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LAWYER-CLIENT INTERVIEWS AND THE
SOCIAL ORGANIZATION OF PREPARATION
FOR COURT IN CRIMINAL AND DIVORCE CASES

by

Patricia Heffron Groves

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Department of Anthropology and Sociology

The University of British Columbia
Vancouver 8, Canada

Date April 26th, 1973

ABSTRACT

This study seeks to provide an ethnographic description and analysis of the practical workings of that part of the legal system which is manifested in the daily routine practices of criminal and divorce lawyers in private practice. It documents the lawyer's role in pre-trial determinations. It aims to show how the organizational features of the lawyer's work and his relationship to other professionals on the legal scene affect outcomes for the client.

The analysis rests on field observation and participation - daily for one year, and intermittently for another year - in the offices of four young defense lawyers in their first two years of a practice which consisted mostly of minor criminal Legal Aid cases and some divorce work. The main material for the analysis consists of transcripts of taped interviews between these lawyers and their clients.

The lawyer's office is a link in the chain that begins with police apprehension of suspects and ends with judgment in the courtroom. In deciding how to handle the criminal client's case, the lawyer looks back in routine ways to certain features of the situation of arrest and looks forward in equally routine ways to the probable situation in court.

The interview is an important phase in the lawyer's preparation of the case and one in which major decisions are

made. The lawyer takes various factors into account in making his pre-trial decisions including what is known in the legal community as the "story". The story is what the client tells the lawyer (or the police or the court) about what happened in the events that lead to his arrest. The story is the concrete focus of interchanges between lawyer and client. The main work of the interview is in eliciting and assessing the story. I examined the production and assessment of both criminal and divorce stories in terms of the features that illuminate the social organization for trial.

The lawyer's interest in what the client says in criminal and divorce interviews is similar: he focuses on the aspects and possibilities of the client's stories that are translatable into what he needs to get the job done: in divorce cases to "work up the grounds", and in criminal cases to "beat the rap". I found that in interviews with criminal clients there were two main influences on the structure of proceedings: one relating to the situation of arrest - the prosecutor's version of the police report (the "particulars"); and the other to the expected situation in court - the credibility of the client in telling his story. In divorce interviews the lawyer similarly orients to how the case will be processed at trial, and to the situation precipitating the divorce only insofar as it is usable in working up the most efficient grounds for divorce as required by the court. Working up the grounds during a

divorce interview is a structured procedure following the same general routine for uncontested cases (and a different general routine for contested cases) regardless of who the client is and of what emotional state he is in. We see how expert and layman manage the course of the interaction so that for both the purposes of the interview are achieved. One of the contributions of this thesis is to provide an understanding of the workings of one part of the legal system - an understanding that is neither the lawyer's nor the layman's view. The focus is on the adaptive and rational character of the daily practices that sustain the workings of the legal system as evidenced in the routine performance of lawyers as practitioners.

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DEDICATION

To my Parents:

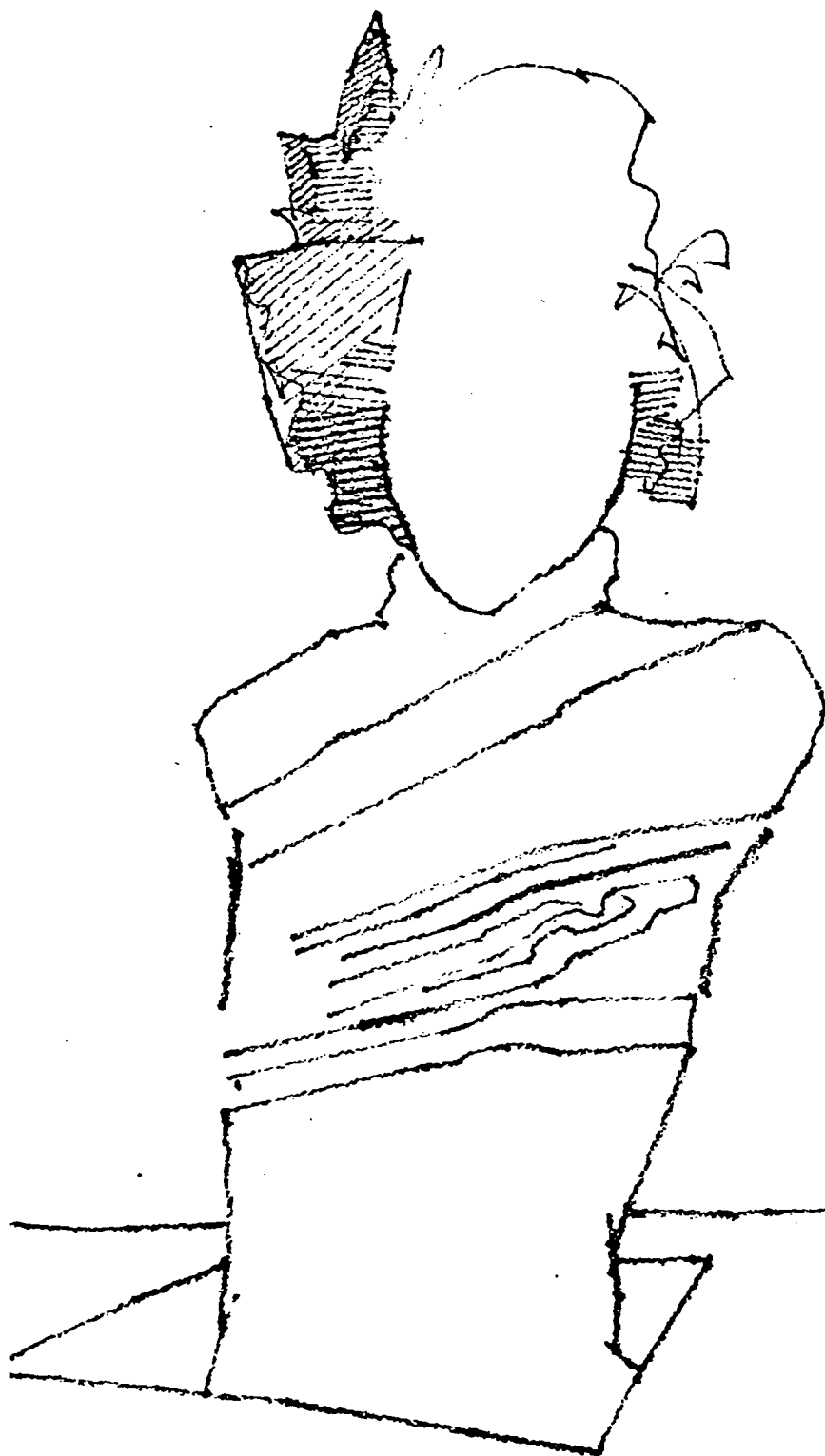
WILLIAM JAMES HEFFRON, KATHLEEN CLARK HEFFRON

And for my Child:

SUSANNAH ELIZABETH HEFFRON GROVES

And her Grandparents:

TOM DOUGLAS GROVES, ELIZABETH McCOWAN GROVES



DEDICATION TOO

ACKNOWLEDGMENT

"Then, Don Juan, you don't see the world in the usual way anymore."

"I see both ways. When I want to look at the world I see it the way you do. Then when I want to see it I look at it the way I know and I perceive it in a different way."

"Do things look consistently the same every time you see them?"

"Things don't change. You change your way of looking, that's all."¹

I wish to thank my four lawyers for helping me to "think like a lawyer".

I wish to thank my thesis advisor, Roy Turner, for making me think like a Sociologist again.

I am thanking Roy Turner not only for his immense practical and good humoured help with this work; but also, and perhaps more importantly, for introducing myself and others to a valuable new intellectual perspective.

I wish to thank my readers for their patience and for their valuable suggestions: Dorothy Smith, Michael Kew, Kenneth Stoddart, Adrian Marriage, Robert Boese.

A very grateful thank you to Fay Masoet for preparing the final manuscript.

I have expressed my thanks all along to the many lawyers who were so helpful and interested and so generous with their time. I would like to thank them again by name here, but they must remain anonymous.

And, specially, thanks to the Little Bear for sharing me with my work.

¹Carlos Castaneda, A Separate Reality, New York: Simon and Schuster, 1971, p. 50.

CHAPTER I

INTRODUCTION

The law is a complex series of social events whose general characteristic is that they regulate matters of personal and institutional interest and value that are functionally important and strongly felt. The law cannot be reduced to terms that are simpler than the social order of which it is a part, nor can it be isolated except analytically (and even then only with great difficulty) from the pressures and conflicts to which its particular terms refer. The legal operatives who participate in these events play a role that corresponds in complexity and intensity with the events themselves¹.

Very little is known about the intimate workings of the legal system on the level of personal interaction between defense lawyers and their clients : between persons who must formally face society to be punished or excused or acquitted - and those whose job it is to defend them. Courtroom trials have been given much attention in drama, in literature, on television and in the daily newspapers. However, much of what happens in court apart from the general program of events as set out in the rules of procedure for a given type of case and in the other rules of play (that is, the rules of evidence and the understood and accepted informal game rules governing interaction among the professional players) is dependent on the lawyer's and prosecutor's preparation for court behind the scenes. The props, the

¹Geoffrey C. Hazard, Jr., "Reflections on Four Studies of the Legal Profession" Social Problems, (Summer Supplement, 1965), p. 47.

organization, the interests and considerations, and the kinds of personal interplay that underlie and structure what will take place in court, unfortunately until quite recently, have not been attended to by the sociologist whose methodology has favoured survey, interview and questionnaire-oriented research. Such research techniques are not amenable to detailed study of the process of interplay between a lawyer and his client and his preparatory materials.

With the current interest of some sociologists in ethnographic¹ techniques of research, we have learned more about the workings of the legal system "from the inside". For instance, there have been a few intimate studies of the police - most notably an ethnographic work by Jerome Skolnick² who participated with the police in their daily

¹For two decades William F. Whyte's Street Corner Society, (Chicago: University of Chicago Press, 1943), was almost alone in this category. Recently there have been many ethnographic studies; for instance: David Sudnow, Passing On, The Social Organization of Dying, (Englewood Cliffs, New Jersey: Prentice Hall, 1967); Harvey Sacks, "The Search for Help - No-One to Turn to" in Edwin S. Shneidman, Ed., Essays in Self Destruction, (New York: Science House, Inc., 1967); Sherri Cavan, Liquor Licence, An Ethnography of Bar Behaviour, (Chicago: Aldine, 1966); Marvin B. Scott, The Racing Game, (Chicago: Aldine, 1968); Julius A. Roth, Timetables, (New York: Bobbs-Merrill, 1963).

²Jerome H. Skolnick, Justice Without Trial, (New York, Wiley, 1966). Another work of interest on the police is: Egon Bittner, "The Police on Skid Row: A study of Peace-Keeping", American Sociological Review, Vol. 32, No. 5, (1967), pp. 699-715.

round of activities for over a year. There have not however been parallel studies of defense lawyers in their daily round of activities. As the "suspect" goes from arrest to punishment or freedom, he is fairly visible to us in his encounters with the police and in his interaction in court - but what happens to him "in between" the police and appearance in court is relatively unexplored. Very few of us have had or will have the experience of relating to the legal system on a criminal charge; more of us know or will know what it is like to deal with and be processed by the legal system in getting a divorce; however, for most middle class people it is usually only through buying or selling a house or in settling an estate that they become "clients".

This study seeks to provide an ethnographic description and analysis of the practical workings of the legal system as manifest in daily routine practices of lawyers. It is a study of the lawyer's role in pre-trial determinations. It concentrates on the social organizational features of the practical activities that constitute the lawyer's daily working world.

Like some recent ethnographic studies of the professions or occupations, this study supports the idea that in attempting to discover the actual practices of members and in attempting to understand the structure of the demands that generate these practices, as well as the import of the

outcome of these practices for discussions of social order, much is to be gained from adopting a perspective that is sensitive to displaying the demands of the routine ways in which any occupation is socially organized. Thus Skolnick in his participant-observer study of the police observed that when the police are faced with a conflict between upholding the rule of law and maintaining order by apprehending suspects, they subvert the rule of law in response to administrative demands to meet arrest quotas. Police respond to administrative demands of the job rather than to public ideals of civil rights. Similarly, Turner¹ in an ethnographic study of juvenile bureau officers concluded that their working day schedule was responsive to the demands and administrative conveniences of the work situation itself, rather than to the urgencies of juvenile problems. Cicourel² in his study of the social organization of juvenile justice showed how delinquency rates change if the administrative conditions of the police change - regardless of what juveniles may actually be doing.

Grosman in a study of the exercise of discretion by prosecutors claims that:

¹Roy Turner, "Occupational Routines: Some Demand Characteristics of Police Work" Paper presented at the Annual meetings of the CSAA, Toronto, (June 1969).

²Aron V. Cicourel, The Social Organization of Juvenile Justice, (New York, Wiley, 1968).

... it is not judicial or legislative theory which determines the prosecutor's discretion or mode of professional behaviour. Often it is the administrative demands made upon him and the informal social relationships which develop within his operational environment that control his decision-making processes. These informal factors, although crucial to any realistic appraisal of the criminal prosecuting process, have not in the past been acknowledged by legislation or by the judiciary.

There are considerable and important differences between what the prosecutor does and what the legal literature and judicial decisions say he should do. ... Yet nothing stranger is suggested here than the affirmation of the contemporary notion that fundamentally, law is tied to the way in which people behave.¹

O'Gorman in a study of lawyers' handling of matrimonial cases explains how and why lawyers break the spirit of the law.

We noted that a conflict exists between legal theory and public attitudes concerning matrimonial dissolutions. During the past hundred years the rate of marital disruption has greatly increased, and while the public has become more tolerant of divorce and remarriage, the legal norms governing the termination of the marriage have not changed. As a result, there has emerged a widespread institutionalized evasion of these legal norms. This evasion creates a professional role conflict for lawyers who are simultaneously expected to uphold the law and represent clients intent on ending their marriages. The role conflict is alleviated somewhat by two attitudes prevailing among lawyers. (1) It is the general professional consensus that matrimonial laws are ineffectual; and (2) many members of the bench and bar tacitly recognize that the evasion of matrimonial laws achieves a socially desired end.²

¹Brian A. Grosman, The Prosecutor, (University of Toronto Press, 1969), pp. 3-4.

²Hubert J. O'Gorman, Lawyers and Matrimonial Cases, (New York: The Free Press, 1963), pp. 152-53.

Sudnow¹ showed how in the public defender system in California the administrative demands of the job and the routine informal working relationship between public defender and prosecutor - rather than abstract principles of "justice" - affect the fate of the defendant.

This study, too shows how the organizational features of the private defense lawyer's work and his relationship with other professionals on the legal scene affects outcomes for the client and how these considerations display the operation of the legal system.

There are many anecdotal autobiographical works by lawyers about their experiences - usually their experiences in court with attention to the dramatic or humorous aspects of trial work². While such works provide much detail about courtroom experience, they tell us very little about actual behind-the-scenes interplay between lawyer and client. These books are written from the point of view of

¹David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office", Social Problems, Vol. 12, No. 3, (Winter, 1965), pp. 255-276.

²The following are some classic examples of such books: Francis L. Wellman, Day in Court, (New York: MacMillan, 1926); Richard Harris, Before and at Trial, (London: Edward, Thompson & Co., 1890); Louis Nizer, My Life in Court, (Garden City, N.Y.: Doubleday, 1961); John Parris, Under My Wig, (London: Arthur Barker Ltd., 1961); Francis L. Bailey, The Defense Never Rests, (New York: Stein and Day, 1971).

the participating lawyer from experience and materials that are filtered in unseen and unknown ways so that the reader has no access to either data or methods and hence cannot analyse the status of the descriptions or findings as knowledge.

In the past decade there have been several studies of lawyers by sociologists. Most of these works have been based on extensive interviews with lawyers¹ and concentrate on social background data about lawyers and on occupational attitudes, type of practice, role contradictions and so on. Smigel², for example, in studying the "Wall Street Lawyer" collected data on the twenty largest law firms in New York City. Each firm was composed of fifty or more attorneys. He began by interviewing thirty-eight lawyers in one firm; in the second firm he interviewed twenty, and gradually reduced the number of lawyers interviewed in each succeeding firm until only a few lawyers were interviewed per firm. In all he interviewed 189 lawyers out of a universe of 1700 (eleven percent). The data from his

¹For example: Erwin O. Smigel, The Wall Street Lawyer, (New York: Free Press, 1964); Walter O. Weyrauch, The Personality of Lawyers, (New Haven: Yale University Press, 1964); Jerome E. Carlin, Lawyers on Their Own, (New Brunswick, New Jersey: Rutgers University Press, 1962); Hubert J. O'Gorman, Lawyers & Matrimonial Cases, (New York: The Free Press, 1963).

²Smigel, The Wall Street Lawyer.

interviews enabled him to talk about career patterns of Wall Street lawyers, the organization of their firms, the way in which large firm practice differs from small firm practice and so on. However, the reader is left with little idea of what it is like to be a Wall Street lawyer in terms of the daily practices that constitute their working world. As an alternative to Smigel, one could take as methodological advice Sudnow's stance:

A central theoretical and methodological perspective guides much of the study to follow. That perspective says that the categories of hospital life, e.g., "life", "illness" "patient" "dying" "death" or whatever, are to be seen as constituted by the practices of hospital personnel as they engage in their daily routinized interactions within an organizational milieu.¹

The import of this position and the disadvantage of the survey-interview type of study is well noted by Hazard in the following critique of Smigel:

The one thing he did not find out about Wall Street lawyers is what they do in their professional capacity. What the Wall Street lawyers do in their professional capacity is nothing less than to provide prudential and technical assistance in the management of the private sector of the world economy.

¹David Sudnow, Passing On, The Social Organization of Dying, (Englewood Cliffs, New Jersey: Prentice Hall, 1967), p. 8. A rationale for this methodological stance is provided for instance in the following works: Aron V. Cicourel, Method and Measurement in Sociology, (New York: Free Press, 1964); William F. Whyte, Street Corner Society, (Chicago: University of Chicago Press, 1943); Philip Hammond, Sociologists at Work, (New York: Basic Books, 1964); Arthur J. Vidich, Ed., Reflections on Community Studies, (New York: Wiley, 1964); Robert W. Habenstein, Pathways to Data, (New York: Aldine, 1970).

It is this functional role of the Wall Street lawyers, rather than the fact that like Carlin's Chicago lawyers they have an LL.B that explains what the Wall Street lawyers are and would have helped explain why they don't wear flashy clothes, beards or an open countenance.

The great difficulty with finding out in any detail what the Wall Street lawyers, or any other lawyers for that matter in fact do in their professional capacity is they won't tell. This is of course because what they know is committed to them by their clients upon the understanding that it is confidential. In view of this obstacle, survey research technique doesn't work very well, except as a means of ascertaining personal miscellanea about lawyers themselves.

As we have seen, these personal miscellanea don't add up to an understanding of the lawyer's role in society, nor therefore to a much deepened understanding of the function of law in the social order. The fact is that other possibly less precise methods have to be used if any real headway is to be made in the sociology of law.¹

The difficulty in finding out what lawyers do is only partly as Hazard says that they "won't tell"; it is also that they do not know what to tell or how to tell it. One must be in a position to observe the daily activities of lawyers in order to analyse the structures that underlie those activities.

David Sudnow's² analysis of the public defender system is an exception to the type of study criticized above.

¹Hazard, "Reflection on Four Studies of the Legal Profession", p. 52.

²Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office".

It is "based on field observation of a Public Defender Office in a metropolitan California community"¹ and makes use of actual interviews between lawyers (public defenders) and clients in its analysis.² Sudnow describes the way in which Public Defenders (lawyers appointed by the state to routinely defend a series of persons accused in criminal matters, in much the same way that public prosecutors deal with all those Accused coming before a given court) attend to features of what they see to be typical ways in which given crimes are committed and to the typical characteristics of persons committing them in deciding how to conduct the case, rather than to, for instance, the specifics of the criminal code and case law. In deciding how to plead the client and how to conduct the defense, points of law are not the important factors attended to, but rather, certain details of the way in which the crime was committed (with attention to whether or not it was typical of the way in which that crime is usually committed) and particular features of the social characteristics of the Accused.

Sudnow suggests that private defense lawyers may do things differently than Public Defenders in trial preparation:

¹Ibid, p. 255

²For an example of a transcript, see ibid, p. 267-268.

In fact he the Public Defender doesn't "prepare for trial" in any ordinary sense. (I use the term "ordinary" with hesitation; what "preparation for trial" might in fact involve with other than Public Defender lawyers has not, to my knowledge been investigated.)¹

This thesis constitutes just such an investigation; that is, of the social organization of trial preparation in private practice. My analysis rests on field observation and participation - daily for one year, and intermittently for another year - in the offices of four young defense lawyers in their first two years of a practice which consisted mostly of minor criminal legal aid cases and some divorce work (along with a scattering of other miscellaneous types of cases such as accident and corporate work).

The main material for my analysis consists of transcripts of taped interviews between these lawyers and their clients; but my observational involvement in the legal community went beyond the offices of the four lawyers into the courts, and briefly into the offices of several other lawyers. I spent time with defense lawyers and with their associates in the legal community not only in the daily routine of their office and court work, but also during lunch times and in the pubs after five; and, sometimes, in their social involvements on weekends - so that my study

¹Sudnow, "Normal Crimes, Sociological Features of the Penal Code in a Public Defender Office", p. 272.

could be considered in a sense an ethnography of "young lawyers' culture". I undertook the ethnographic work as a necessary context of interpretation and background base for my analysis of preparation for court as it takes place in the interview encounters between lawyer and client.

I will now outline the details of the methods I used and of the setting in which they were employed.

In 1966 I spent six months observing in the Magistrates' Courts in a study of courtroom interaction.¹ At the time I realized that to study what happens in the preparations for court - especially in the defense lawyer's office - would be particularly interesting. This eventually became my preferred topic for a PhD dissertation. In the spring of 1970 I discussed the possibilities of such a study with a young lawyer about to be called to the bar. He expressed enthusiasm for the research and said he would be delighted to help me with the study provided that the Law Society approved of the arrangements. He then went to the Law Society to discuss the proposed study and to see if they would allow us to tape interviews between lawyer and client. The Law Society granted the lawyer permission to help me with the study and specifically to tape interviews with clients

¹Patricia A. Heffron & Gillian M. Wilder, "Order in Court: Some Notes on the Structure of Courtroom interaction", (Unpublished Paper, The University of British Columbia, April, 1966).

at their own discretion for use in my study. I then made arrangements with that lawyer and his two future partners to become a "participant" observer in their new law firm which would open in the fall. The arrangement was that I would work without pay as a secretary in the firm each afternoon. I saw this as a way of "fitting into" the setting and also as a way of returning the service the lawyers would be giving me in taping their interviews and in helping me to learn about the legal world from a lawyer's point of view by talking to me about their cases, taking me to court, giving me access to files, etc. I knew that I would absorb useful background information for my study in the course of my duties as a secretary. A secretary would be hired to work in the mornings so that I would have enough free time to keep up with aspects of my study that I could not do in my capacity as secretary. The lawyers just starting up a practice of their own were delighted at the prospect of defraying some of the expenses of secretarial help. It seemed an advantageous arrangement to all parties.

This agreement was made in the spring of 1970, but the firm would not be formed and in operation until the fall of 1970. I had then to decide how most profitably to spend the summer. One of the lawyers suggested that I work for and with another young lawyer he knew who had just started practicing on his own immediately after being called to the bar and could not afford a secretary. This lawyer said he

would be glad to help me with my study if I helped him with his office work. I took advantage of the opportunity. This turned out to be an ideal situation for "learning the ropes" about legal secretarial work and about the legal scene in general - so that by the fall I was not going into the more complicated and demanding situation in a firm of three lawyers (rather than one) in a more formal setting as a novice, but as someone already known and accepted on the legal scene (that is in the courts and around the places where lawyers go for coffee, beer or lunch). My socialization into the role of secretary and into the legal subculture in general was such that by the time the new firm opened in the fall, the newly hired secretary (who had never worked in a law firm) relied on me for job training.

... if a sociologist rides with the police for a day or two he may be given what they call the "whitewash tour". As he becomes part of the scene, however, he comes to be seen less as an agent of control than as an accomplice.¹

In the first setting in a one-man law firm, my role as "sometime secretary" was rewarding to both myself and the lawyer. In a one-man law firm doing mainly criminal Legal Aid work, there is minimal secretarial work; an average of about an hour per day. From my point of view my role as secretary had certain advantages: (1) It allowed me to feel easy about imposing on the lawyers' time. It

¹Skolnick, Justice Without Trial, pp. 36-37.

also allowed me to feel comfortable about any of the nuisance effects inevitably involved when a "native" must incorporate a "non-native" into his daily work routine.

(2) It helped me to fit unobtrusively into the scene as a helpful participant, so that eventually:

I felt sufficiently disregarded to be relatively secure that what I was witnessing would have gone on were I not around.¹

(3) Answering phone calls and sitting at the reception desk gave me access to data I would have otherwise missed. This involved interaction with the client waiting to see the lawyer and telephone conversation with other lawyers, prosecutors and clients. In interaction with the client, I was careful to stay within the confines of the secretarial role as I understood it from my observations of other legal secretaries. Many clients engaged me in conversation about their troubles. My response was the usual one for secretaries dealing with that situation : polite interest and business-like sympathy. The degree of attention that I gave to a client in such circumstances depended on how "busy" I was with my usual administrative tasks. This was one situation where I sometimes felt uneasy about my role as secretary; however, I was always aware of the consideration that any other secretary would have heard the same things and responded in the same way. I believe that this role helped me considerably in understanding the client's point of view and thus in

¹Skolnick, Justice Without Trial, p. 7.

gaining some distance from the lawyer's point of view. I used the materials I assimilated in interaction with the client solely as a context of interpretation and not as materials to be quoted and analysed explicitly in the "public" context of this work.

I typed all the letters, affidavits, petitions, orders, etc., that went out of the office during the period that I was there (June to September). This, however, did not prevent me from going to court or listening to conversations. The typing volume and pressure were low enough that I could do secretarial work at convenient times, such as when the lawyer was quietly busy at his desk. In this setting I feel that the secretarial job enriched my data opportunities. From my position at the secretarial desk, all conversation in the entire two-room office was clearly audible. There was a window in the thin wall which separated my desk from the lawyer's desk so that I could easily observe visually much of the activity in his office.

Unfortunately in my second observation situation, the physical layout was such that I could neither observe nor hear activities in any of the lawyer's offices. The secretary's desk was situated in a separate reception area. I also had a desk in an unoccupied office between the offices of two of the lawyers where I could work when free from my duties as afternoon secretary. The volume and pressure of

my typing and receptionist duties was such that I did not feel as free to go to court as I had in the first office. Another factor decreased the data opportunities in the new office. In the first office, the lawyer had only me to discuss his cases with when he returned to the office. In the second firm there was a tendency for the lawyers to discuss cases with each other in their offices. While I could, and sometimes did, ease myself into these conversations - practically speaking the pressures of the situation often discouraged it; that is, someone had to guard the reception area and answer the telephone which rang very frequently.

In the second firm the opportunities for tapes of interviews between lawyers and clients were increased, though, because there were more lawyers and more clients interviewed per week. The second setting also presented one new regular data opportunity: the pub across the street where more often than not, the lawyers gathered after five. There I was always welcomed and integrated as a colleague; and I feel that the relaxed conversations between lawyers about the events of the day greatly enhanced my grasp of their world and of the particular cases being discussed.

During the first few months in the second setting it was my overall feeling that the lawyers were happier when I was performing my role of secretary and being a resource for

them, rather than when I was working as a sociologist and using them as a resource. This situation gradually changed, though: Toward the end of the first half of the year the secretarial load became increasingly heavy, and by Christmas the lawyers decided to hire the morning secretary full time and to allow me to spend more time on "my own work". I continued to help out considerably by doing receptionist-secretarial work during the secretary's lunch hours and days off and when she was "doing the books" (accounting), but my freedom to spend time with the lawyers and in court was greatly expanded and gradually my relationship with the lawyers shifted more to one of friendly colleagueship, so that it was no longer accurate to say the lawyers were happier when I was of service to them rather than vice-versa. By mid-January my opportunities to take notes and to immerse myself in aspects of the lawyers' world other than the secretarial end of it were as ideal as in the first observation situation. I would say that by the spring our relationship was such that we saw each other not as lawyers and sociologist who were exchanging services to mutual functional advantage, but as people together in the same work situation - people who had become good friends and who were naturally interested in each other's work as part of the person (not the person as part of the work, as was the case in the beginning) - so that my study has become not something that I have "done to them" or that they have "given to me", but

something that we created together as part of our routine working lives in a way that seemed natural to us all.

All four lawyers have read all my reports on the work and drafts of the thesis - criticizing and suggesting freely - with natural involvement and keen interest. I incorporated their suggestions in the thesis only in instances where these suggestions pertained to what lawyers felt were inaccuracies in my interpretation of the technical legal aspects of their work.

Since I left the field on a regular basis in the Summer of 1971, I have kept up contact with all four lawyers. I drop in at the law offices a few times a month to "keep up on the news". I also see them socially out of the legal setting - the frequency of this depending on vagaries of our separate but intersecting spheres of activity.

THE DATA:

(a) Taped Lawyer-Client Interviews:

It was rare for a client to refuse the lawyer permission to tape the interview between himself and the lawyer. This happened in only one instance that came to my attention. I was not present in the lawyer's office during the interview between lawyer and client, although in the first setting I was able to see and hear much of what occurred. Whenever transcripts are used in this work names, places, dates and

circumstances are changed to ensure the anonymity of the client. The four lawyers and I felt that, with the permission of the Law Society and with the permission of the client and with my guarantees of anonymity, due attention to ethical considerations had been heeded. In spite of the above conditions I did feel uneasy about the degree (however slight) to which this study may infringe on the privacy of the client and the privilege of the lawyer-client communication¹. At the same time I strongly feel that studying lawyer-client interaction is invaluable to an understanding of the workings of the legal system. There is of course precedent supporting this general point of view. The reader might like to note that there are studies based on recordings of the special communication between psychiatrist and patient².

Appendix A contains a tabulation of taped interviews. Not all the interviews that take place between lawyer and client are available for taping, because some interviews take place outside of the lawyer's office. Clients who do not get out on bail must be interviewed in

¹Skolnick expressed a similar concern: "For those whose conscience is offended by what I have reported, I might add that mine is also troubled, especially at having listened in to telephone conversations". Skolnick, Justice Without Trial, p. 39.

Fortunately, in my settings, conditions were such that it was possible to have permission of both parties to the conversations that I used as data in my study.

²For example: Roy Turner, "Some Formal Properties of Therapy Talk", in David Sudnow, Ed., Studies in Social Interaction, (New York: The Free Press, 1972), pp. 367-96.

jail where tape recorders are not allowed. Some clients on legal aid - apparently especially those charged with prostitution ("Vag 'C'") - do not contact the lawyer; and since they are often in the NFA category (no fixed address), the lawyer is unable to contact them. In such instances the lawyer will interview the client at court in the hall or barristers' waiting room before the client is required to appear before the judge. Interaction between lawyer and client before the case is called is part of the routine even when there has been an interview in the office. Also unavailable for taping were exchanges over the telephone between lawyer and client.

(b) Non-taped Data:

In addition to taped interviews between lawyers and their clients, my data consists of the following: (1) Notes on the client's behaviour before and after the interview in the lawyer's office, and in court before, during and after the formal court appearance. (2) Notes on lawyer's conversations with me regarding the client or his case. Notes on lawyers' conversations with each other in the office. Notes on lawyer's conversation and behaviour out of the office and court setting; for example, in the pub or at parties. (3) Notes on my conversations over the phone with prosecutors, personnel at the Legal Aid Society, clients, bondsmen, witnesses, other lawyers. (4) I was given complete

access to all materials in the office including office correspondence and files on clients. For each case that I had a taped interview, I kept notes on the file contents. Lawyers often brought to my attention files that they thought would be of interest to me. The lawyers encouraged me to use office materials freely and were aware of the kind of records that I made daily of activities in the office. I kept notes on the interaction between the lawyers and the secretary and my interaction with her. I also kept notes on general office activities. (5) When I went to court I took extensive notes on general court activities and on the interactions specifically related to the case I came to hear. For some cases I was able to take notes on prosecutors interviewing witnesses on the bench before trial or in the hall. (6) I also followed criminal cases in the news and I taped television and radio interviews with people from the legal community. During the period of my study there was a series of radio interviews with the director of the Legal Aid Society and an extensive television interview with the chief city prosecutor.

The data for any given case would include as much of the above sources of data as available and possible.

I met and talked to many lawyers and prosecutors during the course of my year in the field and my continuing association with people in the legal community. Apart from this I formally interviewed at length (from one hour to a whole morning or afternoon) ten lawyers. I did not tape

these interviews, but took continuous notes which I expanded immediately after the interview. One of these lawyers was over ten years "called", that is he had been practicing for ten years after being called to the bar; four were in the six to seven years "called" category; and the remaining five were in the one to two years category. Three of these were from large downtown firms, and the others were from the general police courts area.

I did not use a standard questionnaire or have a written list of questions that I used in each interview. I went to the interviews with the specific intention of trying to find out as much as I could about how the lawyer conducted his interviews, about his relationships with his clients and his preferred techniques for getting and assessing the story, about his attitude to his practice, to his clients and cases, to his fellow lawyers, and to police, prosecutors and judges; his attitude to money, his career goals, his reasons for going into law and his use of leisure time. These were topics that I covered in each interview, but not in a set way. I tried as much as possible to play it by ear and let each interview take its own course. My experience in the setting made it easy for me to relate to the lawyers I interviewed in a manner that fostered candid expression of opinion as one "insider" to another. I was pleased with the general informal character of the interviews and the apparent co-operation and free expression that seemed to result. All

ten lawyers expressed an interest in my work and offered to help in any further way they could.

THE SETTING:

The common territory for all the young (in their first or second year of practice) criminal lawyers in my study are the Provincial Courts, formerly called the Magistrates,¹ Courts and better known as the "Lower Courts" or Police Courts where all the minor and some of the major criminal cases are processed. Included in "minor" criminal offences are summary conviction offences² which are matters that may not go to a higher court. Examples of summary conviction are theft under fifty dollars and vagrancy. Offences which may be dealt with either summarily or by indictment (e.g. Breaking and Entering) are first placed before the Provincial Courts, though the accused may "elect up", that is, he may decide to have his case heard in a superior court, (that is, either in County Court or Supreme Court). The Provincial Courts process traffic offences as well, so that the range may include anything from jay walking to attempted murder.

In cases where one may proceed by indictment only (murder, rape, treason) the accused must be tried in the

¹The officials who hear cases in the Provincial Courts are no longer referred to as "magistrates", but as "judges", although during the period of my field work, "magistrate" was technically the correct term.

²See Martin's Annual Criminal Code, (Toronto: Canada Law Books Limited, 1970).

higher courts by Judge and Jury. The Provincial Courts are technically "inferior" courts in that they have limited jurisdiction. For example they cannot extradite, cannot issue injunctions, cannot award damages, and cannot order examination of witnesses outside the province of their jurisdiction. The County Courts hear more serious criminal matters where proceedings are by indictment and the accused has elected to be tried by judge alone or by judge and short jury (nine members). The most serious criminal cases where one must be tried by judge and jury are heard in the Supreme Court (which is not a Court of Appeal). All divorce cases are heard in Supreme Court as are all corporate cases except mechanics lien cases.¹ There is a separate Court of Appeal where appeals from all the other courts are heard. (Appeals from the Court of Appeal would be heard in the Supreme Court of Canada in Ottawa.)

