time is critical to a public defender, it might seem strange that he would accept the added burden of filing formal motions. His caution seemed to be because of his greater susceptibility to dependence:

> Generally speaking, it is definitely necessary to rely on formal motions for discovery, because I simply wouldn't trust the bastards to give me everything unless it was a matter of record. (P.D. 3)

These same more experienced public defenders also said that it was their impression that the prosecutors would not let them have information that would be beneficial to their case but only that which might induce their clients to plead guilty. When they had a triable case, they would not enter into negotiations in order to obtain information for use at trial. Most private attorneys agreed that this was indeed the motivation for the district attorneys' showing them their files; but they seemed to have less hesitancy about deceiving the prosecutor as to their intentions, gaining whatever discovery they could, and then using it at trial:

> That's what they *think* they're doing. The statement is only true to the extent that the D.A. knows what you are doing and

> what he is doing and what he is letting you see. An attorney has to know what to look for. I can flip through the file quickly until I find just what I'm after. Often I've got to resort to subterfuge. That means that I try to get the file by any means possible, and then look for what I need. (P.A. 7)

Such deception could not be successfully practiced by a public defender engaged in daily transactions with the same prosecutors. Private attorneys are no doubt free to use tactics on an occasional basis that would become very transparent if regularly employed.

Perhaps the greatest danger associated with informal discovery is that it creates the expectation of reciprocity. Public defenders seemed very aware of this danger:

> There is a very natural tendency for discovery to work both ways. It may become a matter of fraternalism. In these informal discussions the D.A. might gain considerable insight into our theory of defense . . . . They may gain information from me to the extent that I think it will help my client. If a defender goes beyond this and breaches his client's confidences, he should be fired. (P.D. 3)

The most that any public defender said that he would reveal to the prosecution were facts which were beneficial to the defendant and those of which the prosecutor was certain to have knowledge already. In general, private attorneys advocated the same restrictions. Two, however, made the following surprising statements:

> Discovery between the district attorneys and me is approaching that stage [mutuality]. We're not quite there yet, but we're getting there. As far as I'm concerned both sides should have joint discovery. That's the way I try to work. (P.A. 8)
>
> You've got to give something to get something. I just walk in, talk to a district attorney, and say, "Here's the way the case breaks down from my point of view. How does it look to you?" (P.A. 5)

Public defenders indicated that they would not participate in such an exchange of information. In general, their responses were to the other extreme:

> The only thing I give the D.A. is a smile and a hardluck story about my poor, dumb client, and how he'll never do it again. Once I gave the D.A. my client's address and the kid was arrested two hours later. Never again. (P.D. 8)

All defenders insisted that there were no conditions, express or implied, attached to seeing the prosecution's files. They admitted that if one repeatedly obtained information by false pretext his privilege might well be withdrawn, but merely using the information to his client's best advantage did not

constitute deception. The prosecution expected defenders to seize every opportunity to help their clients:

> I don't think your access is dependent upon anything like that. Maybe if they think that you're sneaking around corners, that you're going to cross them up at every turn, then they're not going to let you do it. They recognize, of course, that war is war, that most battles are fought with real bullets. They expect you to use that information to impeach them if that's what it takes. (P.D. 6)

Several private attorneys were under the impression that access to the district attorney's files might be conditioned upon not impeaching evidence found there. If the condition were imposed, however, none stated that he would comply with it:

> They've verbally made that threat to me, but they don't enforce it. There's no real penalty for impeaching evidence seen in their files. Even though it's the understanding at preliminary hearings that you only see the file if you waive the hearing, I've often looked at their file and then gone ahead with the hearing. It's hacked them off, but they haven't stopped showing me their files. (P.A. 3)

When asked, "Would you ever see the necessity for calling an error or other flaw in the D.A.'s case to his attention if you learned of it from an informally privileged position, even though it could help your client to destroy their case?," every private attorney answered that he would not hesitate to use any mistake by the state against it. Surprisingly, one public defender responded to the contrary:

> If it was a rapist or a murderer that I was turning loose, I think that I would owe a duty to the court as an officer of the court to call it to their attention. If you're playing a ball game, you shouldn't cheat. You have a duty as an officer of the court to inform them of errors, even though it screws your client. (P.D. 9)