The Provincial Courts are situated in the East End of the City² about ten minutes by bus from the central downtown business area. They are housed in the same building as the police departments, the city jail, and the city prosecutor's

¹Mechanics liens are claims by unpaid suppliers and workmen engaged in construction. The unpaid amount if proven constitutes a charge against the lands and buildings concerned.

²This particular settling is also described in an ethnography of a drug culture in the same city: Kenneth Stoddart, "Drug Transactions: The Social Organization of a Deviant Activity", (Unpublished M.A. Thesis, The University of British Columbia, 1969), Chapter Two.

office. The close physical proximity of the police, the prosecutors and the Provincial Courts makes for close liaison between police and prosecutors, and for the common complaint by defense lawyers that "The lower courts are just another arm of the police force".

The general area in which the Provincial Courts are located is the least "respectable" part of the city, that is it is older and more 'run down', spotted with disreputable beer parlours and cafes where the traffic in illegal "hard" drugs (mainly heroin) is centred. This part of the city includes "skid row" where the disreputable poor¹ (old "bums") hang out together on the streetsides or sit on benches drinking "bay rum" or cheap wine. In this district one can always spot passersby who appear to be strongly under the influence of alcohol or drugs; it is a commonplace to see people "hauled off" by the police and to hear the squeal of ambulances. The city's concentration of Chinese ("China Town") is in this area; a Japanese "district" is close by and one notices more native Indians on the street in this area than in other parts of the city.

This is the "high crime" zone of the city and this is where many of the clients in this study live or "hang out" - and get caught. This is where the unemployed collect

¹For an interesting analysis of this "type" of poverty see: David Matza, "The Disreputable Poor" in Reinhard Bendix and Seymour M. Lipset, Eds., Class, Status and Power, 2nd ed., (New York: The Free Press, 1966), pp. 289-302.

together in the beer parlours and strip joints. This is where hard drugs are easy to get, where prostitutes are the least expensive and where the semi-underworld feels at home. This is the area of "bar room brawls" and street muggings and constant police invigilation.

It is in this area that lawyers who regularly do "police court work" (that is, handle minor criminal offences) are likely to have their offices. There are a few lawyers doing criminal work who are in downtown offices or scattered in other areas of the city; these lawyers are estimated to constitute about five percent of those doing criminal work. Lawyers who locate their offices in the police court area are known as the "East End Bar" which in members' usage has a slightly derogatory connotation related to the general opinion of other lawyers that work on minor criminal cases usually brings in comparatively inferior income and less prestige. If there is a sense in which one could say there is a criminal law "community", this is where it exists. It is in the police courts that these lawyers "run into" each other and go out together for lunch or "a few beer".

Before characterizing the offices and the type of practice of the four lawyers who are the focus of this study, I want to set out as a background the practice of law in general in this city. It is a Canadian City with a population of about three-quarters of a million people. There are

approximately 1,280 practising lawyers (not including judges) in this city. The Federal Department of Justice which handles offences under the Narcotics Act, and the Office of the City Prosecutor (which deals with offences put before the lower courts) each have a staff of ten or twelve prosecutors. The Attorney General's Office is staffed with two lawyers. Business corporations employ about twenty-five lawyers full time. The remaining lawyers are in private practice. (Prosecutors for cases in the higher courts (County Court, Supreme Court, Court of Appeal) are hired from private firms per trial or per assize.¹)

Lawyers separate out three main categories of practice: (1) Lawyers doing general civil law (approximately 700 to 800 lawyers). This includes probate (handling estates), conveyancing, divorce, personal injury and services to small businesses. (2) Lawyers doing "commercial" law, or "corporation lawyers" (approximately 300 or 400). This includes legal work for larger business corporations, work on insurance cases and commercial and labour litigation. (3) Lawyers doing predominantly criminal, divorce and motor vehicle accident work (approximately 100).

There are no exact statistics available on how many lawyers fall into the above categories. The Law Society has a list of lawyers who are practicing law but not of the

¹A group of criminal trials before a given Supreme Court judge and jury lasting up to two months.

kind of practice in which they are engaged. There is a criminal law subsection of the Canadian Bar Association, but membership in this subcommittee is probably not a good index to how many are actually engaged in criminal practice because of overlapping categories and the lack of a practical definition of the criminal lawyer. One could define a criminal lawyer as someone who does daily work in criminal matters, or as someone who does say five trials a month, or someone who receives a certain portion of his income from criminal work, etc. Members do not have a common-in-use definition of a "criminal lawyer", although they will clearly distinguish lawyers who only occasionally take a criminal case as not being in the criminal lawyer category, and someone who does exclusively criminal work as being definitely in that category, but the categories in between are not distinguished clearly. There are very few lawyers who do only criminal work.

The Director of the Legal Aid Society estimates that there are only three or four lawyers who do exclusively criminal work, though this figure is dismissed by some other lawyers as being a gross under-estimation. The more senior lawyers that I interviewed estimated that there were about thirty lawyers who do mostly criminal work (seventy-five percent or more of their cases). Most lawyers who do criminal work also rely on divorce and accident cases.

The Legal Aid Society has 150 lawyers on their list requesting criminal cases. According to Legal Aid personnel about eighty of these lawyers rely on criminal cases assigned to them by Legal Aid as their main source of income. The four lawyers in this study fell into this category during my year in the field. The Legal Aid Society assigns about six hundred cases a month and paid these lawyers \$750,000 out of government fees¹ in the year 1971 - 72, each lawyer being paid thirty dollars per day per case. Lawyers requesting the maximum number of Legal Aid cases are usually assigned five or six cases a month, though my lawyers received more than this during the year that I was in the field they averaged about ten cases each per month. During my stay in the field the supply of Legal Aid cases appeared to be meeting the demand, but Legal Aid officials estimate that the situation will change within the next five years so that the demand will out-distance the supply.

Lawyers doing criminal, divorce and motor vehicle accident work are typically on their own or in a two-man firm. There are no large firms doing mainly criminal work. A firm of three or four lawyers doing mainly criminal work is unusual.

¹The Law Society gives the Legal Aid Society \$100,00.00 a year to cover their administrative operating expenses. This sum is taken out of the interest from lawyers' trust accounts. Trust funds are funds held by a lawyer on behalf of a client for a specific purpose; for example, to complete the purchase of a house or business, discharge a mortgage, pay estate taxes, settle a law suit, etc. When a client in a criminal or other matter pays the lawyer's fees before trial, that money is put in a trust account until the matter is completed (the trial ended) when the funds are transferred to the lawyer's general account.

Large law firms (five or more lawyers) consist of specialists in the different varieties of civil law. Occasionally there will be one lawyer doing mainly criminal cases in a large firm, but this is not the rule. A large firm usually consists of specialists as follows: (a) The corporate department. Lawyers doing commercial law usually bring in from one half to two thirds of the income of a large law firm. They specialize in financing, in bankruptcy and in tax law. (b) Lawyers who specialize in conveyance work. (c) Lawyers who do mainly probate work (settling and servicing large estates). (d) Barristers who do courtroom work, litigation for insurance firms, commercial litigation, and labour relations.

A large law firm can be seen as a business unit in that different specialists often consult on different aspects of the same problem for a given client. The same client can have different lawyers in the same firm deal with different problems; in this sense large law firms see themselves as providing a complete service. Criminal cases on the other hand rarely involve team work. On a major criminal case such as a murder trial the defense may consist of one senior lawyer and one junior; but for the usual minor criminal case, it is a one-man job. "Criminal" lawyers who go into partnership do so mainly to share the expenses of an office and a secretary. They may consult each other on cases, but this is just as likely to be out of friendliness as out of

necessity. Just as common as partnerships are loose "associations" (of up to four lawyers) where lawyers specializing in criminal, matrimonial and accident cases share a suite of offices and secretary pool, consult each other on cases and refer clients to each other in instances where a case does not fit into the timetable or is not the particular lawyer's specialty, but do not enter into a formal partnership by calling the firm by all their names and by being responsible for each other's liabilities and by having some arrangement for the sharing of profits.

The first lawyer I worked with was at the time¹ practicing on his own in a respectably "run-down" two-room office in an old seven-storied building across from the police station. This building houses about twenty lawyers. His office² was without embellishment of any kind : furnished

¹He is now in partnership with another lawyer who is also doing mainly criminal, divorce and accident cases. They are in association with a third more senior lawyer in that the three lawyers share a suite of offices, and two secretaries; and consult and refer each other cases.

²When I first met him, this lawyer described his situation as follows: "Dealing with bums and robbers! Oh hell, just trying to keep them from doing too much time. Suits me fine here; sure isn't any hell, but my clients don't want to be bumping into broadloom. They like it here, I don't charge what I should, but Christ how can you. I know what it's like to be up against it. Besides my overhead is pretty low. I'm on my own - been on my own since May. Figure I've gotta get some experience and this is the best way to do it. After I've been on my own for a while, I'll go in with some other guys. There's no way I'd have been happy in a big downtown firm saying 'yes' to all the senior partners. So here I am!"

only with desk and chairs and wall book-shelves. It was uncarpeted, unpretentious and completely plain (no pictures on the wall, no decorations of any sort).

The three lawyers that I next worked with chose a suite of offices in a markedly different environment. Bordering on the police court area of the city is a sort of "village" within the city, similar to Toronto's Yorkville area, or San Francisco's Union Street area or New York's Greenwich Village. It is part of the oldest section of the city imaginatively renovated and made fashionable. It consists of boutiques for clothes, arts and crafts and antiques and esoteria, of little restaurants and a scattering of offices for young businessmen, architects and lawyers.

The three partners located themselves in a brightly fashionable suite of offices in the upper level of an old warehouse - completely transformed with carpeting, pop art hangings, and glossy new colours. All four lawyers relied heavily on Legal Aid cases, involving almost exclusively minor criminal charges. They were satisfied with the volume of cases coming to them from Legal Aid and also with their usual monthly income (approximately \$800.00 per month) during my year in the field. They are now earning about \$1,100.00 per month from criminal, divorce and accident cases, but still rely heavily on cases from Legal Aid (about seventy-five percent of their income).

All four lawyers did their articles in the same large downtown firm. All except one of the three partners were in the same graduating class. The other partner graduated a year previously from an Eastern Law School and was a practicing lawyer in the same firm where the other three lawyers were doing their articles during the same year. The three partners were in the age category of twenty-five to twenty-eight years. The fourth lawyer was approximately thirty-three years of age during the period of my field work.

For the lawyers in my study, the bulk of pre-trial preparation¹ is based on the interview with the client, and interviewing was clearly the most significant part of preparation for trial², although, as we shall see in the next chapter, the interview is only one phase in the lawyer's role in society's processing of offenders from arrest through the courts to prison, probation or freedom. (Other phases of the lawyer's work are arranging bail, researching the law, bargaining with the prosecutor, going to trial or handling the guilty plea, speaking to sentence, appealing the case, etc.)

¹"The successful lawyer must be able to anticipate most of his problems long before he is called upon for their solutions...preparation for trials must be made in the office." Clarence Morris, How Lawyers Think, (Ann Arbor: Harvard University Press, University Microfilms, Inc., 1937), pp. 27-28.

²This was also the case with Sudnow's Public Defenders: "The bulk of preparation for trial (either trials or non-trial matters) occurs at the first interview." Sudnow, "Normal Crimes, Sociological Features of the Penal Code in A Public Defender Office", p. 265.

When someone hires a lawyer to "handle his case" for him, he becomes a "client". As a matter of professional ethics, the lawyer is required to "take instructions from his client", so that, in principle, "handling the case" does not mean that the lawyer makes the decisions on what to do with the case independently, but must consult with the client, and specifically must abide by the client's decision in the matter of the plea (that is, whether to plead guilty or not guilty, which entails either to be sentenced without trial or to go to trial to defend the matter). In order to discuss these matters with the client, the lawyer "has him in for an interview".

The interview is an important phase in the lawyer's preparation of the case, and usually the one in which these major decisions are made: (a) whether or not to defend the case (that is, to plead guilty or not) and (b) if the case is to be defended, whether or not the client will take the stand. In both instances ((a) and (b)), "taking the client's instructions" comes to mean in practice that the lawyer makes the decisions on the basis of his expertise, and the client agrees with the lawyer's decision. The following two examples show how the client complies with the lawyer's decision. In the first example the lawyer makes a decision to plead guilty; in the second example the lawyer decides that the client may not take the stand to speak in defense of himself, and the client makes no objection.

Example 1.

Lawyer C¹: Okay, guess that's all the information I need. Now what I'm going to do is uh..find out from the police what their story is - or from the prosecutor what the police are going to be saying. And if there's any loopholes in - in their evidence, we may be able to go ahead for trial. If uh, if they have a real solid case - in other words it looks like - pretty obvious - It looks from what you've told me, it looks like they've got a pretty good good case against you for possession - um, I think, uh - there's not much point putting it to a trial - even though you're entitled to it. Cause it, uh, it may only be a waste of time to do it, uh, when they've got you that cold - right on you, you know sorta thing. And that makes it a bit tough. It's almost - there's almost no point in fighting it really. I think, uh, the worst sorta thing you're looking at - well it's - it's not light, but it's, it's not too heavy. You know, you'll be looking at a hundred and fifty dollar fine - which is really - this is what every - this is standard right across the board now for possession, first offence.

Client: Is that right, eh?

L: Yeah...well... [laughs].

C: It sounds like...

L: [Laughs] You join the list in uh - in the [name of radical newspaper] every week!

¹For transcribed conversations used in the body of this work, speech by lawyers will be introduced by the letter L (lawyer), speech by clients will be introduced by the letter C (client), speech by myself will be introduced by the letter P (participant-observer), speech by others present in the lawyer-client interaction will be introduced by the letter O (other).

I will refer to the lawyer in my first setting as Lawyer A and to the three lawyers in my second setting as Lawyers B, C and D. Other lawyers will be identified by successive letters of the alphabet in the order of their "appearance" in this work. Prosecutors are identified separately by the letters of the alphabet starting with A.

C: Right!

L: [Laughs] ...So, um, um - I'll check their story and see what they're going to be saying - if - as I say, if there's any flaws, well, uh, we'll go to trial on it...if, if uh...if it looks like they've got a pretty good case, we should just plead to it and get it all over.

C: Right.

Example 2.

Lawyer D: We have no alternative story to give the police because we know what happened.

C: Yeah.

L: So...there's no point in putting you in jeopardy...by putting you on the stand.

C: Yeah.

The lawyer takes various factors into account in making the pre-trial decisions, including what is known in the legal community as "the story". The story is what the client tells the lawyer (or the police or the court) about what happened in the events that lead to his arrest. In the interviews which I had taped, the story is the concrete focus of interchanges between lawyer and client. The main work of the interview is in eliciting and assessing the story.

On the basis of my general experience in the legal community at large I would say that the practices described in this thesis are not peculiar to the four lawyers with whom I worked intensively, but constitute routine organizational practices of most of the lawyers in that setting who are engaged in minor criminal and divorce work with mainly

legal aid clientele; however, I am not concerned with "generalizability" in the sense of making claims from a "representative" sample to a larger population since this study is based not on survey research techniques but on ethnographic field work. My concern is to document with some ethnographic validity¹ the ways in which the lawyers that I observed conducted their practices. I hope to give an in-depth treatment "from the inside" of how these lawyers routinely handled the business of eliciting and assessing stories in interviewing clients in order to assemble procedures and strategies in preparation for court. Just as Sudnow used the hospital context² as set in two

¹Sudnow expresses the character and value of this kind of research orientation as it applies to the medical setting in his introduction to his study of death "as a procedurally conceived matter": "...I have sought to retain a general ethnographic stance in this discussion, keeping uppermost the concern to provide a documentation of facts of hospital life and death hitherto either unseen or unnoticed by outsiders. I feel it a shortcoming of research on hospital social organization that, with very few exceptions, no detailed accounting of patient care practices is available. Whatever work is available on 'death in the hospital' is generally based on field interviews, rather removed from actual instances of dying, relying heavily on the use of informants who retrospectively report upon their attitudes and happenings at the time of death. Whatever contribution this study might make as an addition to that research will hopefully derive from the fact that the information it contains was gained firsthand." (Italics mine.)

Sudnow, Passing On, The Social Organization of Dying, p. 10.

²Ibid.

hospitals to work with an analysis of death and dying as constituted by the daily practices of hospital personnel with whom he worked closely; so too, I am using the legal context as set in two law firms to work with an analysis of the daily practices of lawyers in interviewing clients.

Before I begin a description of the legal context of this study in Chapter Two in anticipation of the analysis of criminal stories in Chapter Three and divorce stories in Chapter Four - let me caution the reader and myself of the limitations of small scale ethnographies of this type:

An ethnographic report of this kind is subject to several possible sources of serious error. My perspective in the world of medical affairs is, in the final analysis, very much that of an outsider. While over a year was spent in considerable daily contact with physicians, nurses and patients, and while I managed physically to get close to actual settings of medical and nursing practice, what I selected to report upon and, more importantly the ways in which I came to see hospital events, are clearly a product of my own interests and biases. Being practically involved in the world of medicine and nursing places a perspective around events which no outsider can hope fully to achieve, short of becoming a physician or nurse himself. I can claim only a limited insight into the cognitive life of the medical world, and while some of the considerations which I feel govern work in that world have been stated, there is much I feel remains inaccessible to the ethnographer.¹

¹David Sudnow, Passing On, The Social Organization of Dying, p. 176.

CHAPTER II

LAWYER-CLIENT INTERVIEWS IN THE CONTEXT OF THE PROCESSING OF OFFENDERS

I INTRODUCTION:

Once someone is charged with a crime he is "put through the system". His encounters with a defense lawyer are set in the context of this process and mark one phase in it; a phase that is linked to the preceding and following steps in the chain of established procedures. What happens to the accused in the defense lawyer's office depends on what has happened to him up to this point and on what can be expected to happen to him after this point. In other words, in "handling the case", the defense lawyer works from what he knows of the results of the accused's encounters with the police; and in doing this, he orients to what he feels can be expected to happen in court.

In order to interpret what happens in the lawyer-client interview, we must therefore have a working knowledge of relevant considerations arising from the usual events that precede and follow the interview - from the perspectives not only of the lawyer and the client, but

also of the police, prosecutor, and judge.¹

I will discuss the events that precipitate the accused's encounter with the lawyer and the events that typically follow this encounter from the perspective of how considerations arising from these events may or may not influence what happens in the interview.

¹Skolnick makes a parallel point in his ethnographic study of the police: "Although this book is specifically about the police, it is also about the other officials; the defense attorney, the prosecutor, the judge, the probation officer, because they too are woven into the system of Justice Without Trial. A methodological conclusion of the present work is that the Sociologist gains a more adequate understanding of the police by examining the work of the other officials in the system. For example to estimate the extent of illegal police activities of various kinds, police reports alone cannot be relied on. All police have enemies and the natural enemies of the policeman are the defense attorney and his client. Indeed an important reason for studying the Criminal Law Community is that each segment tends to be more critical of the others than of itself." Justice Without Trial, p. 28.

In a recent study of prosecutors in Toronto, Grosman makes this observation: "Similarly, the prosecutor does not act according to a set of rules, but rather in a manner conditioned by his environment and the actions of the other participants in the prosecuting environment - the police, the defense lawyers, and the judiciary." Grosman, The Prosecutor, p. 67.

II PRECEDING EVENTS:

(A) POLICE ENCOUNTER:

Not all interviews take place in the lawyer's office. Some take place in jail, or in the halls and waiting rooms in court. Both lawyer and client are less likely to feel as at ease exchanging information in jail than in the office¹. Whether or not the interview takes place in jail depends on the conditions of the criminal charge, the arrest and bail. The original encounter between police and suspect can result in being charged² by arrest or by summons, or by an Undertaking to Appear (UTA) depending on the legal restrictions regarding the type of offence as set out in the Criminal Code, and on police discretion (where these restrictions allow such discretion). When the alleged offender is handled via summons or UTA in a case where the charge is such that the statutes allow the police to proceed by either arrest or summons (or UTA), the "arresting" officer is

¹Lawyer A claimed that the jail setting made little difference to what he said or how he conducted his interviews, but that clients are very reluctant to "say anything" in jail for fear of "bugging" by police.

²Being charged takes place technically when the "arresting" officer swears an information, before a Justice of the Peace in an office in the police building. The accused is not present.

showing confidence¹ that the accused will appear of his own volition in court when required. In such instances, the accused is not taken into custody and receives notice in the mail or by official police service of when he is to appear in court.

When charged by "arrest", the accused is "booked" at the police station and goes into custody. If the accused is unable to meet the conditions of the arranged bail, or if he is not allowed bail, he remains in custody and his lawyer has little choice but to interview him there in jail or in court before trial. The lawyer will interview his client in court (that is, in a hallway or in the Barristers' Waiting Room) in instances where the lawyer is unable to find time to go to the jail, or is appointed too late too late to do so. In some instances where the accused was not taken into custody, or is out on his "own recognizance"², or on bail, the interview may still take place in court rather than in the lawyer's office. This happens when for instance the client has "no fixed address" (particularly common in "Vag C" (prostitution) cases) and the lawyer is appointed by

¹The details of procedure in this area are quite complicated and I have presented it perhaps too simply here. Readers interested in the technicalities of procedure in Canada should consult Martin L. Friedland, Detention Before Trial, (Toronto: University of Toronto Press, 1965).

²This means that he is not required to put up bail, but only to sign an undertaking to appear in court on the required date. In the legal community jargon, this is known as "being out on your O.R.".

Legal Aid and is unable to contact his client prior to the court appearance. In this event lawyer and client meet for the first time in court. If they decide to go to trial, there will be time to arrange an in-office interview. If they decide to plead guilty at that court appearance, there will not be an in-office interview.

We can see that there is sometimes some selection in the clients who come in for an in-office interview. All of the interviews that were taped for me took place in the lawyer's office, with the exception of two interviews which were taped in the Barristers' Waiting Room prior to appearance in court. It would be hard to judge whether or not lawyers attend to considerations arising from whether or not the client is in custody or is able to arrange or meet bail in making some of the decisions that must be made in the interview; however, there may be instances where these considerations may have some relevance: for instance, someone who is kept in custody and who cannot arrange or meet conditions of bail may be seen as harder to speak to sentence¹ for than someone who is out on his own recognizance; and hence, the probable consequences of the guilty plea are likely to

¹When his client has been found guilty, or has plead guilty, the lawyer may "speak to sentence" for him. In speaking to sentence, the lawyer puts forth reasons why the judge should be lenient in sentencing his client.

be seen as more severe, and hence the option of the guilty plea less advisable. However, how a lawyer sees his client in terms of the possibilities for speaking to sentence depends also on a number of other factors such as the nature of the charge, the circumstances of the crime, the client's record, his job situation, and so forth.

Once a person has been charged with a crime, he will be encouraged by the police or by the judge in his first court appearance to get a lawyer if he does not already have one. Most of the clients in this study were assigned a lawyer through Legal Aid.

(B) LAWYER AND CLIENT CONTACT: Legal Aid:

The Legal Aid Society will appoint and pay (via the government) a lawyer to defend an accused who makes application for legal aid and who meets the requirements for eligibility¹. Eligibility basically involves not being

¹The Legal Aid Society in this particular province screens applicants for financial eligibility. The lawyer who takes the case is also expected to check to see that the client is in fact eligible. The criteria for eligibility are stated as follows in The Legal Aid Handbook: "The first consideration is the financial position of the applicant. No standard has been laid down as it is preferable to deal with each case on its own merits. A person is qualified for free Legal Aid if requiring him to pay legal fees would impair his ability to furnish himself and his family with the essentials necessary to keep them decently fed, clothed, sheltered and living together as a family, or where he is at the moment without funds and requires immediate legal assist-

ance for the preservation of his legal rights."

Eligibility is further explained in the words of the Director of Legal Aid as interviewed on CBC A.M. Radio on April 4, 1971:

Director: "...The function of Legal Aid is to interview people and uh - determine whether or not they are eligible for Legal Aid from a financial standpoint and whether or not it's the type of case that we cover and if so - um, we try and advise them or resolve their problems on the spot. If not - if we can't resolve it on the spot, we will refer it to a lawyer in private practice who takes the case on and acts on that matter like he does on any other matter."

Interviewer: "So a person doesn't have to be out on the street and destitute before they can uh - apply for Legal Aid?"

Director: "No the standard that we use is uh, if a person is - would - if the necessity to pay a legal fee would deprive the person of the ability to, uh, maintain himself and his family with - decently clothed and fed and housed, then we would, uh - provide legal service. I'll just draw a couple of examples for you to give you some idea of how we draw the test: If we have a young fellow who lives at home, makes \$400.00 a month - um, no debts, no responsibilities - and he's charged with possession of marijuana, he probably wouldn't get Legal Aid. However, if you get a man who's got six children; he's up to his ears in debt; and he's got, uh - a wife who's sick and so on : He makes \$400.00 a month and uh - he was charged with some serious indictable offence, he probably would get Legal Aid in spite of the fact that their incomes are the same. So what we try and do is an individual test on each person. Another factor that we consider is the - the type of offence; that is, you may be able to get a lawyer to defend you on, oh, a common assault charge for \$200.00 to \$250.00, but you wouldn't be able to get a lawyer to do the defense of a murder charge for the same price. It might cost you \$2,000.00 or \$3,000.00; so it depends on the type of offence and the circumstances of the individual person."

"able to afford" the services of a lawyer, so that the usual clients in these cases are probably much like the clients in Sudnow's study¹ with respect to social background and economic characteristics; that is, they are poor or "broke", unemployed and on welfare, and from the more underprivileged sections of society and are "up on" charges arising out of attempts to improve their material circumstances (viz: robbery, theft, obtaining goods by false pretences, breaking and entering, possession of stolen property, possession of housebreaking instruments) or charges related to expressive habits of "deviant" subcultures (e.g., possession of the various illegal drugs)². Legal Aid "recruits" clients partly via the Salvation Army who give application forms to accused persons in jail and in the courts when they first appear. Any person charged with a crime may of course contact the Legal Aid Society independently. If the accused passes the eligibility screening of the Legal Aid Society, a lawyer is appointed by Legal Aid to act for him.

¹Sudnow, "Normal Crimes, Sociological Features of the Penal Code in a Public Defender Office".

²Legal Aid is not usually granted for Summary Conviction Offences (as distinct from Indictable Offences) (see Martin's Annual Criminal Code, (Toronto: Canada Law Books Ltd., 1970) for the definition of this distinction "unless there is a real possibility that the applicant, upon conviction, would be sentenced to a term of imprisonment", (Legal Aid in British Columbia, p. 3). Examples of Summary Conviction matters are: Public Mischief, Vagrancy (includes Begging, Prostitution, etc.). Legal Aid is also not provided for most civil matters.

The Legal Aid Society keeps a list of lawyers requesting Legal Aid cases and tries to apportion them to requesting lawyers as equitably as their own internal organizational problems and the availability of requestors permits¹; but there is a section at the bottom of the Legal Aid Application Form² for lawyer preference, and it is the policy of the Legal Aid Society to honour clients' preferences for particular lawyers whenever possible and appropriate³. Apart from client preference, cases are not randomly assigned, but are allotted on the basis of whether they are considered "minor matters" or "serious matters". In the Legal Community "minor matters" are considered to be offences such as theft, obtaining goods by false pretences, possession of small quantities of the various narcotics, and trafficking in drugs on a small scale. Rape, murder, large-scale armed robbery, kidnapping and extortion are examples of offences considered to be "more serious"

¹This is the opinion of the person at Legal Aid who is responsible for assigning eligible clients to requesting lawyers.

²See Appendix C for sample copy of Criminal and Civil Legal Aid application forms.

³According to the person that I interviewed at Legal Aid, an example of an inappropriate request would be for instance where a person accused of murder requests a very recently-called young lawyer (that is, a lawyer in his first few years of practice). Legal Aid assigns murder cases only to "more senior" lawyers (at least five years called).

matters¹.

More serious matters are not assigned, except in unusual circumstances to "inexperienced" lawyers (usually meaning less than two years called); and so, the kinds of cases that came from Legal Aid to the lawyers in this study are considered in the legal community to be "minor matters". Since Legal Aid pays only \$30.00 a day per client (this usually totals about \$90.00 per case: one day to fix a date, one day to prepare for trial, and one day for trial), lawyers who rely mainly on Legal Aid for clients have to conduct a certain kind of practice in order to "make it pay"; that is, they must process a high volume of cases with summary attention to each case.

Clients who can afford to pay the full fee (usually \$250.00 as compared with \$90.00 supplied by Legal Aid) are more "welcome" than Legal Aid clients, though it probably is not the case that they receive more attention or get "better service" than do Legal Aid clients, since they have to be fitted into the same schedule and routine, where the lawyer gears his days to processing Legal Aid cases in volume; but presumably a client who is prepared to pay above and beyond the usual fee can buy special treatment.

¹The distinction between "major" and "minor" matters is understood in roughly the same way by members of the legal community, though individual usage may vary slightly. This distinction has no real basis in the criminal code along criteria such as maximum penalty, and indeed in some instances the maximum penalty for a "minor matter" may be higher than for a "major matter". This is strictly a members' distinction and members are well aware of its inadequacies.

For minor criminal cases, such clients are likely to be rare¹.

That a client is on Legal Aid and is accused of a minor criminal offence affects the way in which the lawyer sees the client as a person and as a case:

Lawyer B: It's this kind of work - police court work is unique in itself. I mean regarding the law...it's called law, but the whole process is totally - if the law has any meaning, it becomes totally meaningless down there. If law has meaning in other aspects or other areas, because these people are social problems----*

P: And they're dealt with in that way----

¹I came across only one instance of a client buying special treatment. This was in a more serious case, the offence being "Importation" (of drugs for the purpose of trafficking) for which the minimum penalty is seven years imprisonment. The clients in this case were given special treatment in that interviews were much longer (two hours compared to half an hour) and there were several interviews instead of just one, as is usually the case. Greater care was taken in getting up the case and in researching the law and in negotiating with the Prosecutor's Office. The lawyer's fee was \$500.00 per client instead of the usual \$250.00. (This case is further discussed below, p. 103, footnote.)

*This convention is used to indicate omission of exchanges.

L: They're dealt with in - through a legal system that is not designed to handle these kind of people. They are technically, they are in the courts because they have breached, quote, "the law", but the law - for most, the law presumes a certain socio-economic, ethical background. If somebody with a record as long as his arm, completely untrained to do anything, and no education - where is he? And naturally the kind of people you're dealing with are going to be just slum types - real slum types. There's no hope - it just doesn't make any difference. Some of the records are just so long. They're just unbelievably long - and you know, to go in there and argue whether or not this fella was guilty under Section 269 of Possession of Stolen Property and the big issue becomes whether or not his statements are admissible in a Voire Dire is a game. It's a mere game, because it doesn't matter whether we beat that or not. It's totally irrelevant regarding this man.

It's irrelevant because it doesn't matter whether he's found to be guilty or not. If he's found to be - if he's not acquitted, he'll be back next week! They'll prove it next week. It doesn't solve anything!

In the police court level for a good many people to go through there: the drunks, the Vag C's, the Vag B's, the Vag A's - repeats over and over and over and over. They're not criminals; they're not evil-doers, they're not con artists, they're not people who burn down homes; they're not people who break other people's legs, or even if they are people who break other people's legs, they live in company where that's considered fair enough! Whereas the rest of us don't - so somebody gets caught - somebody blows the whistle on em!

. . . the judges decide on whether or not they feel on the evidence somebody is guilty. They, as judges, are not concerned with either the dignity of the court nor with upholding principles of criminal law. They are administrators of this social welfare agency down there. They decide whether this person is to go in a foster home or not [laughs]. You know how this is! They are literally running a people mill. I'm not putting them down for that - it's just sheer volume! There's just no other way for them to approach it.¹

A second and very strong factor that influences the way a lawyer sees the client and his case is "the Particulars". The particulars given to the lawyer are

¹This view was expressed by one of the four lawyers (Lawyer B).

The following excerpt from an interview with another lawyer (Lawyer F*) shows a similar attitude:

L: My view of the thing - in most of these police court things; and most of these people have really long records, you know: Legal Aid and so on. My view is that I am helping a dumb animal for the most part -

P: Find his way through the legal maze.

L: A little bit; and it's a little bit hopeless, because it doesn't really matter what happens in court because no matter what happens, he'll be back again. But that is better I think than letting that animal have no direction at all. I mean "animal" - it's just a social animal that we've produced. Some, most of these people I'm sure have less than average intelligence to start with, and a whole bunch of other things that society has created, terrible backgrounds and all the rest of it. And they get into a terrible pattern that there's no way of getting out of. But for the most of it, it's just helping people get through it.

*Lawyer E is referred to in Appendix A.

a second-hand version of the Police Report ¹. Like the "dope sheet" described by Sudnow in "Normal Crimes", the Particulars give the lawyer certain stereotypical pre-conceptions about the client and his case.

¹The Police Report is composed from the policeman's observation of the incidents or circumstances that lead him to make an arrest. The usual procedure for the drawing up of this report is as follows: The policeman observes (or investigates after the fact) and makes notes more or less on-the-spot of his version of What Actually Happened. Usually within the next 24 hours, he writes up a "more complete" report, working from his notes and from memory. He writes this report as soon as he finds time - usually in a "slow-down" period. He may write it out or he may dictate it to a secretary. This report is directed to a departmental head or to the Police Chief and is for in-departmental use only. He is also required to send a version of this report to the Prosecutor's Office. The version that the prosecutor receives may be in part excerpted from the in-department report, but cannot be a xerox because a separate form is required. (See Appendix B for the outlay of this report). The report is supposed to be set up to outline the crucial "descriptions" pertaining to the elements of the charge (as set out in the Criminal Code) that the prosecutor must prove in court. The particular prosecutor who will be handling the case in court does not receive the report until a few days, perhaps longer, after the original report was made out.

It should be noted that the policeman does not describe the events that he himself witnessed or that were reported to him via a complainant - in the way that an ordinary passerby would, or the way a newspaper reporter would; because he does not see them that way and because he writes the report for a unique purpose. The policeman sees things differently because he is trained to perceive people and events selectively through a learned and ingrained mental screening operation that automatically highlights the various "policely" indicators of likely suspects and likely crimes. He also sees the acts associated with likely suspects in a chiaroscuro of focus on the elements of the crime (as set out in the Criminal Code) which must be proved in court - and he is usually careful to set this out in his description because this information is vital to the prosecutor who will use it as his main data in preparing for court.

(C) CONTACT WITH THE PROSECUTOR:

(1) The Particulars:

The Police Department sends the Prosecutor's Office a version of the Police Report for all charges that are laid. The prosecutor assigned to a particular case in turn, on request, passes a version of this police report on to the defense lawyer who is acting for the client charged in that case. The version that the defense lawyer receives is known as the "Particulars"¹.

¹The practice of giving the particulars to the defense counsel who is acting for the accused in a given case is apparently peculiar to the city in which I did this study. Moreover, it is done as a policy of the Prosecutor's Office. By law, a defense lawyer can demand particulars, but would have to go to court to do so. All that the prosecutor is required by law to give out to the defense lawyer is time, place, and a minimal description of events such as "apprehended after committing assault". In practice, in the city of my study, the city prosecutors voluntarily usually give much more than such a minimal few-word description. They in fact usually give most of the descriptive part of the police report, which is usually a few, and may be several, paragraphs long. Apparently not all the defense lawyers, or even prosecutors, are aware of the customary nature of this practice, but assume that it is due and duty. One prosecutor put it this way:

Prosecutor A: "A young lawyer will phone up and tell you he hasn't received full particulars. He will ask you to give them, or else! I laugh because it's just a policy here. Even the prosecutors think they have to give full particulars, when really they have to be formally demanded in court and then all that is required is time, place, and a couple of words. I'm amazed at the amount of information given. But I think it's a very good practice: giving the particulars makes for a fair trial."

According to Grosman, giving the particulars is not the policy in Toronto where whether or not the defense coun-

sel gets particulars depends on factors such as: the relationship between prosecutor and defense lawyer, the bargaining position of each with respect to assumed strengths and weaknesses of each case, etc: "On what factors or criteria does the prosecutor base his decision to disclose or not to disclose? The following interviews suggest that the quality of the reciprocal relationships between prosecutors and defense are the determining factor in the prosecutor's exercise of discretion with respect to the pre-trial disclosure."

"... The foregoing suggests that the prosecutor views pre-trial disclosure, pleas to lesser charges, and the withdrawal of charges as favours to be exchanged with certain defense lawyers. These favours will not be available to defense counsel who are abrasive or demanding, but will be available to those who have proven themselves part of the trustworthy social grouping. A defense lawyer who is part of the reciprocating environment, who is "trusted", who is "safe", will obtain full disclosure of the prosecution's case before trial. He is "safe" if he does not utilize the evidence obtained in pre-trial disclosure for cross-examining prosecution witnesses and is likely to enter a guilty plea after an assessment of the prosecutor's evidentiary strength. The entry of a proportionate number of guilty pleas by defense counsel is a pre-requisite. Defense counsel who consistently take an adversarial position or regularly enter not guilty pleas on behalf of their clients will not share in the benefits of pre-trial disclosure." Grosman, The Prosecutor, pp. 75-76.

At the time of writing of the final version of this work (Summer, 1972) I am informed by the lawyers who proof-read this version that it is no longer the policy of the Prosecutor's Office to give the particulars to the lawyer via the lawyer's secretary, but that lawyers wanting particulars must get them personally from the Prosecutor's Office by talking to the particular prosecutor on the case. The reason given by the Prosecutor's Office was that there was too much distortion when the particulars got to the lawyer via his secretary. The lawyers in my study believe that this is not the "real" reason and claim that a secretary who knows shorthand will take down a more accurate version than a lawyer who is not skilled in shorthand.

The particulars are what the prosecutor reads to the defense lawyer (or, more usually, to his secretary) over the phone as information regarding those parts of the police report that the prosecutor is allowed to pass on to the defense counsel. When giving the particulars, the prosecutor rarely reads the original report verbatim, but does various interpreting, editing and abridging¹.

How a prosecutor "transforms" the police report into "particulars" for the defense counsel depends on a number of factors: An important consideration, according to prosecutors interviewed is what, if anything, the

¹The following excerpt from an interview of Lawyer C and his client shows that defense counsel are well aware of this "censoring" process:

C: Are you - Do you have any access to uh - police reports - on, on the case?

L: On this?

C: Yeah.

L: Well, only as - only as to the extent of what they're willing to give me...over the phone.

C: Uh-huh.

L: Cause, usually, uh - you know - there's some things they won't tell you and there's a lot of things they will tell you -they'll tell you generally what the case is...now - I've gotta call _____ [prosecutor] right now and find out what they've got. I know from talking to _____ [prosecutor] there that, that their file isn't complete yet, because he didn't have all the information either.

prosecutor knows about the policeman who made out the report.

Prosecutor B: If it's a new officer, you know you have to do a little extra work. You know there's inexperience operating there. A lot of the report could be wishful thinking. A couple of cops are known to be so bad no-one takes them seriously. Some cops are toughies, so you scale down their reports; others are known to be softies, so if they say some guy did something, you know he did it and probably a hell of a lot more too. For instance, if it's an assault case, if you know your cops, you know who would provoke an assault and who wouldn't. So in general you shade the report in view of who it was that made it out. You take it as being more or less reliable depending on what you know about the cop.

If a prosecutor reads through the police report carefully before going to court, he may notice gaps, incongruities, or what he takes to be mistakes, and may then contact the officer who made out the report to clarify certain points.

The prosecutor may also ask for a supplementary report, which the police officer may or may not supply, depending on time pressure, personal and departmental policy, and what he can remember from the incident, etc. Sometimes, apparently, an officer will voluntarily send a supplement to a "sketchy" report.

The prosecutor probably also shades his private interpretation of the report in the light of such general considerations as what he thinks he knows about the typical ways in which such crimes are committed, what in his

experience is a typical offender, and how this matches up with the description of the accused, and so on.

Giving the particulars is for the prosecutor a chance to review the case before it goes to court (it may also be the first and only time before court that the prosecutor looks at the police report). If there is an exchange between the prosecutor and the defense lawyer over the telephone about the particulars¹ it may develop as a sort of friendly pre-trial joust in which the prosecutor and

¹Normally defense lawyers leave it to their secretaries to get the particulars from the prosecutor. This is done usually purely as an efficiency measure, since it saves the lawyer time, and since he is out of the office in court a great deal, and since the secretary is usually much more skilled at taking down notes quickly over the telephone (taping the conversation with the prosecutor is forbidden by law). Most lawyers are satisfied with this arrangement, but some lawyers do regret having to leave this job to their secretaries because they feel the prosecutor leaves out more detail if "it's only a girl at the other end" than if it's a lawyer. Also the lawyer knows, and the secretary does not know, what kind of questions regarding further details are likely to be important to his case. In getting a written account, lawyers miss information that comes from interpreting tone of voice, side comments, etc. In sorting out the particulars from what she takes to be aside comments, etc., the secretary is in a sense contributing to the creation of the particulars.

If a lawyer considers a case to be particularly important, he may decide to take his own particulars, rather than have his secretary do it for him. In most instances however, if pre-court exchanges between lawyer and prosecutor occur, they do not take place at the time of the giving of the particulars, but are initiated by the defense lawyer after he has read the particulars, or by the prosecutor on some occasion before or after giving the particulars.

defense lawyer feel each other out and form opinions about the strength of each other's case and about their likely tactics. It may also be the occasion for overtures or for settlements in the negotiations of "deals" : the defense lawyer may point out difficulties in the prosecutor's probable evidence, and the prosecutor may take this as an opening for a deal, or the prosecutor may himself initiate overtures for a deal.

(2) The Deal:

The "deal" should by now be a familiar term to readers in the Sociology of Law. Sudnow's "Normal Crimes"¹ explains in detail one kind of "deal" negotiated between public defender and prosecutor. Professor Grosman in his book² about prosecutors in Toronto examines aspects of deal-making in depth adding much to considerations put forth by Sudnow.

¹Sudnow, "Normal Crimes, Sociological Features of the Penal Code in a Public Defender Office".

²Grosman, The Prosecutor, pp. 29-43, Chapter Four, "Discretion and Pre-trial Practices". On p. 30 he gives the beginnings of a definition of the deal: "The recent report in the United States of the President's Commission on criminal justice recognized the pervasive influence of 'plea bargaining' : 'In form, a plea bargain can be anything from a series of careful conferences to a hurried consultation in a courthouse corridor. In content, it can be anything from a conscientious exploration of the facts and dispositional alternatives available and appropriate to a defendant, to a perfunctory deal. . . ."

See also Donald J. Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice", Journal of Criminal Law, Criminology and Police Science, (Vol. 46, March-April, 1956), pp. 780-90.

In general, a deal is made when the prosecutor agrees to change some aspect of the way in which he would normally handle his case - in a way that is supposed to be an advantage to the accused, usually with respect to lessening the likely sentence by reducing the original charge, in return for the defense lawyer changing some aspect of the way in which he would normally conduct his case. This change usually means pleading guilty rather than going to trial - but pleading guilty to a reduced charge¹.

I found in the particular setting of my study that, although deals may in some instances be to the advantage of both defense counsel and prosecutor, they are not engaged in as a general policy as was the case with Sudnow's Public Prosecutors and Public Defenders. Deals may be initiated by either the prosecutor or the defense counsel. Whether or not a deal is initiated depends on what each thinks he knows about what kind of case the other has and what advantage each

¹Grosman (Grosman, The Prosecutor) points out that the guilty plea to a reduced charge is not necessarily an advantage to the accused in terms of probably receiving a lighter sentence since the maximum penalty for the reduced charge is sometimes the same as or greater than the minimum penalty for the original charge. (Grosman, The Prosecutor, pp. 33-36.)

thinks can be gained from what kind of deal¹. Obviously, the best outcome for the prosecutor is normally the guilty

¹Police opinion apparently plays a role in the prosecutor's willingness to make a deal. There are apparently instances where the police are keen for conviction and "put pressure" on the Prosecutor's Office. Though prosecutors are supposed to be immune from this kind of influence, the lawyers in my study and others are of the opinion that prosecutors are in fact in some cases influenced by police opinion. Lawyers commonly complain that since the police department and the Prosecutor's Office are housed in the same building as the courts, that the Prosecutor's Office is a sort of "wing of the police force". Prosecutor and police witnesses are working partners in the same sense as lawyer and client for purposes of preparation and performance in court.

Grosman (Grosman, The Prosecutor) discusses the question of police pressure at length in Chapter Five, pp. 44-59. The following excerpts support the opinion of the lawyers I interviewed: "The emotional attachment of the police to a particular case or their desire to protect informers for future usefulness restricts prosecutorial freedom to compromise pleas." Ibid, p. 40.

"Police bias is acknowledged by most prosecutors and it is explicable by the occupational perspectives of the police which ascribe the highest priority to "crime fighting" and the arrest of the guilty. Emotional attachment to a case and police pursuit of conviction is particularly manifest where it is alleged that a sexual offence has been committed against a young child, or where police have been physically or verbally abused by the accused during arrest. In addition, when police have invested substantial investigatory effort and have arrested a notorious or important suspect, they are much more interested in the successful prosecution and conviction of the accused than they are in the case of more routine arrests." Ibid, p. 45.

"As noted earlier, some of the younger members of the Prosecutor's Office felt closer to police officers and their expediting values than to their professional colleagues, the defense lawyers. This creates an in-group solidarity between prosecutors and police which may be associated with some hostility towards the outgroup which is composed of accused persons and the defense lawyers who represent them. ...Others identify with the values of the defense lawyers and accord those values some prestige." Ibid, p. 68.

plea. It is more convenient in that it makes his job much "easier"; he does not have to go through the tedium of spending a long morning or afternoon seemingly endlessly calling and cross-examining witnesses to prove his case. Going to trial and "winning" or "losing" does not represent the same advantage or loss to the prosecutor¹ as it does to the defense lawyer, since the prosecutor's salary is fixed and his stream of clients is "automatic" and not dependent on his reputation and his rumoured win-loss ratio, etc.; whereas, the defense lawyer normally is paid less in dollars² and prestige for a guilty plea than for a trial; and his reputation and hence his potential client-attracting power is partly dependent on his rumoured approximate win over loss ratio. I will expand this consideration at this point since it is important in explaining why the defense lawyer handles cases the way he does and in explaining the nature of his relationship with the prosecutor.

The position of the private defense counsel is different from that of the prosecutor and from that of Sudnow's

¹Grosman observes the same consideration: "The number of cases lost at trial do not cause as much concern to prosecutors as the number of cases which ultimately proceed to trial." Ibid, p. 54.

²A guilty plea may involve only one court appearance and no preparation and hence would yield only \$30.00 from Legal Aid. However, it can be stretched out via a request for a pre-sentence report to another court appearance, and hence another \$30.00.

Public Defenders, first because the private defense counsel is the only one who is not on salary and who is therefore in business of recruiting clients and whose remuneration is dependent on how many cases he is able to process and on what type of cases he gets (in terms of the normal preparation time and "bother" involved). Secondly, winning, as compared with simply "handling the case well", is more important to the private defense lawyer than to the prosecutor, because the defense lawyer keeps himself aware of the contingency that clients are not likely to recommend a lawyer to their friends, or come back again, if he feels the lawyer has not "done a good job". Doing a good job does not necessarily mean winning, but most defense lawyers think that it stands to reason that winning is the preferred outcome for the client, and that a client is likely to give good reviews of a lawyer who "got him off".

Gaining and maintaining "reputation" is normally important to the defense lawyer, even if he currently has a steady stream of clients passed on by Legal Aid. The concern to seem to do a good job, even with Legal Aid clients, is for several reasons: Legal Aid clients are likely to have friends who will be "getting into trouble with the law". Legal Aid clients are also likely to be repeaters, and if they feel the lawyer has done a good job, they are likely to request the same lawyer from Legal Aid the next time they are accused. If, on the other hand, the

client is dissatisfied, there is the possibility that he will air his grievance with Legal Aid who then would be less likely to send along as much "business". It is easier and faster¹ for a lawyer to keep defending the same client on "new" charges than to process new clients, for with "old" clients, the data for speaking to sentence is already assembled and on file, rapport is pre-established, and so on. Another consideration is that in the legal community, it seems to be generally believed in operative that if a lawyer mismanages Legal Aid cases, his incompetence will prevent him from building up a clientele of "paying" clients. Increasing their paying clientele is a goal for most lawyers because of the economic advantage and due to the fact that they are aware of the danger of the volume of potential cases from Legal Aid decreasing with an increase in the number of graduates from law school starting out in criminal work relying mainly on Legal Aid for

¹In the following passage Lawyer B refers in exaggerated terms to an example of the convenience of having repeaters: "I've got this client - every week it's something new - I get a new form from Legal Aid every week for the same old client! Dear old _____. I plead her guilty, that's thirty bucks; I ask for a pre-sentence report, that's another thirty bucks. Then before sentencing for that one comes up, she's done it again. She keeps doing it and keeps telling the cops she did it. Cheerful old _____. Good old Legal Aid client; keep you in business for six months. She just keeps coming back."

clients¹.

Lawyers are concerned not only about their reputation with clients and potential clients, but also with their reputation in the legal community at large, especially with other criminal lawyers. One very practical reason why lawyers are concerned about their reputation with their fellows is that other lawyers can be a source of clients. Lawyers pass clients on to other lawyers² in instances

¹The person at Legal Aid who is primarily responsible for allocating clients to lawyers told me that she frequently warns young lawyers who rely heavily on Legal Aid cases: "I keep telling the boys - don't depend on Legal Aid. It may dry up. There are more lawyers than Legal Aid cases to keep them all happy. There are a lot of new lawyers just starting out now; and we don't know many of them, and some of them are finding it hard, especially the ones on their own."

In the following passage Lawyer B shows an awareness of this possibility: "Legal Aid opened up its doors just as we opened up our doors. Same thing for [Lawyer A]. A lot of us, more than ever before, started up this year - would have been impossible without Legal Aid. But next year there'll be more and more guys; and when Legal Aid starts paying fifty bucks, they'll all be wanting it. So five years from now it won't be easy. But we got in on it to build up our practice. Five years from now, we wouldn't want it - and won't need it."

²Carlin in his study of individual practitioners in Chicago found some lawyers who rely mainly on referrals from other lawyers. The following is an excerpt from his book in which he quotes a lawyer who specializes in doing work for other lawyers: "I do a lot of work for other lawyers - I'm a lawyer's lawyer. A lot of lawyers can get judgments, but can't collect. I come in then...." Carlin, Lawyers on Their Own, p. 110.

where they are too busy to handle them themselves, where cases come their way that are not their "line" (e.g. lawyers who specialize in civil cases, and do not want to do criminal work), or where they cannot act for a client because there is "a conflict of interests" (this occurs typically where a given lawyer is defending two persons accused in the same offence where one co-accused wishes to give evidence that contradicts the evidence that the other co-accused wishes to give).

In general, then, it is important to the private defense counsel to "do a good job" and hopefully to be remoured as having a high win over loss ratio in order to achieve and maintain a reasonable reputation within the community so that clients will generate more clients, so that other lawyers will pass on clients and cooperate in "shared" cases (cases where there is more than one accused and more than one lawyer acting for the accuseds); and so that Legal Aid will send the desired volume of cases. For these reasons, the "guilty plea" via the deal is not necessarily the best alternative for the private defense lawyer and is usually taken as the last resort; that is, for example, when the particulars seem to present a very strong case for the prosecutor and the possibilities of a defense

seem "hopeless"¹ and the lawyer feels the best he can do for his client is to try for a lighter sentence via the deal.

The deal described in detail by Sudnow² where a guilty plea to a lesser-included offence is exchanged for dropping the original charge, is only one of the deals used by defense counsel in my setting to lessen the likely sentence for the accused. According to my sources, deals are also arranged whereby the lawyer agrees to plead the client guilty to the original charge if the prosecutor agrees to leave out certain damaging details or statements when he reads the "facts" (from his copy of the police report) to

¹It is still possible for the prosecution to "slip up somewhere" and for the defense lawyer to "get the accused off on a technicality" and hence there is still a chance of "winning" by going to trial when the case seems "hopeless". This is why some lawyers claim that it is almost always better to go to trial than to go for the deal. Prosecutors, too, are aware of this: (The following is an excerpt from an interview with Prosecutor B.) "If you're in court prosecuting five cases a day, five days a week, the more guilty pleas, the better. You actually count on guilty pleas. You can't do five cases a day. No prosecutor is all that anxious to go to trial. So many things can go wrong. There are so many things in favour of the defense counsel: half your witnesses aren't going to show up, some of your cops are going to have hangovers; you've probably got one too. You may have forgotten to subpoena a witness; there may be something wrong with the Information [document sworn out by the arresting officer to officially lay the charge]. You can't possibly have prepared properly for all five cases. If it's a peculiar offence, you may not have done that many. Really the odds come down in favour of the defense. Those guys don't realize it. Even when it looks like the Crown has its case all sewn up, so many things can go wrong."

²Sudnow, "Normal Crimes, Sociological Features of the Penal Code in a Public Defender Office", pp. 256-59.

the judge in court before sentence is passed¹.

¹The following is an excerpt from an interview in which Lawyer B discusses deals:

- L: Another thing about deals - I don't know if you're on to it yet, but one of the biggest things about deals that I've, uh - biggest aspects of dealing that I do - is not just plea bargaining, not just: "We'll plead guilty to count one, if you'll stay two and three", but "We'll plead guilty to count one - if you read in these facts." Oh, christ, I do that all the time.
- P: You do, eh?
- L: Well, uh, you know, when it's inflammatory at all.
- P: How do you do that? - You just phone up and say - just what you said just now?
- L: Oh, sure: "We'll do this, if you'll do that". I've done that on a lotta drug cases - I've got tremendous deals that way.
- P: Does it depend on the prosecutor, or on the case, or on a combination?
- L: Depends on the prosecutor - the prosecutor's a human being. He's standing there in court all day, he's gonna haveta prove all this.
- P: Yeah.
- L: Oh christ! He's on salary, too. Keep that in mind. It doesn't make a damn bit of difference to him. He's just gotta do his job. In his view, you know, your client is guilty, and it's his job to see that he's got a good case. Let's put it that way. He knows damn well he's got a good case! I know he's got a good case! We all know, but I - he knows that I can make it a very cumbersome, difficult...and long, tiring afternoon! By the way - deals are often something that are set up by the Crown - for instance, on that importing charge - I'm damn sure that they had strong suspicions that he was involved in importing, but damn, probably damn little evidence of it. So they also charged him with possession for the purposes, opening the way for the deal.

Typical items that defense lawyers apparently negotiate for the deletion of are such things as the amount of "dope" (in a possession charge), or the degree of violence, or use of obscenities (particularly when these are alleged to have been directed against the police); and confessions of various types¹. For example: If an accused was allegedly in possession of one gram of hashish, one bag of marijuana and three caps of acid, the prosecutor may agree to mention only the gram of hash, in return for a guilty plea. In a case where the charge is Assault Causing Bodily Harm, the prosecutor may agree to leave out the fact that the accused allegedly beat up an elderly lady, as well as the police officer who came to her rescue.

Another type of deal may be arranged in a case where there is more than one accused and charges are dropped against one co-accused and retained against the other. Typically this occurs where a man and his girl friend are both charged with a given offence and the man wants to shoulder it all himself and tells his lawyer that he will plead guilty if they "let his girl off".

¹I did not come across any reference to or instance of negotiation for omission of mention of the record of the accused, although it is standard practice and not considered "dirty play" that when the accused takes the stand, the prosecution will cite any record of the accused as a way of diminishing credibility. This practice is legally sanctioned. (See Section 12, "Canada Evidence Act", Revised Statutes of Canada, (Ottawa: Queens Printer, 1970), Chapter E-10, pp. 1-23. It is also standard practice for the prosecution to put the record before the court prior to sentencing when the accused has been found guilty.

Whether or not deals are made depends not only on the circumstances of the case, but also on the nature of the relationship between prosecutor and defense lawyer.

(3) Relationship Between Prosecutor and
Defense Lawyer:

Relations between the particular prosecutor and the particular defense counsel on the same case may range from the situation described by Sudnow where there is friendly conspiracy to cooperate¹ in getting as many guilty pleas as

¹In the following example Lawyer B describes an incident in which he and the prosecutor conspire together "against" the accused: "This guy comes down when I'm in court on another case and wants a lawyer. He says he's going to plead guilty to an impaired and needs someone to speak to sentence. So I say, 'Yeah, sure, as soon as I finish this one.' So the time comes and we adjourn while I figure it out. Not only is he charged with impaired, but refusing to blow. The Crown is really gonna sock it to him. He says the reason he didn't blow was that he was too drunk to stand up. He was in for at least five hundred dollars in fines. So I go to the prosecutor and it's the one that was on _____'s case. He's a real stick-in-the-mud. Crime-and-Punishment type. So I said, 'Look, I've gotta earn my fee; let's drop the breathalyzer. We'll plead to the other one and don't read in this and this'.

So - fine! It's all set up - he'll end up with a two hundred and fifty dollar fine. And so I go to the guy and tell him the deal and then say: 'I'd like my fee, before we go any further - right now.' So then the kid gets upset and says: 'Fuck you, I'll do it myself.' So I say, 'Okay', and go to tell the prosecutor that the kid want to do it on his own. So the prosecutor says, 'Alright, we'll give it to him.' And the kid gets over five hundred dollars in fines.

It's so stupid; the guy had the bread to pay me - he was gonna take off to Mexico. As it was it cost him twice as much as it would have if he had retained me. These guys just don't know. A lawyer isn't always good for you, but more often than not you need them and the guy's gotta be able to tell which times he needs a lawyer and which he doesn't. They don't realize you've been through law school with the prosecutor, or are buddies with him, or if neither of the two, you are working companions - that's the system. The prosecutor understands you have to earn your fee."

possible, to a situation of hostile non-cooperation, but I would say that neither of these "extremes" are typically the norm¹.

Although, due to the differing economic contingencies (one being salaried and the other not), more is at stake for the defense counsel than for the public prosecutor, and although the defense lawyer is likely to try harder to win; at the same time, the defense is not likely to "go overboard". The game rules (unwritten, but understood), allow the defense to "try harder", but not to "play dirty" (at least not in ways of which the prosecutor is likely to be aware). Both prosecution and defense may use little

¹The following passage (excerpted from a conversation between Lawyer C and myself) suggests typical relations between defense counsel and prosecutor, and indicate clearly that obvious deviations from the norm are not tolerated: "Most of the prosecutors we have, all bullshit aside, are pretty good guys and they're pretty fair guys and they're really not concerned about trying to get as many convictions as they can, but - the prosecutor's office is pretty good. Sure there's the odd guy - especially in the Justice Department. I couldn't get the particulars from this one guy - Can't remember his name. Just came over from Victoria. I got quite incensed. I kept trying for days and days and days and then one day, the day before the trial, I get the particulars, and in the particulars is this statement that I didn't know was in there and I went over to get an adjournment and I fought like a bastard and I told him that I wasn't gonna - I can't even remember the guy's name. I've never dealt with him before. Apparently he just came. I phoned up _____, a friend of mine - prosecutor in the Justice Department. He said, 'You know we've got our black list of defense lawyers'. I said, 'Fine, we've got our black list of prosecutors'. So when I had the run-in with this guy, I phoned and I said, 'Christ - that guy's a real prick!' [laughs] I said, 'He's going in my black book!' [We laugh] . He said, 'Oh, I'll talk to him'.

undercover "tricks"¹, as long as they are not detectable or done in an obviously hostile way; and as long as the main game rules are not infringed.

Relations between defense and prosecution are normally governed by a respectful consideration of the position of each by the other; and bargaining may take place

¹The following passage give examples of these "tricks". The first passage is from an interview with a prosecutor and the second, from an interview with a defense lawyer:

Prosecutor C: "There are lots of little tricks we use - like on identifying witnesses. A prosecutor is usually seeing his witnesses for the first time right there in court on the trial day. In a criminal matter identity is always in issue, so you say to the complainant: 'Can you identify him?' Often enough, your witness will say, 'My god, I can't!' And you say 'Well maybe if you saw him in the halls'...and you point out the defense lawyer or describe the lawyer and say, 'Look for the guy with that lawyer'. Or with the cops; they're not too likely to remember some guy they picked up two months ago who looks like every other bum; but cops know enough when they see a young defense lawyer chatting away earnestly, that the guy he's chatting to is none other than the accused. Cops arrive early and check this on the sly before trial. I know that defense lawyers can go to work on my witnesses too, just before trial. A smart prosecutor will hide his witnesses."

Lawyer B: "I make a point of getting to the prosecutor's witnesses before court. If it's a layman, I'll say, 'I hear you're in on this. Hey, what happened? Is that guy around here? Where? Yeah. You don't know what he looks like?' And he's gonna be much less likely to lie on the stand when he knows you, you know. Cops are pretty good, too. They'll talk to yuh before trial. Let you know more or less what they've got - within limits. They're pretty goods guys, a lot of them. So I know pretty well what the prosecutor's witnesses are gonna say before they go on."

when and if appropriate and mutually advantageous. Jousting during trial takes place within the normative limits of not doing what is considered as "going too far". For the defense this means, for instance, not "calling the police liars" for the prosecution, it means, for example, not "dragging out the accused's record" when not appropriate; and for both it means not "tripping each other up on every technicality in the book".

Outside of court (this includes during court recesses) relations are typically more informal and friendly than in court¹. Often prosecutors and defense lawyers will encounter each other in the lunch places near the police courts (defense lawyers and prosecutors rarely take each other to lunch, but arrive in their own groups); then they will call out friendly greetings and insults to each other.

Prosecutors and lawyers are fellow professionals, often graduating from the same law school. The nature of their relationship (for instance, whether they are on friendly terms, or hostile terms, or are indifferent to each other, or whether each considers the other merely part of the job)

¹Grosman too, remarks on this: "Opportunities for negotiation between the defense lawyer and the prosecutor on questions of charge reduction, guilty pleas, and other available alternatives are characterized by a flexibility that does not prevail at trial. Once the trial stage is reached, more rigid adversarial positions are adopted. For the informality of the pre-trial exchange between the prosecutor and defense lawyer is substituted a formality of protections, procedures, and competitive spirit that is the hallmark of the adversarial forum." Grosman, The Prosecutor, p. 41.

probably depends on the "accidents" of their mutual social history such as whether or not they "went to school together", or have friends in common, whether they have been to court together before, and how it went. It may be that lawyer and prosecutor are on friendly terms, it may also be that they do not particularly like each other, or that the day in court is their first meeting and the nature of the relationship is yet to be worked out. However, that relationship is most significantly governed by the peculiar informal game rules worked out to mutual benefit, which operate at their most accommodative when lawyer and prosecutor are on good terms, and work clumsily when prosecutor and lawyer are not on good terms. The relationship between prosecutor and defense lawyer may affect the kind of particulars the lawyer gets from the prosecutor and also how the lawyer thinks about the case regarding expected interaction in court during trial. Apart from his relationship with the defense lawyer, what may influence what strategy he employs in giving the particulars and in making deals probably depends on the personal policy of the particular prosecutor, his interpretation of the police report, the possible political importance of the case and factors such as the policy of his office toward that particular offence (for example, it may be a case of robbery when the Prosecutor's Office is "cracking down on robbery"). Some prosecutors apparently have a policy (with varying rationales)

of giving "full" particulars¹; that is, they read the police report practically verbatim; other prosecutors like to keep the amount of information that they read from the police report to a minimum, that is, they leave out as many details as possible in giving a version that still "makes sense". In giving the particulars, the prosecutor is also proscribed by how much time he has, what "mood he is in", who he is talking to at the other end of the line and how fast they are taking it down (the faster they are taking it down, the more information he is likely to give). Giving the particulars is regarded as a tedious task and one that prosecutors would gladly pass on to their secretaries, but they are required to do it themselves. Most defense lawyers hand the task of taking down the particulars over to their secretaries, even though they realize the prosecutor is going to give "different" particulars to a secretary than he would to the defense lawyer himself².

If the particulars that a lawyer gets in this way via his secretary do not "make sense" to the lawyer, or if he feels he needs clarification or additional information, he may phone up the prosecutor and make inquiries that will

¹(Prosecutor B discussed the likelihood of the defense getting complete particulars as follows:) "...Actually, prosecutors are more likely than not to give full particulars, because the better you make your case sound, the more likely it is that the defense lawyer will be shitting himself at the other end of the line and thinking he'd better cop for the guilty plea."

²For discussion of this point see previous footnote on p. 58 of this chapter.

change and/or expand the particulars; however, the version that the lawyer receives and usually accepts "as it is"¹ is a version that is, to a varying extent, incomplete in comparison with the police report from which it came. Lawyers are not unaware of this, but usually feel that most of the particulars that they receive are adequate² for the purpose at hand

¹For the most minor criminal Legal Aid cases, the lawyer is not likely to "go out of his way" if he can avoid it, because, as we have explained above, it does not pay, since his practice is geared to giving summary attention to a high volume of routinely handled cases.

²Lawyer G (Senior Defense Counsel, five years called): "First I had my secretary take the particulars because she can do the full conversation in shorthand and I can't. But after a while I started taking them myself for important cases, because I felt I missed too much - you don't get the whole nuance of the thing when you're reading someone else's written word, rather than in immediate conversation with the guy yourself. But I just couldn't keep up with taking them myself - and I'm back to letting the secretary do it."

Lawyer H (Practiced as defense counsel for five years, then prosecuted for two years and is recently back to doing defense work): "Knowing how much lawyers miss when they let their secretaries take their particulars, I swore as soon as I went into practice, I would take my own, but I seldom do, I just don't have the time. But sometimes I use this little machine (dictaphone) and I say, 'Okay, George, you can go as fast as you like, my machine's on'. Then I know he'll give me the whole thing, because he's not cut down by the time it takes you to get it down. Actually, as an ex-prosecutor I get pretty good particulars; and what's more, I know what they're reading from and how to size up police reports. Ordinarily they'll never tell you the name of the police officer, but they'll tell me - and if I've never heard of the officer, I'll say, 'What's he like - I don't remember him?' And the prosecutor'll say, 'Oh, he's good' or 'He's weak' or 'He's not bad'. And I'll ask them about the lab report - 'Do you have it?' 'Is it positive or negative?' 'Can you find out? Will you phone back and let me know?' If you haven't been a prosecutor you probably don't know these things."

given the usual pressures of work load and the lawyer's interest in the particular case as such. Lawyers know that even full or complete particulars rarely give the "whole story" that will be told by police or complainant in court; and so, take this consideration into account in assessing the particulars and in comparing them with the client's story:

Lawyer C: Police particulars only really give you an indication of how strong or weak the Crown's case is - because rarely have I ever seen the police particulars coincide with the evidence in all.

So far I have discussed factors in the events preceding the client's contact with the lawyer that will affect the course of the interview between lawyer and client. Before I go on to discuss the factors in the events that are expected to follow the interview, it will be useful to discuss the client's position vis-a-vis the lawyer in the light of the practical imperatives of trial preparation.

In deciding "what to do with the case", the lawyer works with a juxtaposition of his interpretation of the particulars and his interpretation of what the client has to say about the particulars along with his assessment of

the client in terms of his probable demeanour¹ and presentation in court - all in the light of how the probable facts (what the evidence on both sides is likely to be) "fit in with the law" and in the light of what he assumes will be the interpretation latitude (or probable "prejudice") of the judge in making the final judgment. Before we discuss the effect of what the lawyer thinks is likely to happen in court, we will consider certain features of the relationship between lawyer and client.

III RELATIONSHIP BETWEEN LAWYER AND CLIENT:

The lawyer is likely to be on friendlier terms with

¹For an interesting discussion of demeanour in court, see Gillian M. Wilder, "The Witness in Court: Problems of Demeanour in the Courtroom Setting", unpublished M.A. Thesis, The University of British Columbia, 1969).

his client's "opposition" than with his client¹.

There is usually a "natural" social distance between criminal lawyers and their clients. It is my impression that lawyers do not as a rule get personally concerned about clients in criminal cases; that is, they

¹This, however, is more likely than not to work to the advantage of the accused, since it is likely to make the "battle" in court more accommodative. The latter situation usually works more to the advantage of the defense than prosecution, since the onus is on the prosecution to prove guilt beyond a reasonable doubt. As in the following example, the client himself may see friendly relations between lawyer and prosecutor working to his advantage, though in this instance client and lawyer have differing ideas as to what would be to the client's advantage..

Lawyer B: I know I gotta phone the prosecutor and I'm not gonna get into that kinda discussion with him, because it's got nothing to do with the case tomorrow - absolutely nothing.

C: You - did you go to school with the prosecutor?

L: Sure I went to school with him. I know most of the prosecutors.

C: What kinda guy is he? Is he a sharp guy?

L: Umn. He does a job. Sure - he does a job.

C: When you uh, call the uh, prosecutor tonight, uh, could umm, you lay on him something to the effect that, uh - I think that uh - this is a farce. You don't haveta use that language - be more diplomatic.

(The lawyer ends up telling the client he will not bargain for him with the prosecutor, because, in this instance the case did not merit it, and that he is not going to waste the prosecutor's time, just to make the client feel better.)

rarely take a personal interest in the client himself, and treat the case as a piece of business¹ hopefully to be conducted in a manner that will help build reputation and practice, and in general, be profitable in the sense that it does not take up too much time per dollars coming in via the fee; nor do they interact with the client above and beyond the call of getting his story and sometimes coaching him somewhat for the witness box. (This, I am told, is in contrast to lawyers dealing mostly in civil, especially corporate, cases, where lawyer and client frequently go out to lunch together, and, apart from their business interactions, may become social friends.) At the same time, though, a young lawyer doing criminal work may be personally concerned to see that the "down-and-outs" get a fairer shake (than is usually their lot if they are not represented by a lawyer, or have retained a more "case-hardened" lawyer).

¹In law school students are specifically warned of the dangers of personal involvement with clients. The following excerpt is from a young lawyer's law school notes from a lecture on Legal Ethics by Reginald H. Tupper, Q.C., Act and Rules, (Handbook of the Law Society of British Columbia), p. 3: "The lawyer should adopt Terrence's motto - nothing human is foreign to me. And he can practice as well and as usefully amongst the dregs of humanity as well as amongst the froth on surface of society. But he is unwise if he allows his relationship with his clients in any place in life to become other than a professional one, when engaged about their business. More than one bright young lawyer has lost his right to practice in this province because his associations with his clients made him forget or ignore his duty as a lawyer."