No other public defenders expressed this inclination. Most recalled with pleasure instances in which they had gained dismissals by exposing the prosecution's technical errors:

> I never call an error to their attention, and I don't think that they hold it against me. I don't know why. Maybe again it's because of my relationship. Maybe it's different with someone who gloats upon their mistakes. I'm not that type of person. If there's an error in a date, I argue it as a reason for dismissing the case, and that's the end of it. After all, the district attorney didn't prepare the file. The police did. The district attorney doesn't get overly excited about it . . . . And I've done this on occasion. When I was in county court, I knew going into a trial that the date on the compliant was incorrect and that the police would testify to another date. But I let the thing go. And, when I moved to dismiss, my motion was granted. My experience was that they got a chuckle out of it, rather than feeling destroyed. Maybe they would take it harder in district court. (P.D. 2)

VI. Success in Bargaining

Undoubtedly, most of the time which any defense attorney spends with the prosecution is for purposes of plea bargaining. Individual estimates of the private attorneys with respect to the number of their clients who pleaded guilty ranged from 50 to 90 percent. Public defenders outside of juvenile court estimated that within their currently assigned courtrooms, their own records ranged from 80 to 100 percent. A check of the monthly office reports revealed that most defenders disposed of 5 to 10 percent more cases on pleas than they had estimated. The same degree of underestimation probably also applies to private attorneys. One felony court defender incurred the displeasure of the entire judiciary partly because he took as many as 20 percent of his cases to trial. At the other extreme was a defender who had been assigned to felony court for 3 months and had yet to try a case.

There is no simple explanation for the higher percentage of guilty pleas entered by public defenders. Perhaps more of their clients are actually guilty. Certainly, their limited resources do not allow them to prepare as many cases for trial. The overflowing dockets make it necessary that most of their cases be disposed of as quickly as possible. Yet the attorneys themselves do not make the pleas. The decision is ultimately made by the client. The public defenders whom I observed were very reluctant to pressure a client into "copping a plea." Private attorneys, whose allegiance to their clients is rarely questioned, expressed no hesitation to apply coercion when a favorable bargain was offered. This led to the inquiry whether more defender clients pleaded guilty because they were offered more inducement. The state might well feel the necessity to offer a larger carrot to those whose clients could clog the criminal courts.

Public defenders thought that they obtained better plea bargains than private attorneys for a variety of reasons, not one of which was that they were on closer terms with the district attorney:

> Our office does get better deals because we know how to manipulate the judges and D.A.'s better than private lawyers. The bulk of them can't do nearly as well as we can because of our knowledge of the system. (P.D. 4)

> We've got the volume. I could bring my court to a halt if I tried every case. The district attorney knows that. The judge knows that. Consequently, by and large we get better deals. (P.D. 6)

> The point is that they know a public defender will go to trial.

> This is because he is assigned to a courtroom. He's there. He's going to be there all day. He may have four or five cases set for trial, but they're all set for the same court. He has nothing better to do than go to trial if a reasonable offer is not made. The district attorney knows that if he is not willing to offer a fair disposition the public defender is going to go to trial. He doesn't have to cop out. He doesn't have to worry about chasing from one courtroom to another or back to his office or to another county the next day. He's going to be there ready for trial. Because they know this, we get better dispositions. (P.D. 7)

When private attorneys were questioned, three out of four believed that *they* got better deals than public defenders. Their most common reason was that the friction between public defenders and district attorneys precluded the productive negotiations that private attorneys enjoyed. One private attorney who had served 6 months in the public defender office when it was short of lawyers was able to give the most informed opinion:

> I absolutely get better deals than do public defenders. When I was in their office I think that I got better deals than the majority of other defenders because the judges and the D.A.'s still thought of me as a private attorney. The main reason for this discrepancy is the uncooperative attitude of the D.A.'s toward public defenders. Probably one of the primary reasons is that as a public defender the sins of your brothers are cast upon you — so when one public defender antagonizes the police or the D.A., they retaliate against all of them. One time in Adams County, one public defender angered the head of the robbery detail of the police department. Immediately the word went out: no more deals with public defenders. But there doesn't have to be a specific explosion. There's always a smoldering antagonism between the district attorney's office and the cops on one side and the defender office on the other. They've become enemy camps to each other. Because of their proximity they're much more likely to have a hostile relationship than we are. (P.A. 7)

One of the most experienced of the private attorneys interviewed agreed with this description of the hostility between "enemy camps":

> Because of their greater familiarity with the law and with the courtroom, public defenders do better at trial than private attorneys. But because of the hostility which they've provoked, we seem to get better bargains than they do. (P.A. 2)

Yet the majority of public defenders, as well as private attorneys, were willing to characterize their negotiations with the district attorneys as premised upon mutual trust. An expected exception existed in the felony courts assigned to the "hard line" defenders. "I do not have any trust in any district attorney or in any police officer in the City and County of Denver." (P.D. 1) Most defenders, however, admitted that it

was essential for them and the district attorneys to be able to rely on each others' word. To discover how far this trust was carried, both private attorneys and public defenders were asked if their relationship of trust could be used to convince the prosecution of a client's innocence so that the charges would be dropped. Three out of eight private attorneys recalled instances in which that had happened to them, while two out of nine public defenders had experienced it. Most thought their insistence on innocence had some impact on plea bargaining but felt that they themselves were never *certain* of a client's innocence and could hardly hope to do more than raise a doubt in the prosecutor's mind. Most private attorneys and public defenders were cynical about their clients' innocence:

> I've never had an innocent client. If a guy insists that he is innocent, then I'll take it to trial. I can't say that no one has ever been able to get them to drop charges, but it seems awfully unlikely to me. The D.A.'s would certainly realize what a Pandora's box they were opening if they allowed that to happen. (P.A. 6)

There were, however, those attorneys, both public and private, who claimed to have succeeded in convincing the prosecution of their client's innocence. One private attorney seemed to have had a significant amount of success in this regard:

> Yes, it's happened. But not on my bare assertion of his innocence. Of course, I had to explain the circumstances of the case, how my man came to be wrongly accused, etc. When I was Ivory Soap sure that my client was innocent and could demonstrate his innocence to the district attorney, I was able to obtain a dismissal four out of the six times that I had such a client. (P.A. 5)

A public defender assigned to juvenile court said that the prosecution was often persuaded to check out a child's story and, if it were confirmed, to dismiss the case. It was to be expected that more compassion would exist for juveniles. Yet, the other defender who said that he had obtained such dismissals was assigned to felony court:

> Although it's obviously very rare, I've done this in one case in the past and I'm trying to do it in another case right now — where I'm simply trying to convince them of my client's innocence and the codefendant's guilt and get them to drop the charges. I'm using my nice guy image to persuade them that what I say is the truth and that they ought to do this so that substantial justice will be served, blah, blah, blah. . . . The harvest for this kind of image is in a case where all I have going is my honesty. (P.D. 2)

When asked whether attorneys who presented a formidable threat at trial obtained better plea bargains than did more cooperative attorneys, four private attorneys answered that more

could be gained by cooperation than by threat. They felt that the idea of holding an ax over the district attorney's head was a myth, that he usually held all the cards, and that it was best not to challenge him to play them:

> It's rare that you have a triable case in any event. The defense has little real threat in a criminal case. You're nearly always negotiating from a position of weakness. So your relationship becomes much more important than your trial ability. (P.A. 7)

Certainly not all private attorneys felt this way; but it might be significant that, while four of them had this attitude, only one public defender expressed similar sentiments. The experienced defenders were even more concerned with presenting a threat at trial than were the newer members of the office. On the other hand, private attorneys seemed more inclined to relax once they had proven themselves at trial:

> Initially you have to make them think you are a threat. You have to go to bat at first. When you first start out with the district attorney, you are both usually on the same level, and you'll move up together. In your misdemeanors it doesn't really matter that much, so impress him with your competence, with your ability to challenge him. Then you've made an impression that will last you throughout your practice. You don't have to make additional threats in the days when you don't have time to carry them out. (P.A. 3)

It seems quite logical that a private attorney would have a greater need than a public defender to build a reputation upon which he could coast. By increasing his business, his reputation as a fighter may make it impractical for him to continue to fight. Public defenders have no such problem; in fact, they may have less time for trials while in misdemeanor courts than after they are promoted to felonies. To public defenders, becoming competent fear-inducing trial lawyers was more a matter of pride than of necessity. Most felt that the less aggressive members of the office obtained good and, in some instances, better deals for their clients. Still, their approach was not as appealing as that of the defenders who were thought to "wring" their bargain from the district attorneys:

> Plea bargaining is the big argument in favor of close relationships with the D.A.'s. I think it does represent the easy way to get a good bargain for your client. I do think the better way is to be a threat. If the opposition considers you a feared enemy, then I think substantially the same thing can be accomplished as through close relationships. (P.D. 3)

The response most often received from both private attorneys and public defenders was that no attorney got consistently better bargains than others, no matter what his approach. Too many

factors were beyond the defense attorney's control: "If you've got a lazy judge who doesn't want to sit through trials, it's a hell of a lot easier to bargain." (P.A. 2) All agreed, however, that the most important variable in bargaining was the particular district attorney involved and his particular penal philosophy: "There are law-and-order D.A.'s, and there are *law-and-order* D.A.'s." (P.D. 2)

VII. Administrative Threats to Arms-Length Bargaining

When public defenders and district attorneys dispose of 80 percent of the cases that pass through an overflowing courtroom, their procedures naturally become somewhat suspect. The question arises as to whether this close working relationship and heavy caseload militate against the maintenance of a truly adversary posture. A qualitative comparison between the plea bargaining methods employed by the public defenders and the private defense attorneys should shed light on this question. Therefore, inquiry was made to discover whether public defenders resorted to a more "administrative" approach to plea bargaining as compared to their colleagues in private practice. Specifically, public defenders might be more tempted to share their meager information about a case with the prosecution and bargain from that basis. To do so would remove plea bargaining one step further from the adversary principle of conflict resolution of issues.

Two public defenders new to the office made statements that were disturbing if they represented their actual practices. With little personal experience upon which to base their opinions, they seemed particularly prone to take cues from the following leading question: "Is a policy of turning all cards face up, even if it reveals facts detrimental to your client, ever justified?"

> Your approach should be that of trying to shed as much light on the case as you can, rather than presenting only those things which are good for your client. If you don't, the district attorneys won't believe you. They'll know you're hiding those things which are detrimental to your client. If you're very candid, very often, you'll get a better reception from the district attorneys and consequently provide better service to your client. . . . I try to be candid. If I know something about my client, especially if I know they will find out about it later anyway, I'll openly divulge it. I think they know that they can rely on what I say — that I'll give them the straight skinny. (P.D. 9)

> Certainly, sometimes you turn all the cards face up, put it all out in the open. It is justified sometimes, even if it can become detrimental. Sometimes we get the feeling that it's all just a game. Sometimes you have to take risks. Sometimes we even have people who are guilty. [He laughs.] Sometimes you say,

> "Look my guy did it, but here's the situation," and then go on to make some kind of disposition. And sometimes you do have to give damaging information to gain credibility. But I would say that generally there's not a great deal of divulging of confidential client information. Maybe sometimes the public defender gets in the habit of revealing more information than he should. This could be a problem. Our clients may become less personal, more routine. Certainly this is an error. I don't know. (P.D. 6)

In further discussion of the point, however, both insisted that they would only present positive factors in the case and those negative factors of which the prosecution was already fully aware, which might as well be conceded for purposes of bargaining rapport. This clarification harmonized their responses to a degree with those of other attorneys interviewed.

No attorney, public or private, said that he attempted to portray his clients as blameless. In fact, most admitted that in talking with the district attorney they would disparage a client in a manner that would not adversely affect his disposition but that would promote camaraderie in arriving at a bargain:

> My way of pitching to the D.A. may entail making them think that I dislike a client, that I think that he's a bum, that he's just as much a burden to me as he is to them. This is just using psychology to make them think we're both working toward the same ends. The D.A.'s wield so much power that you have to learn how to play them. (P.A. 3)

The fact that plea negotiations with Denver district attorneys rarely concerned factual issues in the case was an interesting revelation. Every public defender and private attorney made clear that facts were not the meat of plea bargaining. In the first place, there is little probability that either a public defender or private attorney knows facts beyond those contained in the district attorney's file:

> There's usually not much danger of my revealing facts detrimental to my client because I usually know little or nothing about my client or the situation until I talk to the district attorney. The D.A. has all the information and I've got to gain it from him not vice-versa. I never know enough about the case at the plea bargaining stage to give up anything that could hurt him. If I did, I certainly wouldn't give it up before the battle. (P.D. 9)