But this is not an interest that leads the lawyer to a personal concern about the individual client - only about the cases in general, as cases,¹ - the client being a sort of "statistic" within the case.

The book of ethics puts the lawyer's first duty as a duty to do the best he possibly can (within the restrictions of the framework of the legal system) for his client.

¹The following passage from Boswell's Johnson illustrates one aspect of the professional attitude of the lawyer:

Boswell: "But sir, does not affecting warmth when you have no warmth, and appearing to be of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty?"

Johnson: "Why no sir, everybody knows you are paid for affecting warmth for your client and it's therefore properly no dissimulation - the moment you come from the bar, you resume your normal behaviour."

Boswell: "But what do you think of supporting a cause which you know to be bad?"

Johnson: "Sir, you do not know it to be good or bad till the judge determines it. I have said you are to state the facts fairly; so that your thinking, or what you call knowing a cause to be bad from reasoning, must be from your supposing your arguments to be weak and inconclusive. But sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it and if it does convince him, why then sir, you are wrong and he is right. It is his business to judge and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client and then hear the judge's opinion."

From Boswell's Johnson as quoted in Edward A. Parry, The Seven Lamps of Advocacy, (London: Unwin, 1923), pp. 17-18.

This ends up meaning that, as a practical matter, the lawyer puts the client's best interests first within the limits of how far he sees the client's best interests to coincide with what the lawyer feels are his own best interests. The client as a person (rather than as a case) is likely to be unimportant to the lawyer, and may even be considered merely a pawn in the game of winning in court¹ and building up a practice. Bluntly put, the lawyer's interest in the client is usually confined to how the client can help the lawyer get up his case. Just as doctors are often said to be more interested in the diagnosis of ailments than in the people who possess them; so too, the lawyer directs his interest to the case rather than to the person in trouble. If a criminal lawyer took a sincere

¹This view is apparent in the following excerpt from an interview with a young defense lawyer:

Lawyer E: "Ultimately what matters to me - and I think this is true of most lawyers, though only the younger ones will admit it - is what goes on in my own head - my own view of myself. I'm fairly highly ego-involved to begin with. What matters to me is how well I perform. We're all playing a complicated game - the prosecutor, lawyer and the judge. What matters to me is the mental stimulus - playing the game well. When it really comes right down to it, the accused is just a pawn in the game - for all of us."

personal interest in each client as a special person¹ in trouble, he would be unable to meet the practical time

¹Grosman quotes the prosecutors in his study as understanding this phenomenon:

"'You can't identify yourself with each case and you can't identify yourself with each accused. You've got to keep a detached view of the whole thing.' Another said, 'You try not to get worked up about the case...you can't get emotionally involved or you would go squirrely'". Grosman, The Prosecutor, p. 87.

"Those who have been arrested are presumed guilty and it is the prosecutor's duty to process them. He processes them as bodies rather than as individuals. Considerable remoteness from the accused and his plight is current and, indeed, is encouraged as a healthy professional adjustment: 'The accused man? You couldn't care less after a while. It's pretty hard to work up much enthusiasm after your twentieth indecent assault in a row. You get dull and stale and the accused is just another face in the crowd. He is number 656 on the list.'" Ibid, p. 58.

and efficiency demands of his job¹. In order to perform as calculating technicians in the law and in the art of persuasion during trial, it is better for the lawyer to be free of any non-practical non work-oriented involvement with the client as a personality. Each lawyer I talked to mentioned, whether matter-of-factly or regretfully that he had either to begin with, or developed "along the way" as necessary to his working conditions, a very pragmatic attitude² toward criminal clients - who are best kept at

¹Studies of welfare and nursing settings suggest that a concern with the person at the expense of "the practicalities" marks one as the rankest of novices, one who has a lot to learn, etc.: "A worker honoring a hasty, last minute appeal for carfare without checking the story would be seen to have disregarded the existence of readily available routine procedures which would verify the 'facts', for example, reference to the case record, calling the doctor. The moral lesson for the worker is: to permit what would be defined in the setting as applicant 'manipulation' of the agency (e.g., last-minute, urgent demands presumably intended to make advantageous use of a limited time for decisive action) would be to mark oneself as the rankest novice. Not only is 'skepticism' (that is, reliance on methods of verification prior to commitment of belief or action) of this sort a characteristic modus operandi and scheme of interpretation of the 'old hand', it is frequently justified, as in this case. . . ." Don H. Zimmerman, "Record-Keeping and the Intake Process in a Public Welfare Agency", in Stanton Wheeler, Ed., On Record, (New York: Russell Sage Foundation, 1969), p. 332.

²This sort of attitude is evidenced in the following exchange between two defense lawyers:

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- L1 (Lawyer D): "I used to listen to their story and say, 'Oh, too bad, awh, excellent, good!' But now I get right down to the crucial points and say, 'No-one's gonna believe that!'"
- L2 (Lawyer B): "You know, I'd like to believe everyone who comes into this office, I really would, but!"
- L1: "Yeah, sure, so would the judge, I'm sure. It's a nice world, nobody ever does any harm - we'd all like it to be that way!"
- L2: "You don't go to a dentist to make friends with him - you go to a dentist because you want something done to your teeth. And so I certainly feel I have no compulsion at all to emit anything in the way of particular warmth towards clients. I think it's important to keep a clientele to emit some aura of interest in their case; and some aura of competence about what's going on. You should be able to do that, that's what your job is - to be able to attack it in a very competent fashion - to cut out the bull-shit, get right down to it: 'You're in my office, it's going to cost you money while you're here - one way or the other; so I'm going to get right down to the facts, that's all. I don't care if your mother's got lumbago or not! I couldn't give a damn! It's not gonna help your case, and its gonna cost -'"
- P: "It might be dangerous if you let him think that you're fighting for him, rather than just dealing with his case, as a case."
- L2: "Sure! Exactly! That's why it was murder! It was so bloody hard on my nerves doing that case for my father! All out of proportion! It's insane! Somebody comes to me as a lawyer - and I take their case on - I want to do what I consider to be a good job for them in my terms, in my terms - not in their terms. I'm not a psychiatrist, I'm not a social worker, I'm a problem-solver in the law - that's all."

arm's length and dealt with efficiently in terms of the practical problem at hand of disposing of the case in the way that he estimates will have the best chance of avoiding or minimizing the likely sentence.

Though the criminal defense lawyer is likely to regard his clientele as his social and intellectual inferiors, he does not take a moral stance and would rather see his client "get off" than go to jail. The young defense lawyer is likely to have some sort of generalized sympathy (seldom expressed in individual cases) for his clients as people who are constantly getting into trouble with the police for behaviour that may be condoned in the client's own social groups, though not in the larger society; that is, offences such as shoplifting, common assault, vagrancy, drug charges¹. Cases as such are more or less desirable to

¹One lawyer that I interviewed expressed his views about types of offences this way: Lawyer I: "I have three classifications: I classify them via how I feel about them. There are some criminal offences which I don't feel are immoral. These are offences like shoplifting. The guy who rips off the department store hasn't got a dime, while the store is making huge profits on millions of people just like him. But there are offences which I do consider to be immoral and these are offences which involve violence - things like murder and rape. If someone rapes a seven-year old kid, all you can do is send them to prison or an asylum. There are offences which I consider to be 'just a job': I have no strong feelings for the individual or for what he's done. Like a skid row robbery."

lawyers depending on how much money they bring in, how easy they are to handle (that is; for instance, how much library or desk work is involved, the degree of potential complication in the case as a case, the emotional attitude¹

¹This is relevant for instance in custody cases where the client is likely to be very upset and "irrational" and difficult to manage. This sort of case is regarded as "messy" by the lawyer. The following anecdote displays the lawyer's attitude to "emotionally involved" cases. It is excerpted from my field notes:

(December 24, 1970, I came into the law offices to hear sounds of pounding, strife, and raised voices from one of the offices. One of the partners who is pacing around in the reception area greets me with:)

L.1 (Lawyer B): "We've got a live one in there!"

P: "Who? Some robber just sprung from jail?"

L.1: "No, it's a lady."

P: "What! ...Custody?"

L.1: "Right!"

(Seconds later a well-dressed and physically unruffled lady stormed out of the office shouting obscenities at the lawyer who is silently following her with a shocked expression. She continues on her way out of the office shouting obscenities at the top of her voice as she goes down the stairs. After she has left the lawyer involved comments as follows:)

L.2 (Lawyer D): "That son of a bitch _____ [another lawyer] sends me a maniac the day before Christmas! some joke! She wants somebody to go out and arrest her husband! _____ [her regular lawyer] made sure he wasn't around, so _____ [his partner] sent her to me. The husband has custody of the kid. You can understand it, with Christmas coming up and all, she wants her kid back. I was reasonably trying to show her that nothing could be done at that very moment and what we would have to go through to do something about it. But there was no way you could get through to her. She's have nothing but an immediate arrest."

of the client); or how mentally stimulating they are (for instance, whether or not the case involves unusual circumstances calling for innovation in argument in the law); or perhaps how politically advantageous (career-wise) they might be - depending on the particular preferences of the individual lawyer.

We see then that the lawyer's attitude to the client is business-like and "professional"; however, the client's perspective in the interview is likely to be somewhat different from the lawyer's. Since I did not interview clients, but only lawyers, I am unable to describe with confidence what I feel is the client's perspective, except as it is evidenced in the interview itself; (this will be discussed in detail in Chapters Three and Four). I am able to state, though, what the lawyer sees as the client's perspective, but this should perhaps be regarded as saying something about the lawyer, rather than about the client.

A frequent complaint of lawyers about clients is that they try to use the lawyer as a "sounding board": Lawyers feel that the client is likely to come into the interview with an "axe to grind", and to look upon the interview as a sort of catharsis session in which he tries to expose his gripes about such things typically as brutal police treatment, the trouble that his arrest has got him into at work and at home, the fact that he is

"really" completely innocent and everybody is "out to get him", and so on. However, emergencies in other people's lives are merely to lawyers greater or lesser routine problems to be solved in the law¹. A lawyer's attitude to getting up a divorce petition or working out defenses to a murder charge is usually much the same as the attitude of Sudnow's² morgue attendants to wrapping a dead body: It is unique only insofar as it presents particular problems in wrapping. The dead body is not an object of awe or fear or dread to the morgue attendant as it would be to the layman there for the first time. So also the anguished divorce petitioner or desperate accused murderer is normally to the lawyer more or less merely a datum in the never-

¹Everett Hughes discusses this problem in Men and Their Work: "...this is the problem of routine and emergency. In many occupations, the workers or practitioners (to use both a lower and higher status term) deal routinely with what are emergencies to the people who receive their services. This is a source of chronic tension between the two. For the person with the crisis feels that the other is trying to belittle his trouble; he does not take it seriously enough. His very competence comes from having dealt with a thousand cases of what the client likes to consider his unique trouble. The worker thinks he knows from long experience that people exaggerate their troubles. He therefore builds up devices to protect himself, to stall people off." Everett C. Hughes, Men and Their Work, (Glencoe, Ill.,: The Free Press, 1958), p. 54.

²Described in Sudnow, Passing on: The Social Organization of Dying, pp. 77-89.

ending round of routine cases to be got through¹.

People in trouble with the law are likely to be people with problems in general - people ready to "latch onto" any half-willing ear, (as I constantly found in my capacity as "secretary", when clients waiting to be interviewed by a lawyer, would, unprovoked, pour out their gripes and troubles to me). But if they do not sense it to begin with, clients soon find out that most lawyers like to get down to business and are not very sympathetic when it comes to the question of listening to what the lawyer considers to be their irrelevant woes. The lawyer will allow the client to "ramble on about his woes" only to the extent that he feels it will aid in the practical matter of accomplishing the business at hand; that is, of finding out what the client's legal situation is likely to be and what is the best way of handling his case. Some lawyers feel that letting the client ramble on within limits makes it

¹Other researchers have commented on this attitude: "Clients are expendable. Under these conditions when a lawyer receives a client from a layman or a referring lawyer; he has not so much gained a client as a piece of business and his attitude is often that of handling a particular piece of merchandise or of developing a volume of a certain kind of merchandise." Carlin, Lawyers on Their Own, p. 162.

easier¹ to get the facts of the story because it puts the clients at ease and because they feel that clients are likely to include some relevant facts here and there among the irrelevant ones; but most lawyers feel that it is best to "keep the bullshit to a minimum"; (that is, to take a very directive as opposed to non-directive approach). If the lawyer feels that the client is not telling his story efficiently, the lawyer will discourage client initiative and elicit the story via his own well-directed questions as one does in cross-examination².

¹In the following passage Lawyer J discusses the merit of this strategy: "I am always looking for the defense; sometimes you spot it right away; other times it takes a lot of work. Anyway I look for the defense and try to direct the client in that respect. I try hard to be straightforward. I know what I want and I try to get it fast. If the client gets off the track, I just cut him off; but I always try to come back to the human interest thing. I get my facts and then I let them talk. I always try to let them talk. They really appreciate it. It's worth my time. It really helps the guy. All I do is let him talk for a while and he feels better."

²Not all lawyers talk about their attitude to the client in this way; that is, they say they do not regard the client as someone who is unlikely to be much help in getting up the case unless he is kept in line and who should be dealt with efficiently and sternly. The following excerpt is from one of my interviews with a highly thoughtful young lawyer (Lawyer K), who, after his first year of practice, no longer had to rely on Legal Aid (who indicated unusual confidence in him by allowing him to conduct a murder trial in the second year of practice): "Most lawyers keep the client in the dark. It is a better experience from the client's point of view if you let him in on what you're doing. It demystifies the law. It's better for the client emotionally. Makes the experience less frightening. Besides he may be able to do it for himself next time. Apart from that, I sometimes pick up pieces of strategy from the client. If you discuss the case with the client, you may learn things. I have used things suggested by the client."

All of the lawyers I interviewed were of the opinion that most of their clients "actually did it". This opinion is usually backed up by reference to the belief that police rarely charge "innocent" people and that the prosecution is unlikely to proceed with the case¹ if the

¹The prosecutor has the option of proceeding or not proceeding with a charge once the information has been sworn. Grosman gives details as follows: "The prosecutor's first duty is to examine the charge or information in order to make the decision whether to prosecute or not. In this way he performs a screening function by reviewing the sufficiency of the evidence before initiating the prosecution. The exercise of an independent judgment, in addition to the police decision to arrest, provides some protection against the institution of unwarranted prosecution or those based on insufficient evidence. A study of prosecutions in the county of York indicates that in the majority of cases, prosecutors do not in fact consider the information or the charge until after the accused is arraigned before the court. The sufficiency of the evidence against the accused is often not reviewed until the preliminary hearing or the trial itself is reached. The decision, then, to institute a prosecution is made by the arresting officer when he decides there is sufficient evidence of the commission of an offence to justify an arrest. Thus, police decisions to arrest constitute the effective decision to initiate prosecution, although the standards justifying an arrest may differ substantially from the standard of evidence required to justify the institution of a prosecution." Grosman, The Prosecutor, pp. 20-21.

If this is the case in the city of this study, lawyers are not justified in their assumption that cases have been through two screening procedures before a prosecution is initiated. My data does not allow me to comment on the prosecutor's use of discretion in initiating a prosecution, but I did come across a few instances where the prosecution "stayed" a case, after the initiation of a prosecution and before trial, and a few instances where charges were dropped at the same stage. ("Staying" a case means not proceeding. This is its technical meaning, but in practice it is the same as dropping the charges, since although in theory when a case is stayed the prosecution may at any time subsequently re-initiate proceedings, they rarely do reopen a case, once it has been stayed).

police have obviously been mistaken in laying a charge. Lawyers feel that if a client has passed all the "check points" through the police and prosecutor's office to the lawyer's office it is more likely than not that he "actually did it". Whether or not he can be technically proved to be "guilty" is another question and the main one to which the lawyer addresses himself in assessing the particulars. If the particulars represent a strong case against the accused the lawyer is likely to be reinforced in his prejudice regarding the client's guilt. These considerations probably underlie the lawyer's notion that clients are more likely to tell a "story" (tale) than the "truth" in the interview. The lawyer reasons that since it is natural that the client will be concerned to "get off as best he can" the client will come into the interview with a concern to put his role in the events in question in a "better light" than he feels the police are likely to. Since the lawyer believes that the client actually "did it", and wants to "get off"¹, the lawyer feels that the client is likely to distort to some extent what he remembers to have

¹This is what lawyers take to be the client's pragmatic operative in going to a lawyer. Lawyers claim that very few Legal Aid clients in criminal cases are concerned about such things as threat to reputation, because in their circles "getting into trouble with the law" is a routine feature of their lives. I am told that some clients may be concerned to let the lawyer think they are worried about their social image because they feel that that will make their story sound better to the lawyer.

actually happened in a way that makes it appear that he was not guilty of the crime in question.

Although both lawyer and client presumably want to try to "beat the rap" or at least to "get off as lightly as possible", what happens in the interview is not a simple matter of lawyer and client automatically working easily together to achieve the end they both desire. In fact, it is in many ways a struggle for the lawyer to get and keep even the most willing clients on (what is to the lawyer) the right track. It takes much longer and is more difficult for the lawyer to get what he needs out of the interview in order to decide what to do with the case, in interviewing the ordinary "layman" client¹, than if he were interviewing a fellow lawyer as a client accused of a crime.

This is so first because of the obvious difference in perspective and technical competency of lawyer and client. The usual criminal client looks on his story as showing that he is innocent; the lawyer is looking for the technically (in the law) not guilty implications of the situation. This is a very important distinction: People are acquitted in the courts not because they are "innocent",

¹"The client can seldom state all the relevant facts of his problem without prompting and questioning by the lawyer. The lawyer's fuller stock of legal ideas makes certain facts which seem to have no significance to the layman, crucial to him; and the lawyer sees immediately that other facts which the layman will dwell on in detail are immaterial." Morris, How Lawyers Think, p. 35.

but because, as a matter of law, they cannot be proved guilty¹. In the following excerpt from the transcript of a trial we see that the judge acquits the accused while believing that she "actually did it":

Judge: ...And I think for all these reasons I'm left with a doubt in law and that doubt has to be resolved by law in favour of the accused. She's acquitted accordingly.

Defense Lawyer: Thank you, Your Honour.

Judge: Don't do it again, Miss _____².

¹Lawyer L put this distinction very well in the following complaint about client's stories: "The accused tells his story to show that he's INNOCENT, not, unless he's an old pro, that he is technically not guilty. It's amazing every goddam time it happens that a client gets off, not because he is innocent - you never get off for that - but because he can't be proved guilty, the client transposes not guilty at law into being actually innocent. A magnificent jump! Never do they believe their own stories so well as when they get off. But the judge decides whether guilty or not guilty not whether innocent or not innocent."

²The following anecdote (told to me by a friend) nicely shows an example of the judge doing the opposite, that is, finding someone guilty whom he actually believes not to have "done it": "There's a famous story of a judge who one day looking out his window saw a murder - and he tried the case - and the man who was in the dock was not the man he saw commit the crime, but the evidence was strong enough to make the case, and he sentenced the guy to death, because the case had been made, and he said, 'That's my job'. The case had been made."

It is the lawyer's job to try his best to show that his client cannot be proved guilty, as a matter of his own arguments in the law, based on what counts as evidence. However technical the lawyer's ultimate mode of procedure in handling the case, he must be able to talk to the client in the client's own language in order to extract from him the raw material he needs for preparation of the case. Just as a garage mechanic must get from the owner's complaints about his car as symptoms of malfunction to a diagnosis of what is actually technically wrong with the machine, and how it can be fixed: (The owner will say, "Well I have trouble getting it started in the morning". The mechanic, in order to do his job, must get from here to whether there is a short circuit in the generator or whether the problem is that the battery is low, etc.); so the lawyer must get from his client's tale of woe and outrage to a technical diagnosis¹ of the grounds on which the client may be legally vulnerable, and, if, and how, this can be

¹"In the daily routine of legal analysis, the lawyer sifts the grist of client woes to separate contract from no contract, sue from settle, not guilty from guilty, timely from barred, fee from no fee. In the process the lawyer unconsciously asks himself a hundred questions to focus his accumulated learning on the problem of the moment." David Mellinkoff, The Language of the Law, (Boston: Little, Brown & Co., 1963), p. 297.

remedied in court. In addition to asking informed and purposefully and specifically pertinent questions in the language of the layman - but addressed to his own technical ends - the mechanic has available to him lifting the hood and examining the battery and generator; and the lawyer can open up his case book of precedents and work through arguments.

The lawyer is possessed of a very specialized "stock-of-knowledge-at-hand"¹, composed of all the legal facts, precedents, rules and lore that he has assimilated as a student and practitioner of the law. He of course also has as part of his lawyerly equipment certain modes of procedure, strategies, tactics or methods which he uses as tools to get the information he needs from the client and which he also uses to form the opinions he needs about the client's credibility and likely courtroom behaviour, especially as witness. In addition, he has as part of his stock of information certain standard recipes based on "experience" about what kinds of people commit what crimes

¹This term is virtually self-explanatory and comes from Alfred Schutz, Collected Papers in the Problem of Social Reality, (The Hague: Martinus Nijhoff, 1972), where Maurice Natanson defines it on pp. xxviii-iv as anyone's repertoire of "typifications of the common sense world"... "The stock of knowledge at hand is a sort of store house of information, recipes, and standard formulas that we routinely use to solve typical problems in our daily lives."

in what ways¹, what judges think people look like when they are lying, what kinds of arguments certain judges are likely to be swayed by, and so on.

The ordinary client up on a charge under the Criminal Code does not have a stock-of-knowlege-at-hand that matches the lawyer's. More experienced clients (that is, those with a long history of court appearances) may have a set that overlaps the lawyer's stock-of-knowledge on some dimensions and in some areas; and although this knowledge is not formed from the perspective of years of concentrated study in law schools, from association with lawyers as fellow professionals and from daily application as practitioner, some lawyers claim that the crude expertise of a more

¹This was the case with Sudnow's Public Defenders; but, as we have seen, lawyers' "lore" about clients is not put to the same use by the defense counsel as by Sudnow's Public Defenders. The defense counsel uses this information as a way of deciding in part what to do with the case, not as a way of deciding what kind of deal to make.

experienced client "speeds up" the interview¹. However, the usual client has a stock-of-knowledge-at-hand that does not include or even to any significant degree overlap the lawyer's repertoire. The client can call upon his common-sense everyman's lore about what lawyers are like and what

¹Lawyer A, the first lawyer that I worked with, put it this way: "There's one thing that makes a difference in the interview: If your client is an old hand at it, he'll do all the talking. He'll say, 'Here's my defense: it's this and this, and this'. He won't say a word about whether he did it or not. He'll just lay out his defense and he'll know it better than the bloody lawyer. He'll have one story and he'll stick to it. But if it's a first offence and the guy hasn't been around you'll have a hell of a time getting the right information - the facts only. And the guy changes his story every time you ask him - especially in court. Take old _____ - he's an ideal client, really. He knows all the defenses. I say, 'Well, they haven't got you on Robbery, but they have got you on Assault B.H.'. He says, 'Yeah, I know'. You don't have to tell him a thing. He knows it all. Most clients that come in, you know, are confused. They don't know if they're caught or not. Or they're upset, or they haven't got a clue. But not this guy. The judge gave him two years, that's the maximum for Assault B.H. The guy's like a hockey player, you know, maybe I shouldn't make the comparison, but a hockey player gets caught tripping a guy, he knows he'll get two minutes. It's just like that for this guy. He knows the score, he takes his chances. He does his time when he gets caught. He's chosen his job. He's a hardened criminal already."

you should and should not say to them in an interview¹, but this is not likely to be helpful to the lawyer in preparing for court.

So far we have discussed preparation for trial in terms of the effect of the events that precede the client's arrival in the lawyer's office and in terms of the nature of the relationship between lawyer and client. We are now ready to consider the influence of the ways in which the lawyer orients to the imperatives of what he can expect to happen in court.

¹One thing that most clients seem to have a pre-interview opinion about is whether or not to tell the lawyer whether or not "they did it". Some clients seem to come to the interview with the notion that they should avoid telling the lawyer whether or not they "did it"; others seem to feel they should vehemently deny doing it; others seem to feel the thing to do is to come right out with the truth that they "did it" while at the same time expecting the lawyer to "lie" for them; and others employ a strategy of playing it by ear or feeling the lawyer out on this question.

Lawyer I characterized types of client attitudes to the story as follows: "First there's the guy who comes in with a well thought out story. Whether or not you believe him in part or in whole, the lawyer's ethics allow you to dwell on the superficial reality of what they told you. Another will come in and admit everything. He is either honest or simple. He doesn't make great demands on you. He wants you to do what you can. He accepts the consequences. A third type comes in, is stupid, tells the truth and wants you to manufacture stories. Then there's the creative type. He's a con artist. He comes in with a story, if you don't go for it, he tries another and keeps going."

IV ORIENTATION TO COURT:

(A) DEFEATING THE PARTICULARS:

As we have seen, the particulars are the standard against which the lawyer measures the client's story - within allowances of how much interpretation latitude to give prosecutor's versions of police descriptions. The lawyer puts the onus on the client to try to defeat the particulars and holds up the particulars as a standard rather than as something that to begin with is fallible, because this is the way the particulars will be treated in court and because for minor criminal matters with Legal Aid clients, the lawyer cannot "afford" to spend the time that would be involved in looking for ways¹ of breaking down the particulars before trial. Presumably, one could pay a lawyer to take the extra time, but clients accused in minor criminal matters are unlikely to be able

¹One such way is to engage in "field work". (Field work involves such things as going out and researching the scene of the crime to find witnesses and to give oneself a better "picture" as an aid in directing questions in cross-examination, etc.) One young lawyer that I interviewed was a conscientious advocate of field work and claimed that very few of his fellow young criminal lawyers "do their field work" for minor criminal cases. In his words:

Lawyer M: "You need evidence to conduct a proper defense and evidence is witnesses. Whenever my client doesn't know the names of possible witnesses or even if there were any, I go out to the pub or whatever it was and

ask around and see if I can't dig up a witness. If you do it and you actually find 'Joe' - you feel fantastic: There's your case. But most lawyers don't bother with field work. They go out drinking after five and I go out to the scene of the crime to see what I can dig up. This is where lawyers are less prepared."

It is my impression that lawyers who regularly do field work in minor criminal cases are rare. The lawyer quoted above is the only one to my knowledge who does it as a matter of practice. In my two years in the field, there were only two instances that came to my attention where any of my four lawyers engaged in field work. In one instance, Lawyer B seemed to take a special personal interest in a particular client (accused of robbery) whom the lawyer claimed to like as a person because he was "intelligent and gentlemanly". He gave this case unusual attention in his office preparation and also went out to the scene of the robbery in order to fix in his mind the physical details of the setting so that he could have a better idea of what the garage-owner complainant might and might not have been able to observe of the details and movements of the person he claims to have seen opening his safe. The other instance was a case of "unlawful assembly" involving the police ejecting transient youths from a hostel which had been their home. The lawyer involved was defending four accused and said he felt a personal sympathy for the now homeless "hippies". He went to the scene of the riot to see if that would aid him in preparation for trial. However, such activity (field work) was rare in my setting and definitely regarded as above and beyond the call of duty.

to afford to do so¹.

¹I know of one instance where a lawyer was in fact paid beyond the usual fee to do his utmost to "beat the rap". This was a case where the charge was "importing" (smuggling narcotics into the country for the purpose of trafficking). The clients were able to afford a \$35,000.00 bail. The lawyer conducted many lengthy interviews with the clients in which the particulars were carefully examined from "every angle" with a view to how they could be defeated. The following excerpt from an interview with one of the clients involved in this case displays this attitude:

Lawyer B: Statements like that, statements that he made, uhhh! We've gotta keep it out! We can't allow any of those statements to go in. Those are, those are, uh - obviously, uh, highly inflammable. They, you know, they, they uh - they empty the case, right there. One of the most damaging things I can think of that he's [the principal accused] done was to indicate - they asked him how he got the uh - gold seals on - and he said, "Oh, that's simple - you just use gold paint", - or something, or some damn thing. I don't know what it was - that is highly damaging. He didn't say it was his, but - well he explained to us how they made it - how they put it together and what have you.

C: Yeah.

L: It's not - not any of these things are conclusive, at least.

Compare the lawyer's attitude in the above excerpt with that in the two excerpts below taken from "usual" interviews:

Example One:

Lawyer C: Okay - guess that's all the information I need.

Now what I'm going to do is, uh...find out from the police what their story is - from the prosecutor what the police are going to be alleging - and if there's any loopholes in, in their evidence, we may, we may be able to go ahead for trial. If uh, if they have a real solid case - in other words it looks like - pretty obvious. It looks from what you've told me, it looks like they've got a pretty good case against you for possession - um, I think, uh - there's no point putting it to a trial - even though you're entitled to it.

Example Two:

Lawyer D: We have no alternative story to give the police cause we know what happened.

C: Yeah.

L: So - there's no point putting you in jeopardy by putting you on the stand.

The lawyer assesses the client's story not only in light of the particulars, but also against what the lawyer thinks it will count for in court - and all of this in light of possible pertinence to relevant points of law. This is - to the outsider, at least - an involved process and one that requires considerable skill and effort on the part of the lawyer.

There are in the law three ways in which what the police are alleging in laying the charge can be defeated and an acquittal secured: (1) If the defense lawyer can show that the Crown has not proved its case - usually via showing that police testimony has not established evidence "beyond a reasonable doubt" for each of the elements in the charge. (2) If it can be "proved" via the testimony of other witnesses or by other means that the accused did not do what the police allege he did (by for instance proving that the accused was not present at the "scene of the crime", or that some specifiable other person did it, or that it was not done); and (3) if the defense lawyer is able to show that although his client "did it", there are provable exculpatory circumstances which exempt the accused from conviction (for example by proving that the accused was sufficiently drunk, or overly distressed, or acting in self defense, etc. - as defenses relate to particular charges). So in these three ways, the defense lawyer tries to establish what he, on the basis of

his knowledge of the law and of how courts and judges are thought to operate, thinks are grounds for defeasibility¹.

Since the lawyer's notions of what certain judges are likely to do influences how he handles the case I will try to give some indication of what I observed in lawyers' attitudes to judges.

(B) ATTITUDE TO JUDGES:

Categories allotted judges² by lawyers range (in order of increasing merit) from "insane" to "stupid" to "fair". This would indicate a somewhat negative overall attitude³; few judges get above the "fair" mark in young lawyers' private opinion "polls". Judges who are

¹I use this concept in the same sense as does H.L.A. Hart in "The Ascription of Rights and Responsibilities" in Anthony Flew, Ed., Logic and Language, First Series, (Oxford: Blackwell, 1960), p. 148: "...this is the word 'defeasible', used of a legal interest in property which is subject to termination or 'defeat' in a number of different contingencies, but remains intact if no such contingencies mature."

²This term is used to refer to judges in the Provincial Courts, as well as in County and Supreme Court. The characterization applies to the judges that the lawyers in this study encounter most frequently, that is, the Provincial Court judges.

³Lawyer B put it as follows: "They're not, you know, all total morons. You know there are some people down there that are reasonably clever people. But some of them are quite insane, like _____."

"insane"¹ are judges for whom lawyers claim they can see no logic ("rhyme or reason") in their decisions. Judges who are "stupid" are ones who "don't know the law" or who "can't follow an argument in the law" or forget to bring what lawyers consider as relevant facts to bear in their decisions, or who generally "get lost" in the course of the trial. The young lawyer lets on that he considers most judges to fall in the "stupid" category. Then there is the occasional judge who is considered to be "fair": This means that he will "listen to" (that is, give weight to) arguments in the law and assess facts in ways that are not categorically prejudicial to the accused. A fair judge is also a "smart" judge, but there are smart judges who are considered to be unfair, that is, who are thought to be prejudiced in favour of the Crown, or who are considered to be "tough" sentencers, etc.

Although young lawyers are careful to avoid displeasing judges and are respectful before the judge in court, outside of court they talk cynically of playing what they assume to be a judge's preferences and prejudices against

¹In the following excerpt, Lawyer A is complaining after trial about the decision he just received from a certain judge: "That judge is insane! Just insane! He gave my guy three months AND \$500.00 for dangerous driving. He said he didn't see the logic in the penalty for .08 breathalyzer being stiffer than impaired. And he cites this case for impaired! He knew the name and all. We're all standing there amazed! He goes on to say that since the penalties for Impaired are stiff, they should be stiff for Dangerous! Now what the hell! How does he tie that together! That guy's just insane!"

him, by whatever means they consider to be effective¹.

Judges (and seldom prosecutors) are the focus of lawyers' behind-the-scene, snide, joking banter when relating the events of a morning or afternoon in court.

In general, judges are regarded as a sort of tough working condition² to be put up with, manipulated if possible, and complain about if the case does not go as the lawyer expected or hoped it would:

¹In the following three excerpts, three lawyers talk about "making a pitch" to the judge:

Lawyer N: "By experience with the human thing, I know which judges I can do what with. Latitude seems to depend on known prejudices and weaknesses."

Lawyer O: "You feel funny giving pitch to the judge. He hears it so many times. But you do it anyway!"

Lawyer A: "I made this pitch to the judge - practically had him in tears: This poor kid, eighteen years old, hooked, broke, sick, needed a fix, so he traded with the cop. Needs a break. I had the old judge in sympathy. He gave my client the thirty-day trial period to kick his habit. He could have tossed him right in the clinker. Now I'm going to have a hell of a time speaking to sentence! Christ what can I say - my client will get into more trouble in those thirty days than ever before!"

²The few judges who are regarded as "fair" are exempt from this attitude.

Lawyer C: But unfortunately, the judges - when you start out, you're still young, very young at this, so we get caught in a snag all the time about uh - what our view of reasonable doubt is.

P: Is different from theirs.

L: Is different from the judge's - all he has to say is, "I'm satisfied beyond a reasonable doubt that the Crown has proved its case". You can argue till you're blue in the face, you know. He says that - because your idea of what reasonable doubt [laughs] is - You're hanging up by a string, saying that this minute little fact raises a reasonable doubt, you know. The GREAT CRUSH of the evidence goes the other way! So [laughs] you're relying on a case and trying to convince him on that. It's just impossible. He says, "Well I'm satisfied beyond a reasonable doubt [laughs]. All of a sudden you're just - it's like popping your balloon, you know. You're doing great, you know, then wow! That's the thing that sort of wisens you faster than anything else.

P: Judgments.

L: Putting yourself in the judge's position and seeing how much power he has to... interpret evidence.

Lawyers seem to have a well-worked out lore about what judges in general will accept and will not accept; what kind of "pitches" a particular judge is likely to

"go for"¹. In preparing for trial, the lawyer may

¹This attitude is apparent in the following two comments:

Lawyer P: "You say your client has a job and the judge leans forward a bit. You say he's going to school at night and he leans forward a bit more. You know how it goes."

Lawyer B: "The judge isn't likely to grant you a divorce just because you haven't been sleeping together for the last ten years. He hasn't slept with his wife for the last twenty years, so why should you get a divorce when he's perfectly resigned to his situation!"

That judges decide on the basis of their prejudices rather than "the merits of the case" is not an uncommon notion, and one that I have come across in the literature.