Usually, the most that a defense attorney could reveal would be his client's side of the story, which carried little weight with the prosecution in any event. The focus of plea bargaining is not upon what happened. The district attorney assumes guilt, of something. And some degree of culpability is impliedly admitted by the defense's willingness to negotiate. The district

attorney is not interested in obtaining confirmation of his belief of guilt. What each side of the negotiation wants is the opportunity to assess the relative strength of his case as compared with that of his opponent. For the process to work, each party need only show his strength, not his weakness. No private attorney or public defender said that he actually turned *all* his cards face up in the bargaining although every attorney interviewed was very willing to show his *best* cards to the prosecution. At first, it appeared significant that more public defenders advocated "candor" in plea bargaining, but further inquiry led to the conclusion that their candor consisted only of not intentionally misrepresenting material facts.

From a cynical point of view, plea bargaining is regarded as the process by which the prosecutor is provided a basis for rationalizing why charges or sentences should be reduced more in one case than another. Certainly a public defender makes some distinctions between two burglary cases. To the extent that he presents such distinguishing characteristics to the prosecutor, he is candid with him. No greater tendency to divulge information detrimental to a client was discovered among public defenders as compared to private attorneys. Both seemed to talk with the district attorneys only in terms of the strength of the case, mitigating factors, or rehabilitative potential — whatever "pitch" would put the defendant's case in the best light, without stretching it to the point of transparency. This was "candor" to defense attorneys:

> I try to be honest and frank. That doesn't mean that I walk up to the D.A. and say, "Here's my client's case." I've never done that. . . . In most cases, the degree of candor doesn't do a hell of a lot of good anyway. When it's a one-on-one situation where the cop's and the defendant's stories are at odds, even if I were to tell the D.A. what "really" happened, all I'm saying is that my client would testify to such and such. And the D.A. knows that my client usually can't take the stand, and, if he does, that he can't rebut what the cop says anyway. So in a lot of cases the degree of candor is not that important. What's really involved is talking about the guy's record and the guy's personality and the guy's future. That happens quite often. A lot of times the D.A.'s will say, "Aw, come on. You know the guy's a crook. Let's put him in Canon [the penitentiary] for a while." My job is to discourage him from this kind of thinking. But, as a general rule, the D.A. knows a lot better than I do what a bad ass my client is. (P.D. 2)

> I don't lie to them. I don't misrepresent anything. It's not necessary to reveal facts detrimental to your client. It's not necessary for maintaining your credibility. You don't have to tell them everything. You just have to be credible in what you do tell them. (P.D. 5)

Candor had its limits. When asked, "Would you ever feel compelled to mention to the D.A. previous arrests or convictions unknown to him?," every attorney answered that he would never furnish that information to his client's detriment. Several mentioned instances of getting the client's permission to tell them of a prior conviction after the bargain had already been reached, but this was just to expedite the disposition of a minor offense before the "rap sheet" arrived. No public defender or private attorney expressed an ethical duty to provide the prosecution with information:

> I recall one case where my client had a prior conviction for possession of narcotic drugs which the D.A. did not know of, which did not show up on his record. I certainly didn't divulge it. I felt no duty to divulge it. I don't think that the D.A. would have been crushed if he had known that I knew of the prior conviction — even though I snuck by him a nolo to a misdemeanor in a case where my client was super dead on the facts. I don't feel an ethical obligation to reveal that kind of information. Generally I'm not asked about prior convictions. The D.A. has the record, not me. Since I'm not asked, I don't have to lie about it at any rate. (P.D. 2)

Another possible administrative pressure was that, because of their many transactions together, public defenders and district attorneys might arrive at a uniform schedule of plea bargaining dispositions that would be applied mechanically in most instances. Although public defenders vigorously denied that they adhered to established schedules, they had to admit that certain bargaining patterns had evolved. These, they explained, were largely the result of the district attorney's office policies which limited the bargaining discretion of individual district attorneys. Public defenders became aware of these policies and in routine cases were forced to abide by them. On the other hand, they felt fortunate to be familiar with the maximum amount a district attorney was permitted to reduce a charge, because then they could hold out for that great a reduction. A public defender also became aware of the bargaining criteria employed by the individual district attorney with whom he regularly dealt, and, to the extent that he could not manipulate his opponent, his expectations became confined by those same criteria:

> In certain areas, the transactions between the district attorney and the public defender have resulted in a schedule of sorts. An example of this at the preliminary hearing level is when a person is charged with felony possession of a relatively small amount of grass and he's never before had serious trouble with the law. That individual will automatically get a misdemeanor disorderly person. Another example is for most first offenders

> on short check cases with some sort of excuse for their actions. Almost as a matter of course they will get a deferred prosecution. . . . Beyond that there is not a uniform schedule between the two offices. Between individual attorneys there might be something amounting to a schedule. I suspect that there is. (P.D. 3)
>
> Once I know that my client has to go down on a felony then I start playing games with sentencing, with amount of time spent in jail, severity, that sort of stuff. Each case is different and you have to tailor-make a disposition for it. (P.D. 4)
>
> I am aware of the tolerances within which the district attorneys are permitted to bargain. For instance, I know that a driving-under-the-influence case where the blood alcohol content is over 2.0 the deputies are not allowed to offer less than a no contest. The uniformity arises more from the policies of the D.A.'s office rather than from any agreement between them and myself. (P.D. 9)
>
> There is an informal type of thing. . . . However, this is by no means uniformly applied. Unfortunately our clients aren't obliging enough to be placed in neat little boxes. (P.D. 8)

Research revealed no evidence that any public defender engaged in "package dealing" his clients. Every public defender, as well as every private attorney, insisted that he never accepted a harsher bargain for one client in order to obtain a better deal for another:

> No —although the caseload is crushingly huge each is treated separately, even though he may cause great temptation to us because we know he's the leader of the gang, etc. We face this problem every day, but so far I've been able to resist temptation. (P.D. 8)

VIII. Allegiance to the Dangerous Client

A remark often heard from inmates at county jail was that public defenders were "cop-out men" who would "sell them down the river." These clients seemed especially afraid that if they admitted their guilt to a defender and told him the truth, he would cooperate in seeing them punished. As a result of this feeling, public defenders frequently had a difficult time finding out the facts of the case from their clients. Each public defender was asked, "What is your opinion of a lawyer's cooperating with the prosecution to put away a dangerous murderer whom he could get off by asserting a procedural defense?" Their answers uniformly condemned such a practice. If anything, public defenders' peculiar position caused them to be more committed to their clients. They harbored few illusions about the people they defended. Many said they had yet to defend a completely innocent client. Those whose daily efforts were devoted to trying to free dangerous men could not afford to flinch from their duties:

> You may not like it, and you may not feel happy when you go home at night. But if you don't do it, then you should be a district attorney or you should be a social worker or you should raise dogs or you should run a junk shop. But you shouldn't be a public defender. (P.D. 1)
>
> If he has a feeling that he wants to cooperate with the prosecution to put away a dangerous murderer, then that man should not be a defense attorney. He should be applying for a job as a cop. If I have a procedural defense, that's good — or even if it isn't good, I'll assert that defense as vigorously as I can. (P.D. 4)
>
> I believe in the adversary system. I believe that it is necessary to have an attorney representing the interests of the client without any consideration for the system itself. The attorney is not to cooperate with the prosecution in any way which is detrimental to the client. So you don't try to put away dangerous murderers. If you have any feelings like that you ought to get off the case, as I did on one in particular where the guy showed some sexual psychiatric propensity to murder. (P.D. 5)

Private attorneys' responses to the question showed them to be just as fully committed to the defense of dangerous clients as were the public defenders:

> When I am employed by a client, he is my only responsibility. This doesn't mean that I don't care about law and order. But my role in our scheme of law and order is to give my clients the most vigorous defense that I can. I don't play God, and I don't choose to. I just got a client — a bomber, a very dangerous man, very psychotic. But I'll work to help him any way that I can. (P.A. 5)
>
> As far as I'm concerned, I owe nothing to society. I owe everything to my client. If I could put Richard Speck back on the street as a janitor in a nursing school, then I would do it. A lawyer is a member of the world's oldest profession. As far as I'm concerned I'm an absolute prostitute to my clients. (P.A. 7)

Private attorneys, however, have an avenue open that is effectively blocked for public defenders. Nearly every private attorney said that he could always avoid the dilemma by refusing to take a case that was particularly repulsive to him. The only way a public defender could withdraw from a case was to prevail upon a less squeamish defender to shoulder the load. Only one public defender mentioned resorting to this. One private attorney said that he only withdrew from a case when the client was dangerous *to him*:

> I had a client whom I was so scared of that I had to interview him with my partner holding a gun on him behind a newspaper the whole time. His mind was so blown on drugs that I was scared to death of him. I wanted to withdraw from the case, but the guy was right beside me in the courtroom. I had to tell the judge that I just couldn't handle him. (P.A. 3)

Interviews with private attorneys revealed an additional approach not discussed by the public defenders. One of the first

private attorneys interviewed provided the following response which was afterward presented to his colleagues for their reaction:

> I know of another lawyer who did essentially the same thing with a very dangerous child molester. He pled him insane, even though he felt certain that he would have been able to beat the charges at trial. The state's first psychiatric report found the guy sane. So he went to the judge and the D.A. and gave them the alternative: Either they get a new psychiatric report that finds him insane, or they run the risk of his being back on the streets. They got a new report and now the guy's hopefully getting some treatment. (P.A. 2)

Given this option between a complete defense and an insanity disposition, the majority of private attorneys were willing to rationalize that treatment in a mental institution was probably best for the client as well as society.

IX. Political Autonomy

Legal commentators have expressed the fear that adversariness between a public defender's office and a district attorney's office will be tempered by political considerations inherent in their common standing as public agencies. Although this fear may be justifiable where both offices are responsible to the same political authority or constituency, the problem does not arise in Colorado where the public defender is an agent of the state judiciary. This status produces altogether different political pressures, which have no direct connection with any local district attorney's office. No public defender in Denver felt that the district attorney's political concerns in any way interfered with his representation of his clients. Every defender responded in the negative to the questions: "Must public defenders be careful not to embarass the D.A. politically?" and "Are public defenders ever induced to comply with some politically motivated plan of the D.A.'s?" They usually added that politics simply did not enter into courtrooms where they dealt with their counterparts in the district attorney's office. Political maneuvers were in an arena beyond the courtroom. They agreed that the district attorney could be expected to react if a defender threatened his political well-being. They were speaking, however, of adverse news reporting and the district attorney's efforts to protect his public image:

> I don't know about embarrassing the D.A. I've never *embarrassed* them. I once accused [an assistant district attorney] of acting in an unethical fashion. And I said a lot of other uncomplimentary things about him in open court. And it, of course, returned to him. But it didn't affect my relationship with any

> district attorney, least of all [the assistant district attorney in question]. (P.D. 2)
>
> I would embarrass him politically in every way I could. I did that with the last D.A. I said things negative about him that were reported in the papers. I could care less. (P.D. 4)
>
> I don't worry about it. However, I think that dealing with them on a private basis rather than going to the newspapers produces better results and better relationships. . . . The only time that a public defender might go along with a politically-motivated plan by the district attorney is when it is helpful to the defendant. (P.D. 5)
>
> In our court I do not have to worry about the politics involved in embarrassing the district attorney. I don't think they do either. We're just not at that stage in the county courts. (P.D. 7)

Private attorneys also uniformly said that the D.A.'s political concerns in no way hampered their practice. Every attorney denied having any reason to contribute to the district attorney's election campaign in Denver. They, like the public defenders, expressed no reluctance to step on the district attorney's political toes:

> I won't go out of my way to damage him for no reason, when it isn't to the benefit of my client. On the other hand, once when I knew he was lying I did not hesitate to call him a liar in open court knowing that it would make the papers. . . . I realize that right now he's trying to boost his conviction record. There's no reason for me to get spiteful about that. I'll play it for all it's worth. Their deals get a lot better when he's worrying about his record. (P.A. 2)
>
> I don't give a shit for their politics. My client comes way before they do. If it's going to help my client but hurt the D.A., that's tough. I despise this idea of people operating on fear — being so afraid for their own security, so afraid they are going to step on someone's toes. It's incredible that the D.A. would be so insecure in his job as to get vindictive with an attorney. (P.A. 4)