"Professor Frank's argument in Law and the Modern Mind may be summarized as follows: 'It has long been a tradition among lawyers to assert that judicial decisions are reached by a process of reasoning. But in fact this overt display of reasoning is sheer bunkum. When a judge hears a case, he gradually makes up his mind (since the law insists that he must make up his mind); but he does so in response to a variety of factors which have nothing to do with "reason", and range from the bias of his social prejudices to the rawness of his ulcers. The so-called "reasons" which he finally sets forth in his official opinion are nothing more than rationalizations of predetermined hunches. If he has decided to give judgment in accordance with precedents cited on behalf of the plaintiff, his trained intelligence and mastery of legal jargon will easily allow him to demonstrate their relevance. If, on the contrary, he favours the defendant, he can just as easily demonstrate the opposite. Judicial opinions are simply the expression of a subconsciously persisting childhood image of a "father-figure"; and anyone who studies such opinions in the hopes of understanding the nature of law will be wasting his time.' Much of the force was taken out of Jerome Frank's argument by the simple expedient of promoting him to the bench, when, as Judge Frank, he discovered that the judicial process was rather more objective than he had hitherto supposed." Peter Collins, "Architectural Judgment", The Canadian Architect, (June, 1971), p. 56.

explicitly pass his ideas about judges' prejudices on to the client¹.

There is seldom a friendly or paternal relationship between judge and young lawyer - the judge perhaps regarding the young lawyer as a regrettable nuisance who makes the long day in court longer by dragging out trials - and the young lawyer regarding the judge as a more-or-less arbitrary power figure who is more likely than not to smash his case². Judges in general are not respected by the young lawyer who regards them as bastions of the reactionary "establishment" with little idea of "where it's really at". They are seen as representatives of the small minority in power imposing its own "backward" morality on the rest of society, especially with respect to the drug laws and minor criminal charges like vagrancy, disturbing the peace, shoplifting. Judges are characterized as more or

¹Lawyer Q (Senior defense counsel, six years called): "I always instruct my clients that it is very important that their physical appearance does not prejudice the judge against them. Long hair and a scruffy appearance isn't going to do them any good. A trial is an exercise in the art of persuasion. Trying to persuade the judge that your proposition should be believed over and above the other's. I always instruct my clients to be polite and respectful, to speak slowly and gently (- in criminal cases there is usually some violence and you don't want to transmit to the judge that your client is a rough person -), never to get angry, and always if they don't know the answers to the prosecutor's questions to say that they are sorry but they do not know."

²I heard of only one judge who seemed to be respected as a sort of colleague by the young lawyers. This judge is known to sometimes have coffee with a young defense lawyer before trial and good-naturedly joke about the trial in which they both were to be involved.

less ridiculous¹ authority figures for whom the young

¹The following anecdote from my field notes displays how young lawyers enjoy "making fun of" judges: (There was great hilarity among the young lawyers when a magistrate was suspended because he was found in a raid on a house of prostitution. The magistrate was rumoured to be more than casually involved with the "madam" who apparently got an "impossible" decision when she appeared before him on a trafficking charge:)

Lawyer A: _____ got suspended!

P: No! Why?

L: Raid on a house.

P: Drugs?

L: No.

P: Gambling?

L: No.

P: Sex!

L: It was a whore house and there's only one thing you could be doing in a whore house!

(Later three or four young lawyers, a prosecutor and I are having coffee at a break in trial in the cafeteria in the basement of the police court building:)

Lawyer A: What's going to happen to old _____ - will he ever sit again?

Lawyer N: Oh yeah, in a year or so, they'll put him in the Vag C courts! [Laughter all around.]

Lawyer R: I doubt if he'll ever sit again. In fact he's probably not over the hurdle yet. If he wants to practice law will he have to go before a disciplinary committee?

Lawyer A: Yeah, conduct unbefitting a lawyer! Harumph! Harumph!

Prosecutor D: He ought to commit suicide! He ought to do the honourable thing!

Lawyer S: He's sent more poor bastards to jail because he refused to listen to defense counsel.

P: What's his problem?

Lawyer S: Authoritarian - the most authoritarian bastard and so stupid! Not too popular with the other judges either. He was a political appointee in the first place.

lawyer feels he must wear a suit and keep his hair somewhat trimmed.

The expected attitude of the judge is something that lawyers orient to in deciding how to handle the case:

Lawyer A: If I know the judge is going to be _____ and my client has a reasonable story - I mean a story that may reasonably well be true; and it's a case where there's no other defense than to put the client on the stand, I won't do it because the son-of-a-bitch won't believe him. The mere fact that the man stands accused is enough for that judge to convict him. On the other hand if it was a drug case and I knew for certain I'd have _____, my client would stand a chance, cause there's a judge that is fair.

The lawyer quoted above claims if he knows in advance which judge will be presiding over his case, it makes a great deal of difference in how he decides to conduct the case. At the same time, though, lawyers have a notion that they know the limits of what any judge will and will not believe; so they can assess any client's story by what they take to be general standards of credibility; that is, of what any judge will believe, without knowing what particular judge is sitting. Lawyers also use "what the judge won't believe" as a sort of strategy to diplomatically tell the client that his story is unbelievable. Instead of challenging the client himself, the lawyer is able to use the judge as a stand-in and thus avoid confrontation with the client:

Lawyer C: Okay - Well, uh - that, um - Yeah, okay. I think you haveta concede that. I'm just looking at it from the point of view of what a judge will accept. Okay?

C: Uh-huh.

L: Uh, he won't accept that it was in your pocket...

C: Well -

L: Unless it was yours - unless you knew it was - you know - what it was.

As I am now nearing the end of my discussion of the factors that influence the lawyer in deciding how to handle the case and how to conduct the interview, I will put the lawyer's orientation to expected judge opinion in the context of the other variables the lawyer weighs in deciding how to plead the client and whether or not to put him on the stand.

The lawyer mentally processes the client's story in terms of (1) how the story fits into the law; that is, to what degree does the client's story provide or not provide the elements necessary to prove non-guilt, and to what extent can the client's story and/or his social circumstances and personal characteristics be translated into a warrantable defense to the charge by giving provable grounds for (a) "unproving" the crucial elements of the crime as set out in the Criminal Code; or (b) showing reason why, though the elements are there, there are other valid reasons for acquittal; and (2) his notions of judge's criteria for credibility.

The lawyer "sizes up" the client's story against the particulars in terms of its defense-generating capabilities (that is, what probably warrantable grounds the client's story suggests to the lawyer for making the police account defeasible). But the lawyer is at the same time evaluating the story in terms of how it is likely to stack up against what he thinks are judges' ideas of how things happen with certain categories of people under certain circumstances¹ and also in terms of how the story meets with the lawyer's own intuitions and "findings" regarding what he thinks he knows about people who "get into this kind of trouble" and how these people affect certain kinds of judges.

One central question for the lawyer is: Is this an account that could profitably be given by the accused on the stand - usually not exactly as it has just been told to the lawyer, but with appropriate (to the lawyer's way of thinking) modifications, as suggested or influenced however blatantly or subtly by the lawyer - and the feasibility of this - given the probable visibly interpretable character and likely courtroom demeanour of the client as assessed by the lawyer.

¹Max Gluckman in his classic study, The Judicial Process Among the Barotse of Northern Rhodesia, (Manchester: Manchester University Press, 1955), develops a very insightful analysis of the use of social stereotypes in judicial thinking: "Judges work not only with standard of reason-

able behaviour for upright incumbents of particular social positions but also with standards of behaviour which are reasonably interpreted as those of particular kinds of wrongdoers. There are social stereotypes of how thieves, adulterers and other malefactors act. If witnessed actions of a defendant assemble into one of these stereotypes, he is found guilty, though judges prefer direct evidence to convict." Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, p. 359.

The following excerpt from an interview with Lawyer C reveals a lawyer's notion of how judges think people behave and "things happen" in a given type of case (the charge is possession of drugs):

L: Well, uh - the judge isn't gonna accept the fact that, you know, you didn't know that it was there - he just isn't gonna believe you. You know he's just not gonna accept that - uh, you know, sitting there in the open, this sorta thing. Well, he - yer - yer not, you know, you're asking the judge. You can imagine the head space he's in.

C: Yeah.

L: And he - you know, he's just not gonna buy it.-----*

L: Mm...I think they got you cold on the dope, do you know that?

C: You think so?

L: Well - just knowing what the - you know - the way judges'll operate. They, huh, you've been through various situations like this many, many times before an - you know, you try this, an try that, that an try this and try that; but, see, possession is a technical term, and you'd have to um, first of all the - what they haveta do is establish knowledge, that you knew what it was.

*-----This convention is used to indicate omission of exchanges.

Given that the client comes equipped with criteria for story-telling (including built-in instructions regarding attitude, facial expression and general manner in telling the story) - these criteria being part of his repertoire as a member of the culture at large; and given that these criteria for structuring the story are not likely to coincide with the lawyer's model criteria for generating stories best suited to courtroom ears, the lawyer, if he is thinking of putting the client on the stand (to tell his story), has to consider how susceptible his client is likely to be to his own "lawyerly" influencing techniques for "rehearsing clients". In other words does he have a client whom he can influence to modify the typical layman's story into the appropriate courtroom account, which ends up being a story in line with lawyers' ideas of what a layman's account should sound like in court; that is, a story best suited to the lawyer's generalized notions of a typical judge's mentality in judging.

I would say that lawyers do not differ greatly in their ability to TRANSLATE clients' stories into the appropriate legal categories in order to assess the likely chances of "beating the rap" (defeasibility on legal grounds). I would take this to be a skill that lawyers need in order to meet the qualifications of the bar in the first place. I would say, though, that lawyers do differ greatly in their ability to influence clients to TRANSFORM the "natural" layman's story into a suitable courtroom

account - for this involves not only assessing the client and the story along credibility dimensions, but also a more or less complex manipulative steering of the client to "come out with" something that sounds like what the lawyer thinks is an "innocent" layman's account¹.

This transformation problem is primarily an interactional problem as opposed to a legal problem of the sort involved in translating stories into defeasible grounds relating to the elements of the charge in the Criminal Code that must be proved. Translating accounts is probably pretty well a standard ability of lawyers; whereas transforming accounts is a more variable skill - probably partly a function of "experience" as a practitioner as well as of personal manipulative skills at influencing people.

¹"If they had to examine a witness, what they had got to do was to induce him to tell his story in the most dramatic fashion, without exaggeration; they had got to get him, not to make a mere parrot-like repetition of the proof, but to tell his own story as though he were telling it for the first time - not as though it were learned by heart, but if it were a plaintive story, plaintively telling it. And they had got to assist him in the difficult work. They had got to attract him to the performance of his duty, but woe be to them if they suggested to him the terms in which it were to be out! They must avoid any suspicion of leading the witness, while all the time they were doing it. They knew perfectly well the story he was going to tell; but they destroyed absolutely the effect if every minute they were looking down at the paper on which the proof was written. It should appear to be a kind of spontaneous conversation between the counsel on the one hand and the witnesses on the other, the witness telling artlessly his simple tale, and the counsel almost appalled to hear of the iniquity under which his client had suffered." Edward A. Parry, The Seven Lamps of Advocacy, (London: Unwin, 1923), p. 81.

Lawyers differ in their transformation skills, clients in their transformation susceptibility, and stories in their transformation potentiality.

Lawyers differ also in their transformation methods, but basically lawyers are doing three kinds of things in the course of the interview - they are employing methods of getting information, methods of translating information and methods of transforming information. (Remember that the term "translating" is used to refer to comparisons with the law, and the term "transforming" is used to refer to methods of influencing the client in what he's going to say in court.) Methods of getting information are at the same time methods of transforming information; because, for example, by asking one question rather than another, the lawyer fixes the client's attention (and subsequently memory focus) on one aspect rather than another of an event, and in asking it in a certain way, he can arouse and associate the question in the client's mind and expression with certain emotions, or lack of them, - and expect this to "show through" in the client's answer when the same question is asked in court during trial.

Once having decided what to do with the case, the lawyer must also convince the client to go along with his decision. The lawyer is usually working up to this

throughout the interview, and this is another parameter organizing what is going on in the interview¹. We shall see actual examples of this in the next chapter when we examine interviews in detail.

In this chapter I have laid out the relevances of the context in which the interview occurs so that the reader will have the necessary background for following through the analysis in the next chapter, where I examine criminal stories in detail. How the interview stands in the chain of events that take the accused from arrest to court and the practical imperatives in the way the lawyer sees his job should be kept in mind by the reader throughout the next chapter.

¹"Lawyers not only make their own decisions; they also attempt to persuade others to make decisions." Morris, How Lawyers Think, p. 8.

CHAPTER III

INTERVIEWING IN CRIMINAL CASES: CRIMINAL STORIES

I INTRODUCTION:

In this chapter I will present and analyse excerpts from transcripts of interviews in minor criminal cases. The excerpts centre on the "stories" that clients tell in response to the lawyer's questions about "what actually happened" in the events that lead to arrest. The routine ways in which lawyers conduct these interviews are responsive to the considerations detailed in the last chapter. In the course of analysis in this chapter I will be able to fill in some of the fine work in the structure of the social organization of preparation for court. In the next chapter I will be able to broaden the analysis presented in this chapter when I discuss divorce interviews where a different set of practical imperatives operate within the "same" legal system.

I will begin this chapter by describing the usual course of events in the lawyer's routine management of the interview. I will then examine "stories" as the focus of the interview and I will examine them in terms of the three main influences on their structure: (1) the particulars (2) constraints of criteria for credibility and (3) lawyer's contribution to the client's production of the story

("Joint Story Production"). All the while I will be examining the production and assessment of stories in terms of the features in the process that illuminate the social organization of preparation for court.

II THE COURSE OF THE INTERVIEW:

It was apparent to me from working with the transcripts of interviews that the four lawyers that I worked with intensively followed the same general pattern in conducting their interviews with clients accused of minor criminal offences¹. I will briefly outline this pattern to show the place of the story in the context of the interview.

Virtually all of the taped interviews took place in the lawyer's office. The client is usually made to wait in the reception area for from ten or fifteen minutes to perhaps half an hour while the lawyer is busy on other matters or is looking over the file on the client about to be interviewed. When the lawyer is ready he goes out to meet the client and escorts him into his office. He then invites him to be seated and takes down his name, address, occupation, family situation and employment situation. If

¹More "important" matters such as murder and rape follow a different pattern and involve many lengthy interviews.

this information has already been obtained by the lawyer during a telephone conversation previous to the interview, the lawyer will instead begin the interview with some brief introductory comments such as "Oh, yes we talked over the phone" and "You're charged with _____ , aren't you?"

If the client is not on Legal Aid, at this point the lawyer will raise the issue of how the client is to pay for his services. If the question of the fee is not resolved to the satisfaction of the lawyer, the interview will end more or less unceremoniously. Before he will proceed with the interview, the lawyer requires a "retainer"¹ from non Legal Aid clients. For his retainer the lawyer usually required enough money to pay for his time in doing some initial research and going to court to set a date for trial. A retainer usually amounts to \$100.00 or more - the complete fee for handling the case being \$250.00. Lawyers claim that this is the only way of ensuring payment of their bills. A lawyer will not go to trial for a client who has not paid the full fee prior to trial, since he usually feels that payment

¹The lawyer considers himself to be "retained" by the client when the client has paid him not the full fee, but enough to cover the work he will do for the client until he is paid the final installment which is almost always demanded before trial.

of the bill after the end of the case is unlikely¹ since the client will either be in jail or "over the next hill".

Paying the fee permits the interview to proceed to the substantive issue; whether or not and how to defend the case. As we have seen, the lawyer's first step in this direction is to confront the client with the particulars. The lawyer bluntly confronts the client with the police version of events as the standard in relation to which the interview work is to be done. A belief among lawyers is that when confronted with the police story, the client is likely to give a briefer, more "truthful", more to-the-point version than he would have offered if asked to give his story spontaneously without first hearing the police version. The lawyer reads the particulars and prevents the client from interrupting by "cutting him off" if he tries to object or offer explanations before the lawyer has finished reading.

¹In the excerpt below, a lawyer is urging a client to pay the promised fee before trial. The lawyer is talking to the client over the phone in his office. Another lawyer (Lawyer B) and myself are present.

Lawyer A: (To client over the phone) "You hussle yer ass and bring it in. Or I won't argue for you. It's as simple as that, I told you when I took you on that the fee was \$250.00. You owe me \$150.00. Now you said you'd bring it in. Have it with you!" (Hangs up, then says to the other lawyer and myself:) "What did they say about never accepting a criminal case unless you're paid in advance!"

When the lawyer has finished a generally uninterrupted reading of the particulars, the lawyer then gives the client an opening by saying, "Now how does that sound to you?"; or, "Is there anything in there you don't agree with?"; or, "What do you say happened?".

The client may agree with the police version completely, but more usually he comes up with a version that involves some re-interpretation, variation or explanation, and sometimes a "whole new story". The lawyer generally lets the client "tell it his own way" for a while, then gradually becomes more directive in asking the client to elaborate on certain points, etc. The extent of the lawyer's directiveness depends on what the lawyer sees as the extent of the discrepancy between the client's story and the police story, and on the possibilities that he sees for a defense. The greater part of the interview is spent in getting the client's story and in discussing that version against the police version with the client.

Next the lawyer gets more personal data from the client. He asks the client about his family situation, job possibilities, criminal record, etc. The lawyer needs this data in order to speak to sentence if the client pleads guilty or is found guilty. It also gives him some idea of the likely sentence that will be imposed and therefore of the desirability of taking a guilty plea or making

a deal rather than going to trial. If the lawyer goes into considerable detail in asking the client for this information, it may be the first clue to the observer that the lawyer is either "pitching" for a guilty plea or is expecting the client to be found guilty at trial. Simultaneously, or alternatively, the lawyer may be using this data as an aid to himself in his credibility assessments; that is, in deciding whether or not to put the client on the stand. As we shall see in our discussion of credibility below, how the client treats the question of his record has particularly significant consequences for the lawyer's assessment of the client and of what to do with the case. At this stage, the lawyer is piecing things together in preparation for semi-final decision on what to do with the case (whether or not to go to trial and how to conduct the defense), unless there are hitherto noticed significant missing pieces in the particulars, or other contingencies such as the necessity of doing some research on the law before a decision can be made, or talking to witnesses. In the case of these contingencies, the decision on what to do with the case is postponed. However, any decision at this stage is "semi-final" because it is technically subject to the client's approval or veto.

The lawyer's next task is to discuss his strategy with the client. He may make a little "speech" semi-

translated into what he takes to be layman's terms on how hopeless or how good the case seems to be - leading up to "advice" to go to trial or to plead guilty. The client usually agrees with the lawyer's decision but asks some "off-the-track" (to the lawyer) questions. If the client agrees that the case is to go to trial, and the lawyer has decided to put the client on the stand, he will inform the client of this. He usually also informs the client that he cannot go on the stand to tell his story, if the lawyer has decided that that would be in the best interests of the defense. If the case is going to trial and the client is going on the stand, the lawyer may "rehearse" the client somewhat for trial; but the lawyer usually saves the main "priming up of the client" until a second pre-trial interview that usually takes place, not in the lawyer's office, but in the corridors or waiting room at court immediately prior to trial.

Almost always it is the lawyer who takes the initiative at ending the interview and the client who delays things by asking more questions. After dealing patiently with the first few questions, the lawyer usually cuts the client off with "See you in court on _____" - only occasionally accompanied by an excuse such as "I'm running out of time", or an explanation such as, "We've gone into it as far as we can". Apart from the incidentals of opening and closing, the question of the fee and necessary gathering of

biographical information, the burden of the interview is in eliciting the story and assessing it in the light of the practical decisions that must be made in handling the case.

III THE STORY:

What the client tells the lawyer when asked "what happened" in the events that lead to his arrest is known as "the story". While the dictionary defines¹ story as "a narrative or recital of an event, or a series of events, whether real or fictitious", common sense jargon uses the term to mean more fictitious than real when referring to story-telling that is excuse-making. This certainly is the sense of its use in the legal community. "Story" usually has this special "slang" meaning in the legal setting where it refers not to a neutral narrative of any type, but less inclusively and more narrowly to something closer to the common meaning given to "tale"; that is, based on fiction rather than on fact. If we take story (or narrative) to be the inclusive term, for our purposes, types of stories may vary from "accounts" (true to "fact") to "tales" (fictitious) - and lawyers, for the practical purposes at hand in preparing for trial, assume that what the

¹Britannica World Language Edition of Funk and Wagnall's New Practical Standard Dictionary, Vol. 2, p. 1286.

client says about What Actually Happened¹ is likely to be closer to a tale than to an account (an account being a literal description of what can be thought to have naturally happened). If what the client tells him is in the lawyer's assessment close to what the lawyer thinks probably actually happened, the lawyer may say, "He didn't give me a story" - which case he is using the term exclusively in its meaning as "tale" and implying that the "truth" could not be called a story; or he may say (and this means something quite different): "I believed his story" - in which case he is implying that the truth can be called a story because he uses the term in its broader sense to include accounts and tales and the "half-truths" in between accounts and tales.

Though usage in the legal community varies and "story" is sometimes used to refer to narratives that are taken to be accounts rather than tales, the tale connotation is the

¹I am not concerned for the purposes of this thesis with possible philosophical problems regarding the status of "What Actually Happened" and how this relates to truth values assigned versions, but rather with how the lawyer assigns different practical values to competing versions as a practical accomplishment contingent on how he expects these versions to be defined in the practical business of an on-going court case. Melvin Pollner gives an excellent treatment of What Actually Happened as a problem in phenomenology. See Melvin Pollner, "On the Foundations of Mundane Reasoning", Unpublished Doctoral Dissertation, (Santa Barbara: University of California, June, 1970).

most usual usage. I will use "story" and "narrative" interchangeably as the inclusive general term to refer to the substantive material that the client offers about his case, or to anything that purports to be a version of events; with connotations of "account" and "tale" referring not to the truth value in any absolute sense, but to how these terms are used in the setting.

Without exception, the lawyers that I interviewed claimed to be of the opinion that most people who get charged with a crime and taken to court actually "did it"¹ and hence are more likely to tell a "story" (tale) than "the truth", since the truth is not likely to be in their best interests in beating the rap. Criminal lawyers claim that most of their clients inevitably "tell stories". They claim that criminal stories range from obviously conscious and premeditated distortions of "everything they think they can get away with" to stories that are a result

¹The following comment is typical: Lawyer B: "Sure ninety-nine percent of our clients are guilty in the sense that they actually did it. They actually robbed the bank, beat up the old lady, or ripped off Safeway. But whether or not they are technically, legally, provably guilty is another question. Do the cops have enough on them - that's what the law is all about."

The philosophical rationale (and also the lawyer's peculiar "moral" code) supporting the intricacies of pro-

cedural law which make guilt or non guilt a technical, legal matter of evidence and proof, is that the law must be "loaded" in favour of protecting the "innocent" from conviction. If there is "Reasonable Doubt" of guilt, the judgment must be in favour of non guilt. It is deemed better that a certain percentage of the "actually" guilty go free than that a few actually "innocent" are convicted. If criminal lawyers are correct in their assumption that ninety-nine percent of their clients "actually did it", in most instances where they win acquittals they are "protecting the guilty". This is close to the police version of the defense lawyer's work. Police feel the people they charge are "guilty" and should be punished and that in "getting them off" lawyers are cheating justice. We have seen that in merely being charged and going through the system the accused is inconvenienced (especially in awaiting trial in jail) and "punished" regardless of whether or not he is technically found guilty and sentenced. Lawyers claim that sometimes there is a tendency for the accused to want to plead guilty if he "knows" he "did it", but does not understand that he may not have technically in-the-law committed a crime. One lawyer (Lawyer I) talked of instances where the accused would rather have a record than go through the inconvenience of taking the case to trial. He would rather "get it over with" by a guilty plea.

of unconscious self-deception¹. One lawyer aptly expressed this idea this way:

Lawyer T: "A lot of the times, stories just subconsciously grow - they are not obvious premeditated lies. First they see things differently than they knew they actually were, and then they quite naturally let the distortions grow. You sense you're in trouble and you automatically restructure things in such a way as to get yourself out. Many clients actually believe their own stories - especially when they get off. Getting off rationalizes all the reasons and excuses they dug up to begin with, and they actually start to believe their own stories."

¹Kurosawa's film "Rashomon" deals very effectively with the topic of distortions in versions of events. The film is set in 8th Century Japan. Three Japanese peasants are caught in a rainstorm and shelter together in an old ruin (Rashomon Gate). One of the peasants, a woodcutter, tells the others he has just been to "court" to give evidence in a terrible murder case. He explains that he discovered the body of a Samurai out in the forest while going to cut wood. He goes on to say that it is a very strange case because each witness called to give evidence has a different version: First a notorious bandit hero is captured and brought to court. He tells his story. He claims that he killed the Samurai after crossing swords with him twenty-two times in a duel over the Samurai's wife whom he seduced after tricking him and tying him up. He claims that it was not his intention to harm the Samurai, but that he fought the duel on the insistence of the seduced lady whose loyalty he had won as a consequence of seducing her. The lady is brought to court and tells a different story. She says the bandit tricked and tied up her husband, and that she fought him valiantly with her small pearl dagger until she was exhausted and had to give up. The bandit then raped her and ran off through the woods. He husband who had witnessed this then looked upon her with complete eternal contempt. She asks her husband to kill her. He refuses. She faints in anguish. When she awakens, her husband is dead with her pearl dagger in his breast. She runs off terrified and tries to drown herself and then to kill herself in other ways, but all att-

empts fail. She is not sure who thrust the dagger in her husband's breast - whether it was herself, or the bandit, or her husband himself. Next a medium is called to commune with the dead Samurai so that his story may be heard through her. In this way the Samurai's story is told. He says that after the rape his wife cuts him loose so that he may fight for her honour, but that he feels contempt for her and will not fight for her. Instead he chooses to die honourably on his own sword.

It is obvious that none of these versions is What Actually Happened; and the court cannot choose.

The peasant who is relating these versions to the others caught in the storm ends up confessing to them that he himself has not told the truth. He then says that he in fact came upon the scene of the crime not after, but before the murder. He then tells a fourth version of events. He claims that after the Samurai is bound, the lady allows the bandit to seduce her. After the seduction, first her husband scorns her and says the bandit is welcome to her. The bandit then scorns her. She then shames them both and incites them into a duel in which the bandit slays the Samurai after a clumsy and fairly cowardly fight. He then scorns the lady and runs off. The viewer is lead to sense that this story is probably closer to the truth than any one of the versions given by the three protagonists but that it still is not What Actually Happened.

The peasants observe that all men lie in order to make themselves seem better than they actually are and to protect their own interests. Such is human nature. There is no truth to be got from the mouths of men. Even a dead man beyond the grave will risk his soul before the gods by lying in order to protect his own image and his memory in the eyes of men.

"Story" (usually meaning tale) is the accepted term in the law community jargon, used by lawyers, police, judges and prosecutors alike (and often by the story-teller himself; that is, by the accused, especially if he is a repeater). However, the defense lawyer treats what the client tells him as a "story" only insofar as he has to; that is, he monitors the client's story for provability and credibility and discards it only if he feels it will not stand up in court or if there is a more effective defense to the case. He will not discard it simply because he himself does not believe it; however, it is a very practical strategy for the lawyer to treat the client's story as false, for this is the way it will be treated by the prosecutor if it goes to court. Part of the lawyer's credibility test is in monitoring the story to see if, in his own estimation, it is likely to stand up to the onslaught of the prosecutor. If it stands up to this, then it is possibly usable in court.

In order to arrive at the truth by cross examination, a judge or lawyer must assume that the person questioned has been lying; only in this way can he test that person's evidence. He therefore proceeds in cross examination as if he believed and assumed the examinee to be lying.¹

Given that the explanations, reasons, elaborations, etc. that the accused "comes up with" are normally regarded as a

¹Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, p. 96.

"story" (tale), lawyers have categories for clients' stories: there are "likely stories", "the same old story", "hopeless stories", "wild stories", "good stories", etc. However, whatever the story, the lawyer must boil it down (sometimes possibly via the latter categories) into "usable in court" or "not usable in court" given how, in his assessment, the story fits with its bearer, the charge, the police report, the lawyer's ideas of judges' credibility criteria and of judges' whims and foibles, and what he takes to be other relevant factors.

Even if not usable per se in court, the story is nevertheless still part of the basic raw material out of which the lawyer constructs his case: he uses it as a resource for deciding where the weakness in the prosecution's case may lie and a source of what questions to ask in cross examination and a source for what to imply in summing up and in speaking to sentence, etc.

Lawyers see what clients tell them about What Actually Happened as "stories" (tales) because of the situation in which they are told : here is someone whom the police have seen fit to haul in and charge in a criminal matter; furthermore he is on Legal Aid (and therefore doesn't have a penny in his pocket) and is a sort of "down and out". Such a person has everything to lose by "telling the truth" which

would probably mean "confessing". It is natural for such a person to try to "lie his way out of it". So lawyers employ typifications about people who come into their offices through Legal Aid on criminal matters, and they bring these typifications into play in assessing the client and his story. If, for instance, the client is charged with petty theft and has a record for the same, the lawyer will take it before he walks in the door that the client is a petty thief, and that he has an "ulterior motive" in telling the story that he tells to the lawyer; he is going to say whatever he thinks he has to say in order to get out of the "jam" he is in. These are the intents and purposes for which the lawyer sees the client as bringing this story to this occasion. It is not only the features of the story itself that have a bearing on its assessment by the lawyer, but also the features of the situation in which it is told, the nature of the charge and the characteristics of the teller and his social and legal situation.

Starting from (not with) the assumption that stories are told to do work for the story teller - to somehow improve the predicament that he is in or to assuage his feelings about it, we will find out more exactly what kinds of work clients' stories do and how they do it - and the work that lawyers do with stories by analysing the features of actual stories and of the pre-trial situation in the lawyer's office.

Clients do not come into the interview and tell the lawyer what they think Actually Happened or "any old story", but usually a very particular construction of events. This construction is elicited, received and assessed by the lawyer routinely in very particular ways, contingent on the practical imperatives of preparation for court, of processing a stream of clients and of building up a practice. We can assume that the client's construction is usually made up of two kinds of elements: what they remember to have literally occurred and what they invent in contradiction, deletion and/or addition to what they remember as having actually occurred. Lawyers bring certain constraints to bear on clients in telling their stories in order to inhibit invention and in order to shape and control the features of the story itself. The first and strongest of these constraints are the particulars.

IV THE PARTICULARS AND THE STORY

We have seen that the first thing that the lawyer does after getting preliminary face sheet data from the client is to read to him the particulars¹. The client is

¹It sometimes happens that a lawyer interviews a client before the particulars are available to him. In such an interview it is obvious that the lawyer is to a great extent incapacitated by not having the particulars. He will get the client's story and stack it up against his assumed idea of what the particulars would be like for such a client on such a charge, but he postpones making any decision on what to do with the case until he has seen the particulars - at which time he will probably interview the client again.

not first asked for his story, but is first asked to listen to the official police version of the events that eventuated in his arrest. The lawyer has practical reasons for first confronting the client with the particulars: (1) It starts the interview off on an official business-like level and establishes the particulars rather than the client's story as the official standard. (2) Lawyers believe that hearing the particulars first has the effect of influencing the client to tell a story that is structured by the form, length and content of the particulars, and hence is shorter and more to the point than it would have been if told apart from the influence of hearing the particulars first. The lawyer does not want to waste time listening to "irrelevant" details and he does not want to hear obvious "lies" (that is, unprovable statements that the prosecutor can easily expose in cross-examination as being unlikely or untrue). If the lawyer first heard one version from the accused and then read him the particulars and then the client offered a different story, the lawyer would be prevented from using either story because the client has obviously "lied" in one or both versions and ethical imperatives prevent the lawyer from knowingly allowing the client to deceive the court. (3) In court the particulars are granted the status of standing for what actually happened unless the defense can prove (show reasonable doubt) otherwise. This is a working condition imposed by the system on the lawyer : the onus is

on his client's story to "beat" the particulars rather than vice versa, and so the lawyer has little choice in pitting the particulars against his client. He nevertheless hopes that his client will offer a story that can be worked up into a proof against the charge.

The structure of the interview and of the lawyer's work require that the client speak to the particulars. In asking the client to speak to the police version; that is, to tell his story comparatively using the police story as a basis, the lawyer sees the particulars as constraining invention. The lawyer requires the client to try to come to terms with the particulars as a contracted and incomplete version of what he will have to come to terms with in court if he is to give his story in defense of the accusation. First reading the particulars to the client does indeed seem to have the effect that lawyers claim it has. The following example shows excerpts from two interviews with the same clients on a charge of possession of narcotics for the purpose of trafficking. The particulars were not available for the first interview; they were read out at the beginning of the second interview. Notice the changes in the story when it is told the second time under the influence of the particulars:

(First interview: no particulars:)

C: And he mentioned before he went that he was thinking of sending back some hash. But you know I never thought anything of it; and I don't think anyone really di-id. And then, uh - so we, we weren't aware of that parcel coming. And so the next thing this parcel came to my door - like I wasn't there at the time, when it came.

an he [the person who said he might send a parcel of hash from England] says, "Okay, if I do send a parcel just hand it over to this other friend of mine". That's what he told us - just hand it over to him and he's gonna keep it for me. So that's all I was gonna do - was gonna take the parcel and hand it over to _____.

Lawyer A: What's his name?

C: See, there was no intent to traffic.

(The particulars, received after the interview of which the above excerpt is a part state that the police found in the apartment of the accused two pounds of hashish in a spirograph box (this is the hash and the parcel referred to in the above excerpt). The particulars also state that the police found an English cookie tin and an English box of chocolates in which were found traces of hashish. Neither of these items were mentioned in the accused's first story in which the accused presents himself as someone who more or less unexpectedly received two pounds of hashish for the first time from England and who intended only to pass it on to someone else without payment as a favour to a friend. However once the information about the cookie tin and the chocolate box is presented in the particulars, the situation looks different and the first story is no longer adequate:)

(Second interview, after the reading of the particulars:)

L: What kinda tins?

C: We had, uh, I had, I had got another, uh...pound of uh, stuff. It had come in a chocolate tin. I guess it was about two weeks before this.

L: Umn?

C: Actually I had...I - I'm glad it didn't come to the apartment on _____. It had come to uh, this girl's place; and uh, _____ had mentioned something uh to her that he might send her some, but she didn't know what to do with it. She phoned me up - and I went down then and I and I took it up to _____ place, and I kept the tin in the apartment.

L: Did they analyse anything in there?

C: Umhmn - they said, they said they found some hash on the bottom of the tin, but I can't believe them.

L: [Grunts.]

C: I think they were just doing that to try to str-strengthen their case.

(The fact brought out in the second story that he had received a parcel from England prior to receiving the parcel mentioned in the first story makes his surprise at receiving the parcel mentioned in the first story seem fictitious and his probable culpable involvement in the situation seems deeper.)

In the above example in the first interview, influenced only by the client's story, the lawyer felt that there was "probably a damn good case"¹ for the defense:

...Now you - you would probably uh, uh, I suspect have a damn good case even on possession, because of you know this - this time element. They broke in - see w-was there anything on that package to indicate where this was coming from?

¹The charge is possession of hashish for the purposes of trafficking and the lawyer is assuming that the prosecution have no case at all for possession for the purposes, and that even on the reduced charge of possession, the case for the prosecution is weak and hence the case for the defense is strong.

However, after assessing the client's second story in the light of the particulars, the lawyer felt that the prosecution had a strong case against the accused and that conviction was likely¹. From the point of view of preparation for trial, the first interview in which the client told his story without the constraining influence of the particulars accomplished comparatively little.

We can see that, as lawyers say, reading the particulars before allowing the client to tell his story, is likely to constrain "invention" to some extent; however, we can also see that reading the particulars first also affects the way in which the client is likely to tell whatever he is going to tell. Regardless of whether the client is guilty or "innocent" and therefore regardless of whether or not he

¹The lawyer commented to me at the end of the first interview: "They were nice kids - he says to me, 'I figured I'd try it', you know." (The lawyer is referring to trying out the hash before sending it on to the person it was "meant" for.)

P: How was their story?

L: I believed them. I mean I believed them in general. I didn't believe them, though, that it just sorta arrived unexpectedly. Nice kid, wants to go to school. I don't think the police have got enough on them - I think they busted in too soon. Gotta get a holda the prosecutor and find out.

After the second interview, the lawyer's comments were as follows: "That kid was lying to me. He was trafficking in that stuff. He thinks he's the cock of the rock. Christ, if they get that statement in, he's gonna do time for sure. He thinks there's no way he's gonna do time. Figures he's blessed. He was trafficking heavily in that stuff. I know he was and figured it was a good thing. He's still smart-ass about it. I'm gonna haveta psyche him up - prepare him for doing time."

has "something to hide", the client comes into a situation in the lawyer's office where what he tells as his version is going to have to be put into a form that is set up by the particulars regardless of whether or not the client sees that to be a useful or desirable or convenient way of telling what he wants to tell. Having to tell his story in comparison with and up against the particulars structures in obvious and subtle ways what the client will say; for instance, he is likely, as a naturally influenced effect, to speak to events in the order in which they are laid out in the particulars (or the order in which he recalls the just-read particulars to have laid them out).

The particulars then probably act as a constraint on any client with any kind of position with respect to guilt and innocence; and even the "innocent" have to give their stories a form that is constrained by the particulars. The lawyer requires the client to first talk around what police and prosecutors have alleged in the particulars before he allows the client to speak in "free form". The particulars thus act as a sort of agenda. An agenda acts as a mould on what anyone is going to say; by virtue of the structuring of an agenda, the only way one gets to say what one wants to say is by shaping it in a way that fits into the agenda. This may mean that one has to reduce what one originally may have wanted to say, or to leave out what one might have

thought were the best parts, or that one highlights aspects and events that one would have downplayed and vice versa, or that one forgets in the course of answering the particulars details that would have flowed out of one's own "natural" version. So the way the lawyer treats the particulars imposes an agenda-like structuring on what the client will say, by limiting in various ways the way in which he has to tell his story. Even if the client wants to tell What Actually Happened as he experienced it at the time and now remembers it, he still has to address the matter by way of the particulars, regardless of whether or not he sees that as a favourable way of doing it and of whether or not it alters radically or minimally the way he would have told it without those restrictions. It is difficult for the client to ignore or avoid or alter the obvious restrictions imposed by the particulars as a standard and agenda - without it being seen and treated as an evasion by the lawyer. Apart from the overt directions of the lawyer, the client is subject to subtle influences set up by following through as a listener the structure of events as laid out in the particulars, where the usual response is to follow through a parallel counter to that structure.

It is probably safe to assume that most clients think over before the interview what they are going to say about the events that lead to their arrest. The client may or may not know that he will be confronted in the lawyer's office

with a version of the prosecutor's version of what the police are alleging against him. If he is a first offender this likely to be a surprise to him and may throw him "off guard" somewhat (as the lawyer intends). The general lay public are probably not aware that prosecution and defense confer and negotiate "behind the scenes" out of the courtroom prior to trial and that it is the policy of the Office of the Prosecutor in this particular city to give the defense an adequate version of the evidence that will be used against the accused in trial. "Repeaters", though, will be expecting the particulars and thus have the option of preparing for them. In any case, for either first offenders or repeaters if there has been some encounter with the police, the client has some conception of what the police may "know" and may not know about his involvement in the alleged offence and what they are likely to be claiming in court. However, regardless of how prepared the client is to tell whatever it is he is going to tell, he must right away sieve it through the lawyer's device of confronting him with the police version of events as laid out in the particulars - a version the extent of which and the details of which he may or may not have been able to predict beforehand.

In offences involving surreptitiousness or deceit or "stealth", such as "shoplifting" cases, the accused is not likely to know exactly how he was found out; that is who observed him doing what where, how he was observed, what they

saw him do that "put them onto him", though he knows the maneuvers he himself went through to obtain and conceal the articles in question. It may come as a surprise to him that, for instance, there was a one-way mirror or an observation hole in the wall of the store, or that, though he thought his back was turned to all possible observers, he was seen via an angle in the aisle, etc.

So there may be classes of cases that have different relationships to the degree of the client's knowledge of the potential particulars before he hears them. If it is a case where the accused was stopped routinely in a car and the police found some "dope" in his pocket and charge him with possession of narcotics, the accused probably knows roughly what the police know. However if it is a case where the police suddenly break into an apartment with a search warrant, uncover quantities of narcotics and charge one particular occupant with trafficking in narcotics, the accused is unlikely to know what the police "have on him" that induced them to take out the search warrant in the first place. He may not know whether or not he was "found out" as part of an undercover investigation, and, if so, who saw him sell what to whom, when, and so forth. Hence, the accused is unlikely to know beforehand what he can make a story out of and what he can not, because he does not know where he is "nailed" and where he is "safe"; and therefore, where he has room to maneuver facts and where he has not.

So there are instances where the accused does not know what the police know and finds out only when the lawyer reads him the particulars. He may be dismayed to find out that the police know certain things and relieved to find out that they apparently do not know other things. However, the accused finds out what the police have "got on him" only in a sense and to a limited extent, because the particulars do not give the whole of the prosecutor's evidence, but are usually only a rough index of what is going to happen in court. The lawyer is well aware of the fact that the particulars come from a larger universe of facts; and though, through the experience of handling similar cases before with "that" prosecutor (or what he takes to be that "type" of prosecutor) he is able to project and fill in some of the blanks, he is likely to play a conservative strategy, and assume that there is more evidence than indicated in the particulars. Whether the particulars are taken to be closer to minimum than to maximum evidence depends on what the lawyer knows of the prosecutor and the type of case; and on the actual characteristics of the particulars, such as the amount of detail.

One thing of which the client probably is not aware about the particulars is that they probably prevent him from having a "clean slate" with the lawyer. Before the client walks into the office, the lawyer has already "read" the

client in terms of the particulars.¹ The particulars act to inform the lawyer not only of what kind of case he has to cope with, but also, in some ways, of what kind of client in terms of what kind of "criminal" he is as this relates to type of offence and possibly mode of operation², as well as to probable guilt or innocence (or rather to degree of guilt in terms of provability) and to how hard it is going to be for the client to "come up with" a story capable of beating the particulars. So the particulars themselves may serve to generate typifications for the lawyer³, stereotyping his client "before the fact" (of meeting him and hearing his story); and so, the client is facing not only the content of the particulars but the way in which the particulars may prejudice the lawyer as to his likely moral character and probability of guilt. So we see that the particulars have strong implications for the way the lawyer handles the case, and for the client in terms of what he will have to overcome in order to successfully tell a story (to tell a story that the lawyer thinks will stand a good chance of beating the particulars).

¹Lawyers have categories such as: (Lawyer A:) "These are pretty mean particulars. Must be a pretty rotten guy - he smashed some old lady in the face."

²For discussion of methods of criminals at work see: Peter J. Letkeman, "Modus Operandi: Crime as Work", Unpublished Doctoral Dissertation, (The University of British Columbia, February, 1971).

³Typifications are also set up apart from the particulars, as observed in the last chapter regarding Legal Aid and exchanges with the prosecutor who may pass on typifications he gets from the police or from the police report.

It may be that the lawyer's preconceptions about criminal clients and the way in which he sees the particulars have as much to do with the fact that most lawyers think their clients tell stories (tales) than does the opinion (that lawyers themselves give) that most of their clients "actually did it" and therefore have no option but to confess or tell a story, and that since they know confession will not get them off, they tell a story.

Before I begin the analysis of actual stories, let me remind the reader that when the particulars are presented to the client as hard facts against which he must either pit himself or fall back, this is an artifact of the way the lawyer orients to his job in minor Legal Aid criminal matters where he cannot "afford" (in terms of time and effort) to do his utmost to break the particulars down himself via fieldwork, etc.; but presumably he could be paid to do so. It is a feature of the type of practice conducted by young Legal Aid lawyers that for the practical purposes of trial preparation in volume, the particulars are granted this status as a hurdle for the client.

(A) THE CASE OF MR. O'REILLY AND THE BADGE:

Mr. O'Reilly is charged with "Impersonating a Police Officer" and with "Obtaining Goods by False Pretences". He hires a lawyer to handle his case and comes in for an interview.

(He is not on Legal Aid). The lawyer begins the interview by reading the particulars which he introduces by reminding O'Reilly of the charges against him. So right off O'Reilly is made aware of the import of the particulars, in terms of what the facts amount to as a criminal charge. Not only must he speak to the collection of alleged facts in the particulars, but also to what the facts are said to amount to, that is, to their import in terms of the criminal charge. The charge provides a set of relevances to sort out, interpret, and assign weight (as "crucial" and non-crucial") to the facts. Given the particulars, the client can mould his story-telling strategy to fit within the boundaries they provide and to meet the gravity and specific meaning of the charge.

The following is the main part of what the lawyer read out to O'Reilly as the particulars:

(Lawyer A)...The offence is alleged to have taken place at the Green Tree Beer Parlour on the ____ of ____ of this year which is a Friday. You and a person by the name of George Johnson who they have not been able to find were in the beer parlour at about 11:30 in the morning. You were seen by a waiter in there. The waiter also observed a man by the name of Cables. He was in the beer parlour with a couple of people sitting at a table. They observed you about - you and Johnson about two o'clock in the afternoon go over to a table where this person Cables was sitting. They alleged that you...were talking in a loud voice claiming that you were the RCMP. You offered to buy Cables and a couple of people sitting at the table some beer; and they said, "No"; but Cables said, "Yes". You and Johnson are alleged to have told Cables that you were RCMP constables working

on drugs, chasing drug pushers. You were described to the complainant as being Sergeant Williams who was about to retire very shortly from the force. Cables asked, or somebody at the table asked if you had any identification and you showed him the badge, put the badge back in your pocket. Anyway they alleged that you and Johnson had a conversation with Cables, and Johnson asked him for \$20.00. And the reason for this was that you wanted to catch some drug addicts; and what you were going to do was set it up so you appeared as though you were a drug addict and were in need of drugs and in any case Johnson got \$60.00 from Cables. And you...went and sat at another table; and you're alleged to have been acting as though you needed drugs and Johnson went over, and you and Johnson left the beer parlour; and what was supposed to have happened according to the conversation that they're alleging is that when you left - these drug addicts or drug pushers - you were probably going to go outside and then you guys were going to catch them. So you and Johnson left and Cables waited a period of time and he didn't see anybody follow you out; so he went outside and discovered that neither you nor Johnson were there. You had disappeared.

Then on the ____ of ____ a few days later Cables was down at the White Inn another hotel and he saw Johnson. Johnson ran away. So Cables went to the desk clerk and had a conversation with the desk clerk. They phoned the police and went to room number 310 in the White Inn and the police apprehended you there. They asked you about this badge. You were arrested. You said you didn't know this man Cables. And I guess they got you into - yeah, they got you into the police car; and they found a fireman's badge, but as far as you were concerned, no money had changed hands in the beer parlour. Your explanation to the police was that you were an alcoholic and that you play pool for a living. And you stated to them that you'd been drinking all day. That's what they're alleging. Now is there anything in there that doesn't ring a bell with you?

The lawyer makes it plain that these are not just a set of facts, but are, in another sense, a set of inferred allegations. What the prosecutor can make of the particulars informs how the lawyer and client must take the particulars.

Prosecutors can turn particulars from "brute facts" into motivated courses of action:

C: Well the whole thing doesn't ring a bell in my head - to be quite honest with you.

L: Okay.

C: [Laughs.]

L: That's fine.

C: [Laughs.]

L: Let's see what you've got to say anyway. It appears to me the problem - they'll call Cables. They may call the waiter in the beer parlour. They may call the desk clerk, although they may not call him. And they'll call whoever interviewed you - whatever detectives interviewed you. So they may have four or five witnesses.

In the above passage the client begins by saying that the police story is "all wrong". The lawyer soon points out to him that it is not merely a matter of the police story against his story, but that the prosecutor will make the police story "live" by bringing the various characters involved into court to give testimony elaborating on and backing up the police story. So that now "mere statements" in the police story such as "You were seen by a waiter in there" are seen not to be just behavioural descriptions, but statements with definite provable inculpatory import. "You were seen by a waiter in there" does not simply mean that some waiter noticed O'Reilly, "so what" - but it means that the prosecutor can and will ask the waiter to come to court and stand up and bear witness tying the events in inculpatory ways to

O'Reilly. Similarly, "They observed you go over to the table where this person Cables was sitting and they alleged that you were talking in a loud voice", does not act merely to say that O'Reilly moved from one spot to another - it is not an irrelevant detail or redundant as might at first seem (it could be left out - one could merely say that O'Reilly was at Cables' table and the reader could easily and automatically infer that he got up from his table and went over), but has specific inculpatory relevance for what is going to be said by the prosecution about O'Reilly's relationship with Cables. The lawyer (and likely also O'Reilly) know that the prosecution can have Cables get up in court and say something like this: "I was sitting at a table minding my own business having a few beer and this guy I'd never seen before in my life comes over to my table out of the blue and sits himself down". If it had not been known (witnessed) who approached who, the client might more plausibly be able to claim that the complainant was for instance making advances to the accused and not vice versa. But as it is the prosecutor can make it look as if in going over to Cables' table O'Reilly had fixed on Cables as a likely mark in his con game and was approaching him to try out his fraud routine. The lawyer can see that it is important to his imputation of events as a con game that it was O'Reilly who approached Cables and not vice versa; and that the prosecution has more than one witness to back this up; so it is pointless to let

the client get away with a story that flies in the face of "four or five witnesses". And indeed the story that O'Reilly ends up telling contradicts his original assertion about the police story that "the whole thing doesn't ring a bell".

O'Reilly tells a story that grants some of the crucial facts in the particulars, but offers a different outcome. One of the constraints imposed on the client in story telling by the lawyer via the particulars is that the client's story has to lead broadly to the same set of appearances as the police story¹. However both lawyer and client know that more than one course of action can produce the same set of appearances. And O'Reilly constructs a story that shows us how one set of appearances (as laid out in the particulars) can be seen to be generated by an alternative

¹A more exact way of putting this is to say that the client's story must not only incorporate in a plausible way the system of facts in the particulars, but it must also re-arrange and transform them in such a way that the chances of beating the rap or minimizing the punishment are maximized, specifically: (a) a story that is told to completely deny any involvement in the alleged crime must provide documentation in the form of for instance "alibis" for locating the accused in a different time and place than alleged, or documentation that provides that although the accused was not at the alleged scene of the crime, he did not engage in what amounts to provable criminal activity. In the latter instance the client must (b) provide documentation that he engaged in some kind of noncriminal activity that nevertheless located him in the same time and place, and while speaking to the particulars does not support them. (c) Another alternative is to tell a story that shows that a more minor crime than the one that the accused is charged with (usually what is known as a "lesser included offense") generated the same, or roughly the same particulars.

course of action that is not a criminal course of action. In doing this the skillful story teller contradicts the particulars as minimally as possible. Not only does O'Reilly tell a story that generates the same set of appearances in ways that minimally contradict the particulars, but he also has found a way of telling a story that is totally discrediting to the opposition (the complainant). In O'Reilly's story, the complainant is presented as a homosexual arranging an illicit meeting in a bar:

Johnson and him (Cables) was talking about a homosexual matter. I hate to say this. This is adding something to a man's character which is very...insinuating - you know what I mean. I think the detective will verify this. It concerned money that was passed. I was a bit drunk, but I was not this drunk. It was in the afternoon; it was after dinner anyway. The conversation went on to this homosexuality concerning the _____ minister at _____. I think the detective will verify this. That's what he told me they were speaking about at the table. Johnson and this other gentleman - this man who has allegedly made the charge. And there was money promised to meet this gentleman at the White Inn. Johnson was going to meet this gentleman that put this charge against me.

(The lawyer interrupts the client at this point to ask O'Reilly about the badge. The lawyer says: "What I want to know is what - what about the badge bit?")

The badge bit - I'm quite honest about the badge. He asked me, he says, Johnson says, "We're both cops!" I said, "Yeah - does that look like a copy to you! - Auxiliary Fireman!" [laughs]. You understand what I'm sayin. [Laughs]. I says, "A police badge?" He started to laugh. During this conversation - as much as I can remember - as I said I was pretty drunk at this time. But I can remember - isolated things that happened here - which was on a Sunday. That was a - That was a Saturday this happened. He passed Johnson a fifty-dollar bill and three tens: Eighty dollars. It was three tens and a new fifty-dollar bill. I was

sitting at the next table to them talking to four English people from England. In the meantime everybody was drinking pretty heavy. We had quite a bit of liquor, both the complainant, Johnson and myself. It was decided that Johnson and him would go to the White Inn on Sunday morning. Normally people don't check out of a hotel when the hotel is paid at the Red Barn Hotel which we did pay - for the day. So we checked out at nine o'clock. I started scoffing about the idea of going to the White Inn. I says, "We can't pay that money!" He says, "I got a fruit here - an oddball, you see. He'll pay it". He says, "I'm spending the day with him". I cautioned him here and told him to forget about the matter. I said, "You're kinda young to be pulling off this stuff with other, other men". He's twenty-six. We walked into the hotel and checked in and I paid \$19.50. He said he wanted a good room with a bath and because this gentleman that we had met would be visiting him early in the morning. And I would have to take off. I says, "Very well, we will". So he left the hotel. About 9:30 we had a drink. Then George decided to go out and get a razor because we had left our razor incidentally at the Red Barn Hotel. So George did not come back. It's possible that - he was a little bit drunk at the time - we were both drunk. He didn't come back until I'd say a quarter to ten. He came back at a quarter to ten with a razor. And he told me, he says, "You better leave the room for a while". I says, "Leave to where?" And he says, "You can always go to the - there's plenty of places to go". He says, "You have a hundred and thirty dollars on you...in cash". Which I did have at the time. He says, "I'm puttin this guy through". Well to wind this up, and uh, it would be a scandal, but that's the situation. The only thing I knew the cops were in my room.

(The lawyer asks him if Cables was there in the hotel room.)

No they were in a debate and argument down in the lobby - both of them. They were debating over money. So I went up to the room to get a drink. I went back up to the room because I have five dollars - or five bottles of whiskey, which was confiscated at the time. So they had a debate. What happened, I don't know. Johnson automatically disappeared. Before I knew what was happening there was three officers in my room. That's the situation.

O'Reilly's story grants the two core pieces of evidence that will be exhibited by the prosecution in court: the badge and the money, but gives them a very different "social history". The fact that the particulars have O'Reilly flashing a badge is not just one fact among others, but has crucial significance. In flashing a badge, one is doing an unmistakably policeman-like thing. This is how policemen credential themselves as policemen. The ordinary citizen will allow someone to do a whole range of things upon being shown a police badge that they would not have allowed without seeing the badge produced. Also the badge is a physical object rather than an ephemeral piece in a conversation and cannot be denied out of existence in the same sense that "mere words" can. There is a sort of "object magic" about actual physical pieces of "evidence" that are produced in court and tabulated as exhibits. Somehow this gives it a solid dimension of reality that someone's word does not have. No matter what is said, there is the thing before your very eyes; it is an uncomfortable visual reminder, and needs a special kind of explanation¹.

¹In conversation with me, Lawyer S marvelled at how weapons and other pieces of physical evidence are treated with "reverence" and talked about in terms of scientific tests run on them, but that the courts do not do the equivalent regarding questions of mental states. Here a psychiatrist's opinion seems to be enough, when there should also be available scientific studies of the patient's behaviour in the natural setting, etc.

O'Reilly's story does not do away with the badge but alters its identity (not a policeman's badge, but a fireman's badge) and changes the circumstances so that it comes out that he was not using it to credential himself as a policeman, but that he was merely using it as a prop in a conversational joke, as a follow-up to his companion's harmless remark that they were both cops. He shows a fireman's badge and says in light sarcasm, "Does that look like a police badge to you?" This version leaves room for the interpretation that the complainant somehow confused or misinterpreted a harmless remark, as people do after several beers. In any case, O'Reilly's story has rather skillfully taken care of the badge - nicely side-stepping the lawyer's attempt to use the badge as a way of challenging the story about the homosexual arrangement¹, when he interrupts the narrative about the homosexual transaction by saying, "What I want to know is what - what about the badge bit?"

O'Reilly takes care of the money in an equally skillful way. He admits that they received money, but provides a counter to the assertion in the particulars that it was obtained by fraud. It was money obtained for an immoral purpose, he regretfully admits, but thereby provides that it was not money obtained illegally and therefore that there was no

¹See p. 154 above.

fraud involved. A story that denied the existence of the money would be less effective than this one because it could not stand up against the fact that the money will be produced in court as evidence. The story about the homosexual arrangement may not stand up in court either, in the face of the complainant's countering story; but at least it would go further than a story which denied the money exchange altogether, because the prosecutor will produce the money in court as evidence.

It should be noted that there is a specific feature of the circumstances in the particulars that enables O'Reilly to counter the con game allegation with a homosexual story; the facts that O'Reilly has to speak to in the particulars are provided by another lay member of the society as complainant, rather than by the police as complainant. In addition, the lay complainant is a co-participant of the milieu in which the "dealings" (whatever they were) occurred. The complainant, as well as the accused, was frequenting the beer parlour which was the scene of the alleged crime. That the complainant who is providing the story in the particulars was someone in the same general social category as the accused allows some plausibility to the allegation that the complainant was disappointed in a homosexual transaction with a friend of the accused (that is, the co-accused) and was seeking revenge in laying a complaint of False Pretences against the accused. If, however, the complaint had been

laid by an undercover policeman claiming to be victimized by O'Reilly, such a story about homosexual transactions would not be allowed the same plausibility. Even if the lawyer felt he had reason to believe a similar story by O'Reilly about a police complainant, as a practical matter, the lawyer would not treat that story seriously, since it is against the known and accepted courtroom game rules to "call the police liars". Attributing motives of revenge and homosexuality to the police just would not "go over" in court.

The social identity of the complainant can thus be seen as having a structuring influence on what stories can successfully be told. If the complainant is a store detective or manager or other person in a "responsible" position in society instead of being someone in the general social category of the accused, their stories are granted the same sort of assumed authenticity in court as the police story.

Lawyer D:¹ Quite bluntly I suggest that Mrs. _____ [a store detective] was lying when she said she saw the accused leave the store with the jacket. She did see him walking around the store wearing a jacket which she assumed was one of the store's jackets and she made inferences about his movements, but I submit that she was not able to observe him leave the store with the jacket. She had already come to conclusions about him and called the alarm and so she had to say she saw him leave the store with the jacket, when in fact she did not.

¹This passage is taken from my notes taken in court during a "shoplifting" trial.

Judge: Now, just a minute - are you trying to tell me that Mrs. _____ lied? That she lied! I really fail to see that. What you mean is she was probably mistaken.

L: No - I mean - she said she saw him doing something she did not see him doing.

Judge: I don't follow this "lying deliberately" - saying something while knowing it to be false. Why would she do that!

L: Because she'd already committed herself.

Judge: Well all the more reason not to lie. No, I just can't accept that. People like Mrs. _____, in her position, do not lie.

If the lawyer in the above exchange had tried to show that the store detective was mistaken or acted in error, or was hasty in her judgment, he may have "gotten further" with the judge; or if the person to whom he had been attempting to attribute "shady" motivation was of the same social vintage as his client, that is, another out-of-work, would-be shopper in a department store (instead of a person in authority in that store), the judge may not have considered the assertion that he was lying preposterous. The social character of the complainant then can be seen as imposing a constraint on the kind of story that can be structured for court; in most cases the complaint is laid by the police or someone in more responsible, "respectable" social circumstances than the accused and it is not practical to challenge their motivation. In the

special circumstances¹ of the complaint in O'Reilly's case where the informant was a lay person - probably much like O'Reilly himself - it is possible to plausibly show that lay person to have an "ulterior" motive in becoming a complainant.

In the following case we have an example of circumstances in which the complainant is the police and where, in contrast to O'Reilly, the accused does not tell a story that discredits the informants, but one that suggests that they were mistaken - and quite naturally and reasonably so. Her story, too, accounts for inculpatory appearances in exculpatory ways, but on grounds of a different type than those used by O'Reilly.

(B) THE CASE OF MRS. APPLEBY AND THE BREATHALYZER:

Mrs. Appleby has been charged for the third time in two years with impaired driving. The police claim in the particulars that she had a breathalyzer reading of point two and describe the details of her physical demeanour and behaviour

¹A type of case where it is not unusual to have a lay complainant is an assault case where two people are involved in a brawl in the pub or on the street and one of them decides to "rat to the cops" and becomes the complainant if the police decide to lay a charge. The person the complainant was fighting with will become the accused. In such cases, depending on the accused's story and on the particulars, it may become an issue whether or not complainant and accused knew each other, and, if so for how long. Presumably, if they were "drinking" friends, or see each other around the streets, it would be open to the accused to try to "turn the tables" by claiming that the complainant was unjustified in laying the complaint.

that they interpreted as displaying symptoms of impairment. In her story she claims that she consumed only three beers in the course of the evening in question. Why then, asks the lawyer, did the police say she had a reading of point two on the breathalyzer. Mrs. Appleby says that she does not understand why the police are alleging a breathalyzer of point two and backs this up by saying that the police themselves "told" her differently at the time. She claims that the breathalyzer specialist himself told her she was not impaired and that that tallies with her own account. She does not imply that the police were maliciously motivated or corrupt, but only that there must be some confusion or error involved in the process of the reading being taken and passed along through police organization to its place as a number in the accused's file.

Lawyer C: And you're sure you only had three bottles of beer in the whole day?

C: I had two bottles of beer, uh - two glasses of beer at the legion.

L: Um-hmn.

C: And I had a pint of beer at this person's apartment. And that's all I had except for the beer I drank the day before when I was at my girl friend's place, which might have been maybe three to four pints of beer the day before.

L: It seems incredible that you had a reading of point two.

- C: Yes, I know; and then when I asked the breathalyzer man, I said "What's my readin?" And he said, oh, something about zero point something, and I said, "Is that impaired?" and he said, "No," I can remember him saying that.
- L: Well where'd they come up with the point two?
- C: I don't know. This is what the analysis came up when they passed it to me in court when I was in custody.
- L: Who told you this?
- C: The breathalyzer man said -
- L: The guy who was operating the machine?
- C: Yeah, I said, "What's my reading?" And he said, he either said - I don't know - It was point five something.
- L: What do you mean, "point five"?
- C: Zero, point five, or something like that.
- L: It could be point zero five.
- C: Yeah. And I said to him, "Is that impaired?" And he shook his head. And with that the police officer took me upstairs.

She elevates what she thinks she remembers someone to have told her as better evidence than the recorded and reported police reading. She proceeds to tell a story that grants that she was staggering and slurring her words and unable to do the intoxication tests well, but gives a plausible explanation for having "drunken type" symptoms without being drunk. She explains that she suffers from a disease, "Hashimoto's Struma" which causes her to stagger and to slur her words. Not only was the disease impairing her speech and movements,

but in addition she claims that she was suffering severely from nervous tension; and she builds into her story how her husband, who was in the habit of beating her, had beat her that very day, and how her whole life at home and work was full of problems and disasters with no easy solutions. Not only does Mrs. Appleby thus account for the inculpatory appearances as set out in the particulars, in exculpatory ways, but she does so in a way that is likely to arouse sympathy: she has a husband who beats her; she has a terrible disease that causes her constant discomfort; she has trouble working because of her illness; her husband does not earn enough money to support her; in addition to all this, the police mistreated her and laughed at her; and if she is convicted she will lose her job and thus will lose any hope of being financially able to leave her husband and live entirely on her own; and, to top it all off, her life is in danger if she has to stay with her husband because she feels that sooner or later in one of his violent attacks he will kill her. The following are a few excerpts from Mrs. Appleby's story that give the gist of the main points:

L: So...What happened now?

C: So this time, um...

L: When - give me dates and times first of all.

C: First of all Friday the tenth I worked a double shift - sixteen hours; and I work nights, and I do a three to eleven shift; and I got off duty on the morning of the eleventh. My husband had been drunk for a week; and I got kicked out of the house by noon; and I went to my girl friend's

place on _____ street and stayed until the wee hours of the morning; and snuck home again in the middle of the night - because by that time he was half-way sober. And then on the twenty-second I went to _____ street in the afternoon because I couldn't hack it any longer - fighting and arguing and threatening and because he's just like an animal when he's been drinking [sigh] and then I came back - then that day I had - Oh, I'd been drinking in there - beers, a couple of beers, not too many because I don't drink that much. And then I came back after twelve and went to bed on the twenty-third. I stayed all day in bed to keep away from his mouth and by nine o'clock he was still drunk, and I got out of bed about nine-thirty or ten like that night - and he went beserk! And grabbed the butcher knife and held me at knife point in the livingroom for I don't know how long. And I rec- he had kn- the knife across here is gone now and plus I got three gashes in my left elbow and plus I've got several bruises all over my back and I was in my night attire and I finally got away from him and run out into the back yard.

(She talks about going to her girl friend's place and the party that was going on there and how many drinks she had and then going to the Legion and then going back to her girl friend's at an early hour when the police stop her and take her to the station. It continues:)

C: Then the police matron frisked me - and practically exposed my naked body in front of all these men, which they got a big charge out of - and then there was some voice came over the loud speaker and said: "What's going on down there?" Because these cops were roaring laughing because this police matron practically had my sweater off, frisking me, which I'd never had done before; and then from there he asked me to do these physical tests; and I quoted to them that I knew that I couldn't walk a straight line because of my back. It was hopeless - because I would have trouble walking. Well to my knowledge I hit my nose, but I know that I did a very poor job of it, because my left arm was paining and plus my teeth were loose in the back, cause I'd been hit across the head by my husband.

L: So it's got to depend a lot on what the evidence was of your demeanour at the time. You see all they'd have to do is just establish really, which isn't conclusive; and then your demeanour at the time - how you appeared physically; and uh-

- C: Well first of all I suffer from Hashimoto's disease, which gives symptoms of impairedness most of the time - which I have never recovered - look at me now - look! I'm just shaking!
- L: Yeah.
- C: Yeah, I'm - look I'm an absolute mental wreck [sob] ; and I've got no place to go. sobbing, voice breaking.
- L: Who's your doctor?
- C: [Sob] Ohhh! [Sob] [Sigh] Ohhh!
- L: Who's your doctor?
- C: [Sob] Dr. _____ - He's given me up, because I can't work it out with my husband [Still sobbing] ...I mean he's just given me up as a patient because my nerves are real bad and I call him up; I get real panicky and you know. And he said that if I didn't get away from my husband, because I mean he's got no use for my husband, and he just says, "If you don't get away from him, you're going to get killed". That's the specialist that did my thyroid operation in which...it gets acute periodically and when my nerves are bad, my thyroid gets out of whack and I slurr my speech and I have sluggishness of movement and when I-
- L: What's this disease you say you suffer from?
- C: Hashimoto Struma.
- L: Hashimoto...
- C: And that's sluggishness of speech and you become also hysterical...seriously.

Mrs. Appleby's story skilfully counters all the allegations in the particulars by making her come out as an unfortunate and diseased rather than drunken woman; and it does so in a way that "saves face" for the police. It allows the police to remain looking reasonable: they were not wrong in claiming that she looked impaired. The police were not being

malicious or unobservant or "stupid" in claiming that she looked impaired. They simply made a quite reasonable inference which happened in her special case to turn out to be, technically, not correct. She in fact shows good reasons why the police should reasonably have thought her to be impaired. So Mrs. Appleby provides that the judge or any other hearer of the story does not have to accept that the police have been grossly negligent or malicious, etc., in order to conclude that, within the boundaries of reasonable doubt, they could have been wrong.

However, it is still the police that she is talking against, and, in view of the fact that they are likely to "stick" to the letter of their story and insist that she not only appeared impaired, but that she also actually was impaired, the lawyer feels that the story by itself will not stand up in court, and that it must be bolstered by doctor's evidence. Her story may be intrinsically strong, consistent, plausible, and also reasonably accommodative to the police version; but, from the lawyer's point of view, this is not enough. Her "challenge" to the police story, however subtle and face-saving, in order to stand up against the police version, must be documented in some way. Her "word" (the story by itself) is not enough; it must be documented.

L: Well it sounds to me like your disability has certainly contributed to your demeanour at the time. I don't know to what extent of course; but I think it's essential that we get some medical opinion as to your capacity to stand up

under those circumstances and perform those physical tests and to speak coherently and to survive a nervous condition. I'm not saying that is necessarily going to win an acquittal ...you see, without having heard any evidence, it puts us at a disadvantage. And if we come on really strong with a doctor who testifies that you were incapacitated for this reason and this reason and this reason, I think it's going to have a profound effect on the judge, and a lot greater effect than merely having you state..what's happened to you, which I don't think the judge would - seriously, I don't think the judge would believe; because two prior convictions and a natural tendency on a person to more or less plead on their own behalf.

The lawyer feels that, in order to be fit for court, the client's story needs documentation in the form of expert evidence to attest to the fact that Mrs. Appleby's disease and general emotional condition could have produced the same symptoms of impairment as are normally caused by alcohol. The doctors are not witnesses in the sense that they were actually-present-as-it-happened on the night of the arrest, but they are the only people qualified and legally legitimized to document Mrs. Appleby's usual physical condition and its symptoms. Fortunately, Mrs. Appleby apparently does not possess some shadowy, unnamable disease known to herself as bearer alone, but a definite disease recognizable to the experts. Further, Mrs. Appleby has been treated by experts who can be called upon not only to explain the disease as a disease, especially in terms of its symptoms, but also attach that disease to her.

This takes us from the particulars to another dimension of constraints on the story: CREDIBILITY. A story that is likely to be successful in court must not only meet with the inculpatory allegations in the particulars in exculpatory ways, but it must also meet the court's standards of credibility (as pre-interpreted by the lawyer) before the lawyer will consider using it in court.

V CREDIBILITY AND THE STORY:

A story will not be accepted in court merely because it counters the particulars. It must also meet with judges' notions of believability. Few stories can do this on their own merits up against the courtroom suppositions that ninety-nine percent of those charged "actually did it" and that it is "only natural" for the accused to plead on his own behalf (that is, "to lie to try and beat the rap"). Some form of outside substantiation (for example, alibis, expert witnesses) is needed to bolster the chances of the story being accepted by the judge. In everyday life we can often substantiate our stories when challenged by very simple devices such as by simply saying in an offended tone, "Do you think I'm not telling the truth!", or "I don't care if you believe me or not, but I'm telling the honest truth"; or, "Just ask John". But such devices are of course powerless in court.