CONCLUSION

The autonomy of both public and private criminal defense attorneys in Denver substantially exceeded expectations. Results revealed little evidence of co-optation of either public defenders or private attorneys. Certainly, the overflowing dockets of the criminal courts in Denver forced everyone involved to rely upon expedient procedures; however, no relationship between expediency and co-optation was found. Perhaps a greater tendency to cooperate with the prosecution exists in a system where justice is dispensed on a less hasty, more personal basis. In Denver, little seemed to depend upon the individual attorney's standing with the district attorney's office. Expedient informal discovery was virtually a necessity, and not a privilege reserved for a select few. The quality of cooperation between the prosecution and defense was more busi-

nesslike than personal — it was dependent more upon external forces than the personalities involved. The caseload, the judge's impatience, and the district attorney's desire to increase his conviction rate were pressures felt by a prosecutor no matter with whom he was dealing. Politics played no part of a defense attorney's practice in Denver, where justice was dispensed more mechanically than arbitrarily. The existence of a public defender office may do much to institutionalize expediency and thereby diminish favoritism. Through working with the public defenders, the district attorneys are forced to employ uniform cooperative procedures. Thus no defense attorney need "purchase" cooperation at the expense of his client. The system becomes mechanized but no less adversary.

Research produced no indication in Denver that public defenders were more cooperative with the prosecution than were private attorneys. In fact, compared to private attorneys, public defenders must be considered less cooperative. For the most part, however, the practices of the two groups were substantially similar. The few differences discovered were largely due to the public defender's caseload and his confinement to a single courtroom. The scope of a private attorney's cooperative relationships was much broader, and the avenues open to him were more varied. His efforts could extend beyond one stage in the criminal process and beyond an appeal to a single prosecutor. He could approach every person whose discretion might benefit his client — from arresting officer through trial judge. More than a defender's isolation restrained him from engaging in practices employed by some private attorneys: the defender's institutional position caused him to be more cautious. He had to be particularly careful not to place himself in a compromising position. Many public defenders were wary of favors that might entail a *quid pro quo* detrimental to their clients as a whole. They chose not to become overly dependent upon the district attorney's files for discovery and appeared more concerned than private attorneys with the danger of mutuality. Moreover, a public defender could even less afford to resort to devious practices that might destroy the integrity so necessary to his position. A private attorney might occasionally employ surreptitious tactics successfully that would become transparent with continued use by a public defender. Such considerations might well make for a higher standard of justice in cases handled by the public defender.

The public defenders' advantage seemed to lie in their

expertise and in their familiarity with the system — its procedures and its personalities. It should be expected that their proximity to their adversaries would allow them to evaluate and dispose of their cases more quickly. Efficiency was also achieved through their cooperation with the prosecution to solve common administrative problems and better allocate their time and resources. To this extent, defenders were cooperative. They came to terms with the district attorneys; given those terms, they were enemies. Heat was generated in cases handled by public defenders that rarely occurred in private attorneys' work. Perhaps the temperature rose because of the additional pressures to which a defender was subjected. That most attorneys in the Denver office were able to withstand the forces exerted toward their co-optation is testimony to their dedication and competence.

Among private attorneys and among public defenders there were negotiators and there were warriors. There appeared to be no more warriors in one sector than in the other. A given defender's alignment in the disagreement over what was appropriate behavior in a public defender depended upon his own personality and it seemed that each approach fulfilled an important function. The "vigorous adversaries" preserved the image of the office, both to their opponents and to their clients. They fought the battles and won the Denver office a reputation for aggressiveness not shared by many public defender offices. The less aggressive "negotiators" handled the bulk of the caseload. They did seem to obtain better plea bargains and lighter sentences for their clients, and they kept the wheels of justice rolling.

No matter what his personality, every public defender said that his primary interest lay solely with his clients. Apparently most important was not that an attorney employ a particular technique of defense but that he utilize his own individual talents to the utmost. It is significant that every public defender said that *competence* was the most important ingredient in his relationship with the district attorney's office:

> Your competence is vital to your relationship. The same is true for any other attorney, I suppose. But we have to be particularly competent. Some district attorneys will take advantage of anybody they can. And our clients have been taken advantage of enough. They have been dealt out, screwed over, shunted off to jail without a second thought, neglected by our whole system. A public defender has to be especially careful that those things don't happen while he is handling the case. (P.D. 6)
>
> *Jackson B. Battle*