The lawyer will depend on the story by itself as a defense only as a last resort when there seems to be no other defense available. Even in this event, the lawyer will use the story (rather than pleading his client guilty as the only other alternative) usually only if he thinks the chances are in favour of the judge believing it. If the case for the defense depends entirely on the story; that is, if the client's defense depends solely on "his word" against the police version, conviction or acquittal will depend on whether or not the judge "believes" the story. If the judge does not accept the client's version, he will find him guilty. In order to find the accused guilty when there is no defense other than the story, the judge need go no further than to say, "I do not believe the accused". Lawyers routinely decide whether or not their clients' stories are stories that a judge is likely to believe.

In assessing credibility lawyers look not only to the internal features of the story itself in terms of such notions as "plausibility, but also to how the story matches up with certain characteristics of its bearer and of the context in which it is told. Before I consider "external" factors that affect credibility, I am going to present an example of a story that "falls down" on its internal merits.

(A) THE CASE OF MR. JONES, HIS SON AND HIS SON'S
FRIENDS AND THE MEAT, MIXMASTER, AND POTS AND PANS:

Mr. Jones is charged with Possession of Stolen Property. He begins his story:

Well, um, it's quite a long story [sigh]. I was at home and a whole bunch of kids that uh, come around to my place...- and they went and stole a whole bunch of things and they brought them to my place.

The client begins by giving himself a passive role in events; he was sitting at home and the action happened to him. Someone else stole the goods and brought them to his house, thus inevitably and unavoidably involving him. Mr. Jones is allocating questionable activity to others and keeping himself as a bystander involved by association only. Mr. Jones continues this tactic : once the stolen goods get to his house he keeps himself in the passive role when the lawyer asks him what happened to the "stuff":

Well it just happened there and nothing happened.

And again when the lawyer asks him what he did with the stuff:

Oh, I just left it in the house.

The lawyer then says,

Now did you leave it in the house? Was - was this stuff in th- Did you consider it to be yours - or theirs?

And the client answers:

Theirs, not mine, cause they, they brought it home - it wasn't mine.

However there is a problem with Mr. Jones imputing responsibility to his son; and this is that his son falls into a category which in the court's view makes his son ineligible for responsibility. Mr. Jones' son is not old enough to be considered responsible: He is eleven years old.

Lawyer B: You see, it isn't even an excuse in law to say - you know, or - to open up and say, "Well the kid brought this home and I didn't know what to do with it. So I didn't want to phone the police and involve him". But that still leaves you with the possession. See I was thinking in terms of - Well your son brought things home and they were his. So that you weren't in possession and he, he was...

C: Yeah.

L: But if the boy's eleven years old! Ha, ha. You know - they're gonna look at that. Oh, yeah! Yeah. Sure!

C: Yeah, right. I'm not doin very good, am I? That's what they'll think.

L: That's right.

C: I'm not setting my kid a very good example.

Up to the point where the lawyer makes the client bring in a further identifying characteristic for his son, beyond him being just a son (he is now a son, aged eleven years: a very young son in the context of the responsibility that the client is hoping to shift from himself to his son), the story might have been a viable one for use in court; but both lawyer and client immediately recognize that responsibility is definitely not something that can be attached to any

incumbent of the category eleven-years-old age-group. Further on in the story, the client sheds a little more responsibility by bringing in his son's friends as characters, and by being careful to mention their ages, since some are older than his son and therefore could be seen as having an influence on his son and being "more" responsible than his son for the thefts:

C: Bobby's got a couple of other friends he hangs around with. About twelve - one was about ten or eleven, another one was about eleven or twelve.

However the added details about Mr. Jones' son's friends do not improve the story as an answer to the charge, since it still leaves Mr. Jones in possession of the stolen items.

Another objection to Mr. Jones' story (which the lawyer discovers subsequent to this interview when he gets the particulars) is that it contradicts the "statement" he allegedly made to the police at the time of his arrest. The particulars say: "Jones stated that the meat was bought at the _____ store and the powders were bought from the _____ store . Police interviewed managers of both these stores and both said the items in question did not come from their stores." (Mr. Jones is accused of possession of stolen meat, jelly powders, a mixmaster, and various pots and pans.) In his story to the police, Mr. Jones accepts responsibility for possessing the goods in question, but gives a legitimate course of events leading up to his possession - a course of

action which provides that they were not stolen goods.

(Another option would be for him to say that he acquired the goods in a certain legitimate way; for instance, that he bought them from a friend at a poker game. This leaves the option of them being stolen available, but the option of him knowing that they were stolen unavailable.) If they were bought in a store, they could not be stolen goods. In saying he bought those particular items at certain stores, Jones is not explaining the whole collection of allegedly stolen items found in his possession, but only some of them, and not just "any" some of them, but a certain class of them: those that were not used and could be bought new (as opposed to borrowed or stolen used articles). Since Mr. Jones in his story to the police has not given any account whatsoever of the used items in the collection, his story to the police is inadequate. At least by the time of the interview, Mr. Jones is aware of the fact that if he has not accounted for the whole collection, he has, in a sense, not accounted for any part of it:

L: ...and possession, the possession part: If they can prove that one of these things was stolen, it doesn't look very good.

C: You know - one, uh [mumble] brings on the rest, doesn't it?

As a collection of items, the goods in question are an odd assemblage: What normal shopping trip brings you home with frozen meat, used pots and pans, large packages of jelly powder, a used electric mixer, a guitar and other small things?

Maybe if you went to a rummage sale and then to a meat market, - but what kind of activity is this for a group of young boys? If the collection of items in question were just an assemblage of used kitchen articles, or just an assemblage of groceries, it would be easier to construct a legitimate course of events that lead up to their possession and identified them as not stolen items.

In any case, neither the story that he told the police nor the story that he told the lawyer "gets him off the hook". In admitting to the lawyer that he knew the items were stolen, and in locating them in his own house, Jones has in fact supported the charge against him. At the same time, though, neither story "gets him in deeper" - in that he avoids the possibility of a charge of theft by building into the story the assertion that people other than himself brought the goods to his house. In telling the police that he bought some of the items at a store, Mr. Jones is asserting that those items were not stolen, but this gives the police an opportunity to try to prove that he did not buy them at the stores in question.

We see from the above example that the internal features of the story itself (such as plausibility and adequacy in countering the particulars) are important in assessing credibility; however, when the judge listens to the story, he hearing not just a story, but a story told by a particular someone in a certain kind of predicament. The relationship

between the story and its bearer and the context in which it is told is important in the judge's assessment and therefore to the lawyer in his preparation of the case. From the point of view of the lawyer (orienting to what he knows things "count for" in court), credibility lies only partly in the internal characteristics of stories such as content, logicality, plausibility, etcetera. Credibility is also something that is imparted to stories in the standardly accepted courtroom ways, such as by providing "independent", "reliable", and "believable" witnesses. Here the defense tries to guarantee that what the accused says happened did happen - by virtue of other participants in the original event coming to say that that is in fact the way it happened.

Because of the necessity of documentation - normally via witnesses - whether or not stories can be made credible depends on the way in which they can be seen to lock into other people's lives and activities, and their ability and willingness to witness it¹. Presumably even an implausible

¹The following excerpt shows some of the problems involved in digging up witnesses, and some of the advantages in being able to do so:

C: Mnn...Like I mean, I - I can't remember specific dates. I just decided that night to go back to the apartment and get my girl friend, you know. They were staying with me at the time.

Lawyer B: Where's your girl friend. Who's she?

C: Her name's _____...Well I- I don't want to involve her in it, you know - probably we should, but I don't want to, if it's possible at all.

-
- L: Well - it's just that... [slight laugh] she's able to substantiate the, the uh, the claim.
- C: Um-hmn. Well is it a question of the judge believing me or not?
- L: Sure, sure.
- C: Because, like I mean, it's uh - I'm an assistant ()*.
- L: Right, right, but he- he has to evaluate that and it's just - there's no doubt in my mind that uh - a lot of the law...
- C: That's what I'm doing right now.
- L: A lot of the law is a weight of evidence. A lot of the law is a weight of the number of witnesses you've got...
- L: Yeah - I- I feel stupid...
- C: If there's forty cops and there's one accused - you can be damned sure that he's gonna be convicted. If there's one cop and forty defense witnesses...probably be acquitted. There's some truth to that. So somebody can help. Somebody can come along. If you want to make sure of it, better, better bring her.
- C: Mnn- I don't know if she can get time off work then. I'll have to ask her, but...
- L: Well I can subpoena.
- C: Well don't - you know. I mean, uh - see I don't think that I'm gonna get her involved in this either.
- L: Why not?
- C: Well I dunno...It's just a hassle for her.
- L: It'll be a hassle for you if you want to stay, cause you're gonna be deported if you're convicted.
- C: You think it will be for sure.
- L: I would say for sure, yeah...So that's something you've gotta weigh. If it's a matter of convenience between her taking an afternoon off work - an, an, an you guys being through forever and a day here.

*This convention is used to denote unintelligible conversation.

story if documented with the right witnesses could become for courtroom purposes a credible story. Credibility does not depend on whether or not the lawyer believes the story, but on whether or not he thinks it will be possible to make it believable in court, that is on whether or not it is "documentable". In this sense, credibility becomes an organizational characteristic, as well as being a story-inherent characteristic.

So a story must not only "sound likely" (that is, probable), but also must be documented in some way in order to become believable, as well as probable. The known situation in court is such that a reasonable sounding story is not sufficient in the face of its contradiction by the police witnesses - that is, unless the accused does not happen to "look like" the "kind of guy who would do that type of thing" and who is able to tell his story with a very credible demeanour¹. In minor criminal cases the client is unlikely to be of this type.

¹Regardless of whether or not he is "telling the truth", many lawyers have said to me that it is "very difficult to get away with lying on the stand":

Lawyer H: "The professional con man is the only one who can get away with lying on the stand. He speaks well, looks you in the eye, smiles a bit at the right moments. He comes across with clarity, sensitivity, common sense. Your sympathies tend to go out to him. But these people are one in a million."

When the judge listens to the story he is not hearing just a story, but a story told by a particular someone in a certain kind of predicament. The relationship between the story and its bearer and the context in which it is told is important in the judge's assessment of credibility and therefore to the lawyer in preparation for trial. Credibility for the lawyer is not entirely or even mostly a question of whether a story is logically flawless, etc., but also a question of how the story matches up with its bearer, and how he via the story matches up with the character of the charge. Does he look like the kind of guy who would be doing what he says he was doing and does he speak convincingly and with "normal" or appropriate demeanour? Does he seem like a typical petty thief, or robber, or child molester - giving the typical innocent pitch, or does he seem rather like some ordinary guy caught in untoward circumstances by chance and seem like the sort of person who through clumsiness or whatever would get mixed up in an unfair and inappropriate arrest?

The character of the charge is relevant to how the lawyer sees the client and how he sees the story. Lawyers make judgmental distinctions about types of offences and types of offenders¹. They describe typical differences in

¹Just as do Sudnow's Public Defenders.

the personality type and usual social characteristics of for instance typical "robbers" as opposed to typical "con men": they believe for instance that people who do violent, "brave" things like armed robbery are very different from people who do "safe" cheating scheme things like forgery and impersonation and various "con games"¹, who are again different from people who are likely to be up on charges involving "impulse" things like common assault or threatening.

In the following example Mr. Zellers a client accused of Possession of Housebreaking Instruments displays right in the interview the kind of behaviour suggested by the charge: After Mr. Zellers tells a story that explains that the "tools" were for fixing his girl friend's hot water heater which burst at four o'clock in the morning, Mr. Zellers produced a burglar's collection of goods, thus:

¹The lawyer who handled O'Reilly's case claimed that the kind of story that O'Reilly told and the way in which he told it identified O'Reilly as the sort of person who is a likely con man. He told a slick story in a slippery way, and hence defeated his purpose in telling it. He would have been better telling an awkward story in a clumsy way.

Lawyer A: "Funniest damn case I've ever had - this old Irishman down in the pub - pulling off his routine. Had it so well worked out he got eighty bucks out of the complainant. He masterminded the whole thing. He says he's an alcoholic and earns his living playing pool. Well that's inconsistent - yuh can't play pool when yer coked. What bullshit. Cock and bull! Pretty hard to fool the judge. They see so much of it. He's just gonna say: 'O'Reilly you're lying!' With a story like that it's like wearing a flag saying 'I'm a con man!'"

C: What would you like for a Christmas present?
How about this baby? [Producing a polaroid
camera.] Eh?

Lawyer A: Where did you get that? Is that yours?

C: Yup.

L: It's a good one, eh?

C: Oh-oh - it's one of the best.

L: Where did you get that?

C: Fred's a dealer, you know.

C: Hey, have you ever seen a lighter this size? It
works too. Oh, I've gotta put a wick in it.

L: Have you?

C: I've got one in my pocket somewhere. Which
pocket is it. I don't know. Got more junk
on me than a junk collector.

L: Yeah.

C: Oh, Fred's got any sort of thing you want...The
basement's full of TV's, radios, old ones, new
ones...

L: Okay, well I gotta-

C: Well you'll buzz me sometime tomorrow night.

L: Yeah.

It would be hard for the lawyer to avoid the conclusion that Mr. Zellers is somehow involved in the burglary business, after the above interchange in which Zellers demonstrates items that suggest the very behaviour that the story he has just told is trying to defeat. Since it does not come out as part of the story, the lawyer does not need to let it influence him in his assessment of the likely success of the

story from the point of view of credibility; however, it is not likely to increase his confidence in the "non-burglar" character of his client; and hence his confidence in the client being able to "fool the judge".

Another way in which the courts determine credibility is in terms of the "record" of the bearer. Generally speaking it is common knowledge in the legal community that if the client has a record for the offence that he is presently charged with, the judge is not likely to believe an undocumented story which claims that he "didn't do it" (this time). The lawyer inevitably asks the client sometime during the course of the interview whether or not he has a record; and the client's answer to this question has significant consequences for the lawyer's assessment of his client's credibility and for the lawyer's decision on what to do with the case. The lawyer may already know before he asks the client, "Do you have a record for anything?", the answer to this question (from information given to him by the prosecutor along with the particulars). If the lawyer knows the answer to this question and asks it anyway, he does so for a reason; and that reason is not usually to see if the police are wrong in alleging a record, but to "test" the client. Lawyers take this situation as telling them a lot; for instance: Will he lie about his record? If so, he has probably also lied in the story and is likely to be "caught out" by the prosecutor in cross-examination.

If the client is charged for instance with theft under fifty dollars and has a record for the same, the lawyer weighs this against putting the client on the stand to tell his story, because the lawyer knows that someone with a record for a particular type of offence who claims that he did not do it (this time) is not likely to be believed. If the client has a consistent and exclusive record for theft under fifty dollars and is up on a charge of, for instance, indecent assault, the lawyer knows that he can argue that sex offences are not his client's line, and the lawyer takes this into consideration in assessing the client's story and what to do with the case.

The length of the record and places of occurrence tell the lawyer how well known to the police his client is likely to be, which can be an important consideration in the management of the case; (for example, in assessing the chances of winning by putting identity in issue¹). For

¹In all criminal cases the police or lay complainant must be able to identify the accused; that is, to pick him out from the "crowd" in court. If the defense has reason to believe that the police "got the wrong man" or that there is a chance that the complainant will not "remember" the accused or will confuse him with other people, the defense counsel will "put identity in issue"; that is, he will ask the court to have the complainant try to select out the accused from the others in the audience in the courtroom. (The lawyer may go to some trouble to seat the accused amidst people of his general age, coloring, etc.) If the accused is not successfully identified, the case will be dismissed at that point.

instance, on a robbery charge where the client is claiming in his story that he "had nothing to do with it" and that the police just picked him up as a likely candidate, if the lawyer sees that the client has a long¹ record for robbery in the city where the charge was laid, it will seem more possible that, as the client claims, the police just picked him up as a likely candidate; (and there may be ways of making this seem credible in court). But whether or not the lawyer comes to this conclusion depends on the details of the particulars and on the lawyer's assessment of the client's credibility by criteria other than the record.

¹The length of the record also gives the lawyer some idea of how harsh sentencing is likely to be in case of conviction; and therefore, of how important it is to try to use the client's story, as opposed to simply pleading guilty. If, for instance, the client is up on his second charge of Impaired Driving, a jail sentence is mandatory, and therefore a guilty plea means going to jail for sure. Judges in general are thought to be likely to impose higher sentences on repeaters. If a client has no record, this makes a guilty plea less disastrous; or if the client has a record say in minor theft, and is up on a drug charge, but has no record for drug offences, that is almost as good from the standpoint of lessening the record as having no record at all.

The following is an example of a lawyer discussing how the length of the record influenced his decision on how to handle a certain case of Impaired Driving: Lawyer A: "This guy is a real lawyer's nightmare. He has eight previous convictions. Normally in a case like this where the cops have him cold, you plead the client guilty and hope for a light sentence. But there's no way I can do that with eight previous convictions! The judge'd throw the book at him! So what I gotta do - I plead him not guilty and hope to hell the prosecution slips up somewhere."

Before leaving the topic of how records affect the lawyer's assessment of credibility as a constraint on the story and whether or not it will be used in court, I want to bring in some examples of how clients handle the question of their record. When asked about their record, clients often come out with a story rather than with the required "answer" which would be for example: "I have a record for theft, one conviction in 1964 and one in 1970, both in this city."

(In the following example the charge is Theft Under Fifty Dollars.)

Lawyer C: Do any of you have records for anything?

C: Yeah, I've got a record in uh _____
[City].

L: For what?

C: Uh, well, I-I was doing an article about uh- to see if uh, uh draft dodgers and uh the Canadian judiciary system received uh any kind of different treatment and uh, I went into Eatons and I uh stole a bottle of Vischy water and something else that I don't remember, and um, I was given a year's probation for that.

L: Theft Under Fifty.

C: Yeah, that's right.

The client in the example above tries to present the fact that he was convicted as just a part of the field work in a scientific study, but the lawyer does not respond in kind; that is, the lawyer does not use what from his own

perspective would be a euphemism, but comes out bluntly with the plain, hard, cold fact: "Theft Under Fifty", because from the lawyer's point of view, no matter how the client camouflages it or skirts around it, that is exactly what it will boil down to in court: theft. The lawyer knows that in court the record is simply the record and there is nothing that can be done to change that fact. But the client's relevance is different: the client may or may not know that his record will be available to the court and cannot be concealed. Apart from this, the client knows that his record is going to affect his credibility. Clients (as in the examples below) seem to give themselves the problem of how to tell the record to the lawyer in a way that encourages the lawyer not to make the usual discrediting inferences that one normally draws from the fact that one has a record (that makes it not seem like a record), so that it will not greatly impair credibility. In the above example the client presents the record as a sort of incidental result of a worthwhile and legitimate activity in which he was involved. He is attempting to undercut the normal presumptions that are made from records by presenting the record as meaning that he was doing field work for a study of draft dodgers - and this was not at all an act of theft, but a part of his research. He is saying that, although technically he has been convicted for an act of theft, actually it cannot be assumed that his record means what records usually mean; that is, that he is a thief. He wants to make clear the special circumstances

which make his "record" not a record. He is not saying that records do not mean anything, or should not be a criterion by which to make assessments of people; he is saying that in his particular case, his record does not mean that he is a thief, but that he is an overly-involved (and perhaps naive) researcher. He is careful not to allow the lawyer to "get the wrong impression" (meaning the usual impression) from the fact that he has a record. He is trying to preserve as much of his credibility and moral character as he can by interpreting his record in such a way that its status as a record is hopefully defeated. The client does not know that many other clients use a similar sort of strategy; and what are for the client very special circumstances is for the lawyer who hears similar elaborations over and over again, the "same old routine", and will not "get either of them anywhere" in court where a record is bluntly and unconditionally¹ taken to identify any given accused as a "repeater" - plain and simple. The record is read out in court by the prosecutor before sentencing when an accused is convicted (that is, pleads or is found guilty). The record is read out by the prosecutor as type of offence (charge), date and place of conviction, sentence; (for

¹The only way in which the "usual inferences" are modified is in what can be read in from the sentence: If the sentence is severe the judge may infer that the accused was overly malicious in the act of crime. If the sentence is "light" (probation, or minimum fine, or minimum jail term depending on the type of offence), the judge will know that there were probably extenuating circumstances.

example: Convicted of robbery in Salt Lake City, August, 1962, two-year jail term). No other information is given by the prosecutor and the accused is not allowed to make any comment.

For the client, however, what was happening in his life at the time of the events that lead to his conviction is very relevant to how he would like people to interpret his conviction.

To make this simple abstraction: convicted in _____ on _____ for Theft Under Fifty Dollars, fifty dollar fine, is for the client, to make an unfair simplification that does not properly represent the complexities of his life and events at the time. However, these sorts of considerations are irrelevant in the lawyer's office because of the business-at-hand of preparing for the actualities of processing a case in court. (For the judge, a record is also seen as an index to a whole trial which involved a lot of tedious work on the part of the prosecution to get that conviction). But the client's relevance, too, has a practical authenticity: it is a feature of daily life that we are allowed to turn "brute facts" (such as, for instance, "I am a divorced person") into rationalizations and histories and other elaborations; in fact, we are often asked specifically to make such "explanations".

Later on in the same interview, the same client brings up another part of his record:

C: Oh yeah, uh - I forgot! I don't know if this counts. I don't know if anyone possibly knows, uh, I was convicted of uh, theft, when I was in Austria.

L: Uh.

C: Stealing a sausage. [Laughs] I had five hundred dollars in my pocket too. It was just a trick, you know. I was just fooling around. I got uh, an eight dollar fine and five days in jail for it.

Here the client translates what is, to the legal world, plain ordinary theft, into a "trick" or sort of joke not to be taken seriously. He implies that, for him, stealing in Austria is not like stealing something at home (where we all "know better"); however, the Austrians took it seriously enough to impose a fine and a jail term.

In the next example the charge is Possession of House-breaking Instruments and the client is Mr. Zellers:

Lawyer A: They're alleging a breaking and entering of si- you did six months in _____. And they're alleging, uh,

C: Six months for what?

L: Breaking and entering.

C: Where's this?

L: That's what the guy never told me.

C: Ah, no - no. No. Never.

L: 'K.

C: No, not in _____ [City], no sir. That I could-

L: Okay, well did you do- Did you do six months anywhere for breaking and entering?

C: Oh, I got charged in _____ [another city]. This Indian brought some junk over to my room.

L: For what? What was the charge?

C: That was breaking and entering and theft. And I did two years in the _____ Pen for that, round about 19___. Almost twenty years ago. Well naturally that Indian was gone.

The lawyer senses that Mr. Zellers is using location as a way of trying to evade going into his record and so the lawyer forced Zellers to the specifics. But Zellers very succinctly, almost as an aside, squeezes in a story that shifts the "blame" from himself to someone else: "This Indian brought some junk over to my room...Well naturally that Indian was gone." Zellers knows that the lawyer is able automatically to fill in the missing parts of the story: Zellers is saying that he innocently bought some stolen property from an Indian and the police caught Zellers with the stolen property and "nailed" him with the B&E¹ and Theft which was done not by Zellers but by the Indian who in the meantime had disappeared so that Zellers had no way of substantiating his story.

The final examples of stories told in connection with the record that I will consider come from the interview with

¹Term used in the legal community as a short form for the offence of Breaking and Entering.

Mrs. Appleby (charged for the third time with Impaired driving).

L: Now, uh with respect to this charge - it's impaired driving and this is your third-

C: Right.

L: Third offence of impaired...since when?

C: [Sigh.]

L: When was your last offence?

C: [Sigh.]

L: Well when- when were the uh - the two others I should say?

C: Well, uh - it's a long story behind these two... [laughs].

L: Oh, I see.

C: Very similar circumstances.

L: Well.

C: Um- In 1968 it was a - it was a cooked up deal - And uh, because people figure I've got quite a bit of money; and I was uh - what do you call it - charged with hit-and-run and impaired driving and I had _____ [name of a well-known criminal lawyer], as uh

L: Um-hmn.

C: a lawyer and they dropped the hit-and-run and the impaired driving charge and we won the case. At that time I was working with the Narcotic Foundation in _____.

L: You were acquitted of impaired, eh?

C: Yes, I was acquitted of both - and four to five months later, I was served with papers, and the Crown appealed it; and they won the appeal on the impaired driving charge. And that time I paid seventy-five dollars fine and three months suspension plus over five hundred dollars in lawyer's fees.

L: Yeah.

C: And then, uh, let's see, my husband landed back in September...

L: Of this year?

C: No-no.

L: Er-

C: This is 19__.

L: Okay.

C: I was driving across _____ Bridge and I'd had about two or three beers and the cops stopped me and flung me in jail in _____; and um, because of having a previous conviction, I - Plus I'd defended myself and

L: You were charged with impaired again?

C: I was charged with impaired driving and spent two weeks in _____ jail in at the hospital.

L: Impaired - you were convicted?

C: Yes.

L: And uh - sentenced to two weeks.

C: Sentenced to two weeks automatically - which I spent in bed.

L: And- any fine?

C: No fine.

L: [Clears throat.]

C: And at that time I had two doctors testify against my physical and mental health, and um, but because of me defending myself, I think that was the only reason I lost the case.

When asked when she was convicted, Mrs. Appleby does not give the answer required by the question; that is, she she does not give him the date, but says that it is a long

story and proceeds to tell the story about each conviction. Both times she attributes the fact that she was convicted to her opinion that her case was improperly managed - that her actual "innocence" was not recognized because things went "unjustly" wrong in court. She makes her second conviction seem like an inevitable consequence of the fact of her previous conviction which itself she makes out to be an injustice.

When assessing credibility the lawyer takes into consideration things in addition to the story's relationship to its bearer and the context in which it is told. He looks as well to the possibility of bolstering the "truth value" of any story, whether plausible or not, via documentation or provability.

First of all, it is not a question of whether or not the story is "true; that is, of whether or not it corresponds to "what actually happened" in the events that ended in arrest¹. But rather the considerations are whether or not the story sounds plausible; and, more importantly, whether or not the story can be "proved" or documented. To tell What Actually Happened may be to tell what "nobody would believe". This is particularly true of "the same old story"

¹It is not unusual for a lawyer to apparently accept (leave unchallenged) the client's story and at the same time

to ask questions that the client should not know the answers to, if his story is What Actually Happened. In the following interview both lawyer and client sustain this sort of double reality. The charge is Breaking and Entering and Possession of Stolen Property. Basically what the client's story accomplishes is to attempt to make the client liable only for the charge of Possession of Stolen Property and not for the charge of Breaking and Entering. He says that yes, he was where the police say they found him in a small washroom with stolen goods in the corner, but he was not there because he had just committed a B&E at the boutique next door and was hiding from detection: he was there because he was going to buy the stolen property for re-sale. By identifying himself as a fence rather than a burglar, he tries to make himself liable to a lesser penalty. The lawyer does not overtly challenge the story but soon asks the client if his fingerprints were on the hacksaw that the police found at the scene of the B&E: "Were your fingerprints on the hacksaw do you think?" Instead of saying something like, "Of course not, I was not there", the client says: "I don't think so, I was not sawing" (meaning the co-accused was sawing). Both lawyer and client seem to be assuming that the story is a story (tale), and each knows that the other knows it, but they are both hoping to be able to construct a defense; however, the lawyer soon sees that the story is not strong enough and tells the client that he cannot take the stand.

(the story that "everybody" gives). If the client gives the usual story in the usual way, lawyers know that the judge is not likely to believe it, even if it is the "truth" because he has "heard it too many times" to take it as anything other than "a story". Therefore, the sort of obvious story (the same old story)¹, unless well documented, is not a good story - regardless of its "actual" truth value. The

¹In order to be comprehensible to others a story or account must meet certain structural expectations - accounts are in this sense standardized, ritualized structural forms that we all learn to use as language for operating in our culture. However, while meeting certain of the structural expectations, the story must transcend them in some essential way in order to come off as unique to the situation. If a story simply demonstrates the rules of story-telling, it will not be a believable account: it has to transcend its story-like features via uniqueness and specificity - a new angle that carries it beyond the status of "the same old story". However if the story's features are too unique, it will be like not speaking our language; the story will leave little basis for mutually meaningful interpretation. It will be more like an account given by the "insane". (See L. Binswanger, "The Case of Ellen West" in Rollo May, Ed., Existence, (New York: Basic Books, 1958), pp. 237-364.) It would throw so much of the world that everybody knows and accepts into doubt, that in order to believe it, one would have to deny too much of what one naturally and automatically accepts to be the case.

The two extremes of unacceptability are "the same old story" and the one that is so outlandish that no-one would believe it. The same old story is the one that too many people have told as the natural, unthinking "lie" so that no-one would believe it even if it were true. The story at the extreme end of inventiveness stretches the imagination of the hearer beyond the limits of his ordinary conventions about how things normally happen, even in unusual circumstances.

following is an example of a story which the lawyer regards as the "same old story". The client is charged with possession of various drugs and possession of acid for the purposes of trafficking:

(B) THE CASE OF THE ACID AND THE POSTER,
THE PIPES AND THE BOOT:

Lawyer C: Alright - tell me about um- how much you think you've been involved in this then. What um, what's your answer to these things that they're going to be saying that all of this belongs to you, or-

C: Right - Well I'm going to tell them that it doesn't belong to me. They're, I- I've been thinking - Do you want me to relate to you what I- what I think about this - right?

L: Yeah - exactly.

C: Okay. Uh- well - the room that my stuff was in, uh - A lot of stuff when I moved in, I didn't move directly into that room, because there was somebody else staying in that room. They moved out on the first of the month and then I just moved my stuff in, um...The posters that were on the walls when the police came were already there and I didn't disturb them at all.

L: Is that the poster that they found the acid behind?

C: Yeah - a hundred tabs of acid behind the posters and uh - they were there before I was even involved with the house - along with uh, the furniture, the rugs and ().

C: And - let's see - the night before the police were there, uh, I - I was reading in the front room () and uh - I fell asleep in the room there ...And I woke up the next day about oh - two o'clock I guess or something like that; and uh, a lot of people were in the house at the time... [He proceeds to narrate the events of the police "bust in".]

The lawyer explains to the client that that story is not going to "get him off", because the judge is just not going to believe that it was his room, but he was not living in it at the time, etc.:

L: Well uh, the judge isn't going to accept the fact¹ that you know - you didn't know it was there. He just isn't going to believe you. You know he just is not going to accept that, uh, you know - sitting there in the open, this sort of thing. Well, he - you're, you're not - You know you're asking the judge. You can imagine what head space he's in...

C: Yeah.

L: And he - you know, he's just not going to buy it.

L: Mnn. I think they got yuh cold on the dope - do you know that?

C: You think so?

L: Well - just knowing what the - you know - the way judges operate - they, huh - you've been through various situations like this many, many times before and you know, you try this and try that, and try this and try that, and try that; but see - "possession" is a technical term; and you'd have to um, first of all they - what they have to do is establish knowledge, that you know what it was...

C: Right.

¹It is probably partly the case that the lawyer thinks the judge will not believe him, but it is also likely that the lawyer is not considering letting it go before the judge and that he is invoking the judge not believing it as a way of avoiding telling the client that he himself does not believe it and at the same time discouraging the client from wanting to tell such a story on the stand. This is a nice diplomatic interactional device that achieves the lawyer's purpose of letting the client know his story is not credible but saving face all around by using the judge as a stand-in for the lawyer so that confrontation between lawyer and client is avoided.

L: And that you knew it was there and that you consented to it being there; and that you had some measure of control over it, you see, and so...Okay - it was your room, first of all...uh

C: Yeah - I would like to say I had no idea that it was there.

L: Well - you can say that - I'm just saying what the judge is going to accept. Now, you - it was your room - the stuff's sitting out in the open, this type of thing. Right in your pocket - you're dead on that. And the pipe, uh----the, dope in the boot, in the boot.

(Later on in the interview, the client ends up admitting that he fabricated his story:)

L: See, you have to have an answer for these things...

C: Right, well.

L: That really makes it tough.

C: Uh-huh - this thing about - like sleeping out in the living room, um, is complete fantasy [laughs]; but uh, this is the only way I can see.

L: Well, you know, I can, I can appreciate that - that approach to it. I'm just - any - anyone - You know normally you'd think it - That would be a good answer to it, but the judges, they just don't accept it any more.

C: Yeah.

L: Like, it's been tried too often now and they just don't buy it; um - so it looks like, you know, you're dead on the pipe. You're whether, whether you know about the gram of hash on the scale. It would be a real shock to me. You tell, you know - you can argue that uh - you didn't know it was there, but the judge - [laughs] - he'll turn very, very purple! [laughs]. Let's put it that way. Veins'll stand out on his head! [Imitates a judge's snarl]. He'll say, "Alright - you trying to tell me that" - you know...

C: Um-hmn.

L: Now the pipes that were in the hall and this scale thing - I don't think they can put that on you, necessarily...

C: Yeah, right. How about the acid?

L: I know that's a mean approach for one of the pipes.

C: How about the acid?

L: Okay, let's get to that, now - a hundred hits of acid...Okay, well behind the picture - there's a possibility of avoiding that...cause the picture was there and this type of thing, you know, um - I don't - I think it would be asking a lot for them to say, you know, you have to...look behind the picture. But at the same time it's going to be - seem very curious to the judge that whoever put it there didn't get it, you know, when they left.

C: We-ell...

L: Unless somebody else somewhere who stuck it behind the picture and you know, to avoid getting busted themselves or something. Uh, if you can, if you can - all I- I'll say is this, if you can convince the judge that you - that that picture was, you know - that that was the situation, then fine. Um - that's a fifty-fifty one...

In the preceding example the lawyer discourages the client from wanting to use his story (even before the client confesses that he fabricated it) because the judge has heard "it" (similar stories) too many times before: "Like it's been tried too often now and they just don't buy it". In the following example another lawyer decides to try to use a story that is "the same old story", but only if the client is able to bolster it with a strong supporting story from a witness. It is unlikely that the lawyer "believes" this story, but as long as it can be "substantiated" in an

effective way so that it is likely to be successful, he is willing to use it. The client is charged with possession of marijuana. In his story he claims that he was wearing someone else's jacket over his own jacket; and that the marijuana was in the jacket belonging to someone else:

(C) THE CASE OF THE DOPE AND THE TWO JACKETS:

Lawyer B: And the marijuana was in someone else's jacket. That's a good defense to possession of marijuana, if we can prove that. The only way we're going to prove that is if Bob comes down and says not only did you take his jacket, but he had a cigarette in it and as far as he knows -

C: [Slight laugh.] You didn't know that it was there.

L: Yeah.

L: Right - Oh, now, you tell me you don't know, so there's no reason why we shouldn't defend the thing. So we should go ahead and say we don't know. You didn't have any on you and you got drunk and you got picked up and you had two jackets on. One of them wasn't yours and they found it in this jacket.

C: Umnn.

L: I'm gonna tell you right now. This is a very trite kind of defense because it happens all the time. Everybody just says it was someone else's jacket. So if we're gonna make this defense work, it's gotta be real. Bob's got to be there. He's gotta say it's his jacket and it was there. Bob should be able to confirm that with someone else that was at the party - his girl friend or his wife, or whatever it was - You'd better phone Bob and tell him to get the whole thing together and he'd better be there and he'd better phone me.

The lawyer decides that the above story is a "good" one (usable) - not necessarily because he believes it to be true, but because it is "provable" in the sense that it is possible to substantiate it via a witness, which, in the lawyer's view, would give it an element of reality that would help it transcend the status of the "same old story", even though it is the same old story. Bob would be able to come and document the client's story as a witness at little risk to himself because the lawyer would put him under the protection of the Canada Evidence Act which provides that the evidence given under its protection cannot be used (in any subsequent court proceedings) against the person giving evidence under its protection¹. The Canada Evidence Act then makes it possible for someone to come and testify with impunity in a manner that is inculpatory for themselves and exculpatory for the accused. This makes it possible for perhaps a friend of the accused to construct a story that is designed to "save" the accused, usually at no risk to himself - no risk, except perhaps that of perjuring himself, as

¹It is possible though for the police to lay a charge against someone who has testified under the Canada Evidence Act regarding the charge they are testifying about, provided they can get evidence against him apart from the evidence given in court; and this does in fact happen on occasion, though it usually is the case that it is too late for the police to gather the required evidence. "Canada Evidence Act", Revised Statutes of Canada, (Ottawa: Queen's Printer, 1970), Chapter E-10, pp. 1-23.

pointed out in the interview quoted below where the charge is possession of marijuana and the lawyer is speaking to a friend of the accused who comes to the interview with the accused and tells a story taking the blame for the marijuana being in the vehicle owned by the accused:

(D) THE CASE OF THE HITCHHIKERS AND THE DOPE:

Lawyer B: Okay - fair enough, but I'm just - you can take the Canada Evidence Act and you will be fine and dandy, uh. The only thing I can tell you about as a warning is if you, if you get up and tell your explanation as you have here, and under cross-examination you tell a different story, you might be charged with perjury - that's a very serious offence if that should happen. I just - I want you to know that, uh, you're entitled to do it and it can't be used against you. But if you're lying, you can go to jail for a long time!¹

O: Well there's no lying.

¹It is unlikely that a perjury charge would be laid in such circumstances involving testimony given in a minor criminal matter. Perjury charges are usually brought to bear only against Crown witnesses in major trials involving such matters as rape or murder, or kidnapping. So the lawyer is using the reference to perjury only as a threat to lever the client out of jeopardizing the case by telling a story he is likely to be "caught out on" by the prosecution. Lawyers are not likely to use this threat against clients who have "been around" (and hence know the ropes about when perjury charges are laid) but only against relative novices.

Gluckman makes reference to a similar phenomenon: "That is, the judges expect parties and witnesses to lie. Judges frequently threaten to prosecute witnesses if they do not tell the truth, but very rarely do so. Lying when giving evidence is thus treated as normal but reprehensible." Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, p. 111.

L: Okay - I'm not saying you did. I'm letting - I just want you to know, uh; and if you're not, then there's nothing to fear - that's the deal - fine.

(The accused comes to the second interview without his friend and explains that his friend has decided not to testify on his behalf under the Canada Evidence Act.)

C: Uh - First I've gotta tell you this _____ has decided not to testify.

L: You want to do that, eh?

C: Well - uh, I think the only thing we can do is just tell - tell them what the story is - which is that uh - we didn't know the dope was there - you know that.

L: Why has he decided not to testify?

C: Because, um (). He decided to do it, just as a kind of gesture for us. To help us out and he's afraid of perjuring himself, or something.

L: Sure.

C: You know that's, that's understandable, so uh, that's it.

L: Well I - I can tell you now - one thing, that if this story doesn't hold up, I'm forced to the conclusion that uh - the police particulars are correct - you had knowledge of it.

C: Um?

L: What is the truth? Where did it come from then? How was it there? Did you know about it?

C: Oh, no - that part of it - No, we didn't have any knowledge of that.

L: Well how did it get there?

C: I don't know. I mean the story we told the police was true!

- L: No. What you are doing is telling the judge to to believe that somehow or other, some hitchhiker deposited in your car in the glove compartment between the, the passenger's seat and the driver's seat, um; it looks like a couple of lids of grass.
- C: Yeah.
- L: And you just left them there.
- C: Well there could be, not necessarily.
- O: [Co-accused] Well first of all, and second of all, uh, that's the truth.
- L: Yeah, well, um...
- C: It could have been - you know. Other people got into the car. It could have been someone else, I dunno.
- L: Well there's one alternative to this, I'm just suggesting to you -
- C: Yeah.
- L: That, huh! You know, that's fine. I can take your instructions and you can go ahead and you can both get on the stand; you can get up and tell the judge your story.
- C: Yeah.
- L: And he may believe it - I DOUBT it! - very much, but he may.
- C: Um-hmn.
- L: Um, the other possibility is that the Crown may accept one of you pleading guilty and stay the charges against the other and that's up to you to decide and the whole, the whole -
- C: How could one of us plead guilty?
- L: One of you would be found guilty and one of you would presumably be fined. The other would be uh...This is on assumption that they stay, they stop the charges against the other.

C: Well the chances are, you think, really pretty slim if we just go up and - tell the story

L: Yeah, well -

C: of both of us getting off, right?

L: Yeah - it's - you've got to appreciate it's pretty unlikely; I'm not saying it's not the truth, but it's pretty goddam unlikely.

C: Oh.

L: Unlikely to the point where the judge is going to be very reticent to accept it.

C: [Mumble.]

L: I'm just telling you what I think is likely for the judge, that's all.

In the above case, the lawyer discourages the client from wanting to use his story, because, regardless of whether or not it is true, it is a story that no judge is likely to believe, because it is an "unlikely" story. What is unlikely about the story says the lawyer, is that some hitchhiker would leave the dope in the glove compartment of the car, and that the owner of the car would just leave it there. What the lawyer is getting at by implication is that everybody knows that hitchhikers do not go around opening glove compartments of the cars they get rides in and depositing dope in those glove compartments. Hitchhikers are there "just for the ride". And furthermore, even if a hitchhiker did deposit dope in the glove compartment, which in the first place is unlikely, it is further unlikely that the car owner would not know about it, and that he would not "do something about it", that he would just leave somebody else's dope in his car. The lawyer is

probably working from some common sense notion that if people leave things in your car, you are likely to take them out because they do not "belong there".

Another interesting feature that this story brings up is that it was disbelieved on the grounds of the unlikelihood of courses of action attributed to parties other than the teller of the story. The lawyer feels that the judge is likely to disbelieve his client's story on the grounds of the unlikelihood of some hitchhikers doing what the client proposes that they did. This may be seen as a strange way of assessing credibility in the sense that it implies that if you associate with someone who does improbable things that leave you legally vulnerable, you yourself are liable not only to prosecution, but to the full blame, since your version of events attributing culpable responsibility to other parties will not be believed. This would imply a courtroom assumption that someone's actions do not speak just for themselves - they speak in alliance with other people's actions; and all the actions as they interlock together are subject to the same common sense rules of probability, possibility, plausibility, etc. So one cannot successfully propose the actions of other parties as grounds for one's own story being credible, when the actions of those other parties are, by common sense courtroom standards, unlikely.

Similarly in The Case of the Acid and the Poster and the Pipes and the Boot¹ where the particulars claim that the

police found a hundred "hits"² of acid behind a poster in the bedroom of the accused, and the accused claims in his story that it was probably left there by the previous occupants, the lawyer raises the point that the judge is not going to believe that someone would leave behind such a valuable and large quantity of a prized and popular contraband drug. The client will not be excused in merely saying something to this effect: "Well how should I know why that guy left it behind. That's his problem. All I know is that he did." The onus is on the defense to make all the actions of everybody in the accused's story probable. If this is not achieved in the inherent soundness of the story itself, the client has the option of trying to make his unlikely story credible by bringing other parties to court to confirm the story - provided they can tell it in a way that sounds credible to the judge. In this way, the accused's credibility is tied to the credibility of persons other than himself.

The lawyer tries to find a possible ground for making plausible the story that the acid was left behind by the previous occupant; he proposes that it is possible that the previous occupant left the acid in order to avoid getting "busted". The lawyer estimates that there would be a "fifty-fifty" chance of the judge accepting that as a reasonable ground for obviating the unlikelihood of anyone moving

¹See above, p. 196.

²A "hit" is one tablet, or one "dose"; that is, sufficient for one "trip".

out without their "dope". Here we have an example of a possible way of imputing some reasonable basis for explaining the otherwise improbable actions of characters in the story. The lawyer assesses improbability here in terms of what sort of possibly probable further explanations can be thought of in order to salvage the story. Presumably if it was possible to come up with such further "saving" explanations, the story indeed would have to be abandoned as not plausible.

In the case of the Hitchhikers and the Dope, it comes out in the interview that there actually were hitchhikers in the car at the time of the arrest. Both lawyer and client can see that this could be worked into a factual base for making plausible the seemingly implausible part of the story; that is, the assertion that the dope must have been left in the glove compartment by a hitchhiker. However, these hitchhikers were not acknowledged in the particulars and the client claims that the police did not question the hitchhikers, but merely told them to leave. These facts read together probably tell the lawyer that there would be no point in making anything out of the possibility of the hitchhikers being present, because there is likely to be police opposition to this since the hitchhikers were summarily ushered out by the police. If the hitchhikers had been mentioned in the particulars, the possibility of using them to bolster the plausibility of the story would be improved; however, it is likely that the lawyer does not find the possibility of the

presence of the hitchhikers a usable possibility because of the way this fact was treated by the police (or it may be that the lawyer simply does not believe that there actually were hitchhikers present).

If it is the case, as generally believed in the legal community, that most people charged with crimes actually committed them, the "true" story is likely to be inculpatory. The trouble with any other story (than the "true" one) is that there is the danger of it being improbable precisely because it is the one that did not happen, and people believe that things have a habit of happening the way they usually happen. The only way one can successfully claim that things did not happen the way they usually happen is by bringing in provable exceptional circumstances that can somehow normalize the extraordinary, as O'Reilly tried to do in claiming that he and the co-accused received a large sum of money from a stranger in a bar not because they defrauded him, but because the money was received as "prostitution" payment for a promised homosexual encounter between the complainant and the co-accused. Since O'Reilly also claims that he has witnesses who can substantiate his story (the telling of the "same" story by independent witnesses can pass in court as a proof, provided that the judge finds these witnesses credible), the lawyer "goes along with it", at least to the extent of allowing O'Reilly to bring his witnesses to another interview so that the lawyer can assess the utility of putting them on the stand.

Given that the "true" story is likely to be inculpatory and that any other version is likely to be improbable or unprovable and therefore unbelievable in court, the client who does not want to plead guilty and whose defense may depend on his story is not in an easy situation. But regardless of how they are pleading, clients usually tell a story that probably departs somewhat from what they remember to have actually happened (at least up to the point where they are "kidding themselves"), if only in the sense that it is "distorted" somewhat to disguise or euphemize what might be interpreted as "criminal" intent and behaviour, and to make the teller appear in a better light than the particulars do. Lawyers may well be incorrect in seeing the client and the story in this context; however, that they see it this way influences how they manage the interview and what they decide to do with the case. I will consider two examples in this connection: first, one in which the clients do not want to plead guilty, and second, one in which the client does want to plead guilty.

(E) THE CASE OF THE SIXTEEN STEAKS:

The story in this case comes out as a casual string of events, a sort of behavioural description which by-passes any interpretation of intention. The missing intentionality is seen by the lawyer as the part of the "real" story, which, if included in the given story, would entirely change its

character from something that just sort of happened to a planned act of theft.

Lawyer B: And what happened?

C2: Uh, well we woke up one morning and uh decided we were going to do some shopping, and uh, John drove us to the super market, and uh, we went inside, and uh, we bought some groceries, uh, which, uh, we paid for - I paid for, at that time. Then we decided that we were going to pick up some meat, uh, which we ordered, specially at the, uh, meat counter. Uh, while we were waiting for that, I went to the, uh, uh, cash register and I uh, made another purchase: some, uh -tch- cigarettes, and uh, came back, uh, tch, uh, got the meat and uh, then I went uh up to the uh front; and I walked out of the door with it, and just as we left the door, a uh, assistant manager or something like that came up to us and said did we go through the check-out counter, and uh, we said, "Yes, we did", and uh -

C3: No, I didn't say anything.

C2: Well I said, "Yes, we did".

C3: Yeah.

C2: And uh, we uh, walked to the car; and there was somebody pursuing us; so, uh - tch, uh, we put the meat into the car, and uh; John took off, and uh, uh, the um, police arrived - not the police, uh, the manager said that uh, uh, we'd better come back to the store. We were standing on somebody's lawn, and uh we said we're under no obligation to come back to the store, because, uh, he didn't, he didn't have any evidence that we'd actually stolen anything, because he didn't have any meat, and he didn't have a receipt; and uh, like the meat was nowhere around. He couldn't prove it was stolen and uh, so we waited until the uh, police arrived, and uh, when they did arrive, we put, uh, they took, they took us into the car, took our names and addresses, and uh, and uh, we went back to _____ road, and the police said the officer was looking for, uh, John, and uh, John wasn't around, so he took us to the uh, to the RCMP station on _____ street.

To say that, "We woke up one morning and decided we were going to do some shopping and John drove us to the supermarket", is to be a long way from a description of anyone's morning, because to wake up and decide you are going to do some shopping is not normally the way one wakes up or the way one decides to go shopping. To go shopping on a Thursday morning may be just as routine and commonplace as all the other things unmentioned but obviously done that morning (such as waking-up rituals, grooming routines, and the things that went through their minds in addition to deciding to go shopping); but in this context, going shopping has special significance, but only because of the alleged intentionality involved: did they go shopping just to go shopping, or did they plan a "heist" either beforehand or on-the-spot?

The client described all the actions involved in what the lawyer thinks is a theft as those actions come down to certain of the mere behavioral mechanics involved in routine shopping (while omitting those not involved in routine shopping), such as, "Put the meat in a shopping bag and walked out of the door with it", instead of what would probably have been the case if there had actually been a theft: "When no-one was looking I put my meat into a shopping bag because that's the way meat looks when it is already duly paid for: it gets packaged in a brown bag; then, and usually only then; and I wanted any onlookers to think it was already paid for. I then by-passed the check-outs, which is where one usually

goes with unpaid-for meat; and I just walked out the door with my unpaid-for meat in its bag disguise, masquerading as someone who had just made a purchase of the contents of the bag that they are carrying out the door."

The client does not manage to sustain a sort of neutral behavioral description approach in telling the story: "We walked to the car and there was somebody pursuing us, so uh, we put the meat in the car and, John took off." To describe someone as "pursuing" you in this context would be to the lawyer to engage in sort of "guilty talk"; that is, to interpret someone running behind you in your direction as pursuing you is to have in mind some reason for which they might be in pursuit. Instead of wondering why this person was running, or instead of assuming he was running for some other puzzling reason, the client interprets the running as being in pursuit of him. Similarly when the client says, "John took off", he is opening the possibility of a "get-away" interpretation. He could have said, "John drove away" or "John left", both of which would be more in keeping with the tone set by statements like, "I put the meat in the bag and walked out the door". This "guilty" attitude is carried further when he relates the interchange with the person decribed as in pursuit:

We said we were under no obligation to come back to the store because, uh, he didn't have any evidence that we'd actually stolen anything, because he didn't have the meat and he didn't have a receipt.

A more "innocent" interpretation of these events would be something like:

The manager wanted us to come back to the store. He seemed to think we hadn't paid for something. Why should I listen to this guy waste my time when I'd done my shopping and wanted to get on back home.

In the technical sense, this part of the story does not amount to an admission of guilt, but comes down to the lawyerly way of looking at things, that is, from the point of view not of what was done, but of what can be proved to have been done. Still what the client presents as a behavioural description of "normal" (non-criminal) acts is nonetheless shot through with Criminal Code implications; and therefore, in view of the unavoidable confrontation with a prosecutor's way of dealing with a story like that, it cannot stand up as it is. And in fact the lawyer adopts a cross-examination stance with the client:

L: This was uh - this was the plan, was it - to, to uh

C2: Well it wasn't; it wasn't actually a, a plan, you see, it was a spontaneous thing.

L: When did it become spontaneous? When was that?

C2: Uh - when we were in the store, I suppose, we just got the idea there.

L: Do you know anything about this, John?

C1: Well - we, uh, we might as well be straight with you. We initially had the idea, like uh, that we needed some meat.

L: Yeah.

C1: Uh, for a party.

By saying when did it become spontaneous, the lawyer is challenging their imputation that it was spontaneous, just as a prosecutor would; and in fact this results in the clients being more frank ("straighter") with the lawyer. No doubt the lawyer does not miss the incongruity posed by the suggestion that they got the plan in the store when John was already waiting in the parking lot from the start with what could be interpreted as the "get-away" car. The "normal" thing would have been for John to join in the shopping with his friends rather than wait in the car out in the parking lot. The fact that John was waiting in the car implies that this was a thought-out contingency: in case something went wrong to have as few people involved in the store part of the operation as possible and also to have a car ready to hop into and leave quickly. The fact that the "wrong" bag (the one with the unpaid-for meat) was thrown into the car and John immediately left with it implies that John knew something about it, and that there was probably some sort of plan¹.

¹This could bring us to another constraining feature regarding this particular story. "Saving" John could be seen as a constraint on the story telling. During the course of four interviews, a version of the story that includes John in the planning of the theft is never included. Everybody sticks to the version that the plan arose in the store while John was sitting unawares in the parking lot, though John allowed them to be caught with the right bag (the one containing the paid-for groceries) by driving off with the wrong one (the inculpatory bag containing the unpaid-for meat). John was probably not so much the get-away man, as the one of them, since it was his car, and he could be a get-away man if needed, who should be least involved, - for why should they all "risk their necks" when the job in the store needed only two men?

(F) THE CASE OF THE IMMIGRANT AND THE CAN
OF MILK AND THE FLASH CUBES:

The particulars, read to the client at the start of the interview, go as follows:

Lawyer C: Now here's - they're, they're saying...
You're charged with theft under fifty dollars.
Now you were seen in the _____ store at
_____ street on _____ street. That
would be uh, Friday at five-fiteen in the after-
noon? You walked up and down the aisle, picked
up a can of milk, Then you picked two packages
of flash cubes up. You went into a deserted
aisle, put the flash cubes into your shirt and
went to a check-out counter. You paid for the
milk and left the store. You were stopped on
_____ street. And the police asked why you
stole the flash cubes and you said, "If I had the
money I woulda paid".

(The client's story comes out in the lawyer's quest-
ioning over alleged admissions that the client made to the
security officer in the store:)

C: Well she asked me for what I stole dat. I said
well I wanted to buy an instamatic camera and use
it for uh, you know, that's all.

L: In other words, you admitted taking the flash cubes.

C: Oh, sure.

L: Okay - had you uh, been drinking or anything at the
time, or, or

C: No, I wasn't.

L: That was on _____, um. Is that the truth then?
You - is that why you took them? Is that, is
that the truth, then?

C: Well, uh - I had some opportunity to make a few
dollars because I was broke.

L: Yeah.

C: And I got this idea in the store, not before, during the store.

L: It was a spontaneous thing, eh? Okay - well you don't have any real defense to it, then. You'll have to enter a plea, I guess.

C: Yeah, I realize that. And I know that I can't - because no harm was done. The goods, the articles were recovered. I return it to the owner.

L: Yes.

C: Means relatively no technical or material harm was done. And this, then - I contrary the law. I cannot undo the thing. Was on the other hand, at least psychologically to relieve myself. Uh, uh, I renewed my blood donation. I usually give blood, you know, free, once a year...

L: Yes.

C: So, otherwise I have some remorse, up to that. I don't feel fine, psychologically very well, you know. But I can say to the judge, just -...I can throw myself onto the mercy of the court and ask for leniency and this otherwise...

L: Okay - You'll probably get a suspended sentence.

C: Oh-oh, and I will, will. I'll intend to even leave Canada somehow, because, not because I'm compromised, but uh - I said to myself, uh - I must, uh - reform myself.

L: Things aren't working out too well, is that it?

C: No-no, no, no! I'm satisfied existence over here. I have no worries, no troubles, and this I did, uh, in some move, uh, wrong move in my mind, you know. I shouldn't do that otherwise, uh, I think, I - for a few minutes in my life I was a bad guy, otherwise I never do anything, uh, wrong that way, you know.

L: Yeah, right.

- C: I said to myself I would like to be more useful to the Canadian Society, but this was done in an extreme case. I had last forty-three cents in my pocket, you know. That little flash bulb would complete opportunity to make...some pictures and make some money on it - you know.
- L: You could have borrowed a camera?
- C: Yeah, even the film, just flash bulbs were somehow missing.
- L: From whom?
- C: Well one friend of mine said if I need to borrow and make a few bucks, of course not big money. So I could borrow it and I got that idea that having that little flash c- uh, flash bulbs I might -
- L: What would you do with it though?...After?
- C: Well I could put it in de instomatic camera and shoot pictures and make some money, you know [laughs].
- L: Can you do that - can you make money from pictures?
- C: Oh, definitely, it's not so hard -
- L: ()
- C: I can, I can see some friends of mine and say, "Listen, it's the weekend, let's go somewhere in _____ park, or make a trip around _____." I will make nice pictures and you give me a few dollars, and good, uh - five, three, four, five dollars, you know. I can have this camera. So far it would work, if I have, see - If I could have about three dollars, sixty cents, it would buy it, uh, making no troubles. Who wants troubles anyway. I'm not born trouble-maker.
- L: Yeah, okay, very good then.
- C: Yeah, well listen, at least...() de charge, in my favour, cause I will try to reform myself and I ask for leniencies this, this Centennial year, you know, and I will be nice guy and never make anything like that. It's very unfavourable for me, because psychologically I don't feel very fine, you know.

L: Yeah.

C: You can imagine that - though it's a small thing, you know.

L: Still, it's quite a serious offence, as you know, and uh -

C: Yeah, I'm feeling in my big brain and small brain when I go to sleep I still have, uh remorse.

L: Mnn.

C: And it's very bad. Some of the time I don't sleep at all, you know.

L: Well I think that all you're facing really is a suspended sentence in view of what you've told me, and um, we'll go to court on the_____.

Even though the client admits right off that he did it, and even though he expects to plead guilty, he still tells a story. It can be seen as a story (tale) in that it probably departs from what he remembers to have literally occurred, especially in his reasons for wanting the flash cubes. This is noticeable first of all because the story changes. (He told the security officer that he stole the flash cubes for a camera he hoped to buy, then he told the lawyer that he has a friend who would lend him a camera.) In addition, certain features of the story are improbable: All he needed, he claims, were flash cubes to complete his kit of borrowed camera and film to make some money shooting pictures of friends on the weekend in the park around the city. It is hard to imagine picture-taking circumstances in a park for which flash cubes would be appropriate, the normal picture-taking time in the park is in daylight; moreover, at night

flash cubes would be inadequate with an instamatic camera. Also the very plannedness of the money-making scheme mitigates against the client's claim that the idea occurred to him spontaneously when he was in the supermarket buying a can of milk.

One interesting feature of this interview that has not occurred in the interviews that we have considered up until this point is that the lawyer does not challenge the inconsistencies in the story or attempt to influence the client to modify the story, even though he probably plans to have the client tell his story in court as part of his speaking-to-sentence strategy. The charge is the same as in the Case of the Sixteen Steaks, but the lawyer handles the client very differently and seems not to criticize the story. In the case of the can of milk, the lawyer does not make an issue of whether the client went into the store to buy a can of milk and saw some flash cubes while in the store and succumbed to a spontaneous temptation to steal them, or whether his primary aim in going into the store was to steal the flash cubes and buying the can of milk was used as a "cover" to get him past the cash register by making a purchase in the normal way which would act as a camouflage for the fact that there was an unpaid-for package of flash cubes under his jacket. A prosecutor presumably would try to have the purchase of milk interpreted as evidence of stealthy artfulness by alleging that it was used as a planned cover for

the stealing of the flash cubes. In the case of the sixteen steaks the lawyer pointedly asks whether or not getting the steaks was premeditated.

The difference in the way the lawyer treats the Can of Milk case and the Sixteen Steaks case stems from the fact that one case will be prepared for a guilty plea and the other for trial. Since the lawyer sees the judge as giving the client in the Can of Milk case a suspended sentence, the lawyer seems convinced that the judge will be favourably influenced by the story. In spite of the little inconsistencies in the story the lawyer can see that the story fits with its bearer and with the charge in the sense that here is a small theft, clumsily done, openly admitted remorsefully on-the-spot at the scene of the crime and later in the lawyer's office and in court; and here is an unfortunate immigrant clumsily telling a more or less pathetic tale of how he was broke and had an idea to earn a little money legitimately by taking pictures of friends with borrowed equipment and awkwardly stealing the last item he needed to get his venture going while he was in a grocery store buying a modest and wholesome thing to nourish himself: a can of milk. In trying to overcome his poverty in a small way, he steals a small thing. He is an immigrant trying to get along as best he can in this country and he is satisfied with his meagre existence, nonetheless. There is some inventiveness in his idea of legitimately trying to make a few dollars to improve

his situation. There is no greed in his motive as there would be in, for instance, robbing a bank, and he is not stealing from a helpless victim, but from a large supermarket. Sure, the story is not completely "true" and puts its teller in a better light than he probably deserves, but the judge is likely to overlook this, even though he will notice it, because that is the way most of the people appearing before him in court are; and this story is probably not any further from what judges conceive to be the "truth" than stories told by most people trying for leniency on a guilty plea.

It would seem that in making a guilty plea on a minor crime, inconsistencies and flaws (unless glaring) are likely to pass by unnoticed, or are permissible, because, due to the volume of cases that have to be processed, the court routinely does not invest the time and interest that would be required to prove in any detail the stories attached to guilty pleas - and so the features of guilty plea stories are attended to and treated differently than the features of trial stories: guilty plea stories are usually "just listened to" by the judge and register in his mind in a general sense as being mitigating or not mitigating and likewise vaguely influence him in determining sentence. The police particulars and the general demeanour of the client probably have a stronger influence on the judge than the details of the actual story. But presumably if one were pleading guilty to a major crime like manslaughter, rape, kidnapping, extortion,

etc., the client's story, if given in hopes of mitigation would be examined in great detail, especially with respect to premeditation and motivation. But in the Case of the Can of Milk and the Flash Cubes, the accused will probably be allowed unchallenged to claim that he stole the flash cubes impulsively and spontaneously while buying a can of milk in a store - in the hopes of improving his economic circumstances by amateur photo-taking. Neither prosecutor nor judge is going to go to the trouble of unearthing and/or highlighting probable lies by cross-examination to ascertain whether or not, using the can of milk as premeditated "cover", he deliberately stole the flash cubes for his own pleasure. However, if, in similar fashion, he had stolen a seventy-five dollar clock, or if the store in question was putting pressure on the city authorities to "crack down on" shoplifting, the case might be treated differently. They are not going to bother in The Case of the Can of Milk and the Flash Cubes; because, in the practical relevances of the business of processing offenders through the courts, guilty pleas are items that can be disposed of quickly, hopefully to shorten the long day in court.

Before I leave the topic of probability, plausibility and provability and how they relate to credibility as a constraint on successful story telling, there is another feature of stories we should consider: the characters depicted in stories, the work they do, and how they sometimes fail to "come off" as "real" characters.

(G) CHARACTERS AND CREDIBILITY:

Characters in the story other than the story teller himself are often used to take over criminal responsibility, or some part of it, in order to provide that the accused did not "really" do it, or can not be held as responsible as he might have been otherwise. They often come off as "filmy" characters with only first or last names whose whereabouts at the time of the story telling are unknown and who are somehow insubstantial and ephemeral.

(1) The Hitchhikers and the Dope

In the Case of the Hitchhikers and the Dope¹, the hitchhikers are used to evade responsibility and have an ephemeral quality:

Lawyer B: Now - you recall ever - ever having any-
else in the car - hitchhikers when you weren't in
the car?

C: Oh yeah - like we'd stop for gas and get out

L: Sure.

C: of the bus. Cigarettes and gas and things like
that - and , you know we left the car a couple of
times.

L: Did you ever have any hitchhiker get in that
offered you any weed? - Or did that ever happen?

C: No.

O: Yeah, that happened a coupla times.

L: Okay - Did you see any of the week? I'm just
trying to relate this back.

¹See above, p. 202.

C: See the weed?

L: Did you - yeah, right. Did he come out? - Did you do any of the week?

C: Did we smoke it?

L: Yeah.

C: Uh, we smoke dope.

L: No-no, I mean in the car, though I mean, you know like -

O: Yeah, we smoked in the car.

L: Right - hitchhikers would, you know, after you, you know.

C: Yeah.

O: Yeah.

C: Yeah, it happened several times with a joint, because, sure.

L: Okay - Well we want to talk about that. We want to get that out. I mean, you know, that uh -

C: Sure.

L: When was the last time? How many days before you got stopped there, was the last time you had a hitchhiker in the car?

C: Oh, we had hitchhikers up here.

O: We had hitchhikers when we got stopped!

C: Yeah! We pick up hitchhikers just about every day.

L: There were other people in the car!

C: Yeah, there were some other people.

O: Yeah - there were two kids in the car. They just sent them away.

C: They told them to get lost.

L: Anybody -...- Did you do dope in the car with the hitchhikers while you were in _____.

C: Uh, probably not - I can't recall.

In order to get out of the responsibility for knowing that the dope was in the glove compartment, the accused has to provide that someone else put it in there and that for him it was a surprise. He needs some human agent to help him out with this and uses the hitchhikers as a hopefully probable solution to the mystery of how the dope got there without him knowing it got there. The accused does not introduce a known hitchhiker who he remembers to have had dope and who must have put it there and forgot about it, but supposes that someone among the many hitchhikers they were always picking up must have done it. It must have been a hitchhiker, claims the client, because it was not the client himself or the co-accused, and no known-and-producible persons are willing to speak up in court to take the responsibility¹. The hitchhiker is not given any identity beyond that of hitchhiker. The fact, later brought up, that there were hitchhikers in the van at the time of the police search lends some substance to the general hitchhikers as characters - these being individual manifestations - but responsibility is not assigned to them, nor is further identity beyond them

¹Remember that this particular client first came with a friend who told a story saying that the dope was his - that he (the friend) left it one time when he borrowed the car in order to smoke dope with his girl friend on the beach.

being "kids" as well as hitchhikers.

(2) O'Reilly and the Badge:

Though Mr. O'Reilly's characters are given at least partial names and general locations, they have an "unreal ring" about them:

C: Now, Jim, it's too bad George's not here, but I can verify this by two witnesses I had myself - will have in a few days.

Lawyer A: Well, uh - within a few days...

C: Yeah.

L: Well this trial's tomorrow.

C: Well we can always set it back. There's no option of plea being taken in.

L: 'K. Who are your witnesses?

C: Well, they will not be in town until

L: Who are they?

C: this coming Friday. There's Sam Slater from _____.

L: What kind of witnesses are they? Were they at -

C: They're quite reliable.

L: No, what, what can they say - were they there?

C: They can only tell the truth as I have - have spoken here.

L: In other words, they were there.

C: That's right.

L: [Clears throat.]

C: They were in the hotel at the time...and John Anderson.

L: Which hotel are you talking about now?

C: I'm talking about the hotel where this, uh, phoney charge was trumped up on me.

L: Right there in the - the beer parlour.

C: Yeah, that's right.

L: In the Greentree on _____.

C: That's right, that's right.

L: Oh. Where, where's Sam Slater from? - _____?

C: Sam Slater comes from _____. I-I believe they both do. I know Slaty does. I don't actually know where Anderson comes from. I think he's an Easterner. I think he comes from _____ province.

L: Where are they now?

C: They will be, uh. I'll be seeing them on Friday. I, uh - phoned them through a lady friend that they know. Or haven't been at home - at the present time.

L: Do you know where they are?

C: Well I have an idea.

L: Okay, uh - you know - the reason I'm asking...

C: Yeah.

L: This uh...

C: Yeah, yeah.

L: _____ [Client's first name], is uh,

C: Yeah, yeah.

L: Uh, you uh, this thing has been set for trial.

C: Yeah.

L: Okay - I want you to - get a holda these two guys.

C: I'll certainly do that.

L: And I want you to - be able to tell me, tomorrow morning at um, I've got to be able to say to the court - my witnesses will be here on such and such a date.

C: [Laughing.] Well - that's right too. They have to be there at one time. It's like an emmy, eh! [laughs] Yeah, I realize that quite well.

With O'Reilly's characters, identity is more explicit than usual; that is, they are given full names and partial locations, but, in terms of actual locatability and producibility, there are problems. It is curious that although O'Reilly knows Sam Slater well enough to call him by a nickname, "Slaty", he is unable to locate him other than through a "lady friend of his" (no further identification given to her), and has only a vague idea of where the other witness comes from.

In the following case, in contrast to most, a character in the story, rather than the accused, comes in to tell the story. The charge is prostitution and the accused is in jail:

(3) The Case of the Hotel Room and Fifteen Dollars:

L: ...Guess you heard what they said - they said that she - this is what they said; and this is what is going to come out as evidence in court, basically

O: Um-hmn.

L: that she went into the...St. Helen's Hotel in the lobby...and then she left the lobby in the company of a male and went up to a room with a particular room number in the hotel, and she was there for... a few - you know for a while.

O: Um-hmn.

L: They didn't say how long. They heard the usual noises, and that she came out and that she had fifteen dollars and that she said she got it from him!

O: She couldn't have - I gave her - if that's all she got - I -

L: Oh no, no, no, no! I got - I'm just telling you - this isn't our story - that's theirs!

O: Yeah - cause I gave her fifteen dollars before I left - an so that musta bin the

L: Alright -

O: money she had with her - so -

L: Sure, that's fine. That's essential to the case. Your, your testimony - it looks - it's going to be very essential -

O: Ohhh - if she did come out in the company of a man, then they musta bin doin sumthin for nuthin then, because, uhh - I know that I had given her uhh - fifteen dollars.

L: Uh-uh - good! This is why -

O: I was jis - you know trying ta, you know get her outa there, you know, outa that jail.

The teller of the above story is not an alibi in the traditional sense, but just someone who takes care of a crucial incriminating detail. The money exchange is the critical element in what makes a sex act prostitution; and here is a non-sex partner who will testify that she gave the accused the money (which the prosecution will allege was payment for prostitution and which will be produced in court as evidence against the accused) as a gift for shopping; and hence, that it did not arrive in the possession of the accused

as a result of a sex-for-hire transaction. According to the lawyer (in confidence to me after the interview) the only problem with this story is the character of its bearer. The lawyer felt that the prosecution could successfully imply that the witness was a "madam" for the accused in her profession as prostitute¹.

VI JOINT STORY PRODUCTION:

I have been analysing the work that lawyers do in preparing for trial by examining the constraints structuring story production imposed by the particulars and by credibility criteria. In all this I have depicted the client as the active story-producer. In fact, sometimes another active story producer is "in play" along with the client - the lawyer. What the lawyer contributes to the actual story beyond the structure influenced by his imposition of the particulars and credibility as constraints may vary from "nothing at all" to actually suggesting content and strategy. In the following excerpt, the lawyer explicitly sets out for the client what the content of his story should be (though it should be noticed that the lawyer has inferred these details from the client's answers to his questions):

¹Another difficulty surely not overlooked by the lawyer is that the story offers no proof that the fifteen dollars given to the accused by the witness is the same fifteen dollars that the police are alleging was received as payment for an act of sex.

(A) THE CASE OF THE HALF A BOTTLE OF BACARDI
AND THE STOLEN SUITCASE:

Lawyer B: Now, from the time you left George's room till the time the police picked you up, - how long?

C: Oh, about uh, I drink half a bottle of Bacardi by that time.

L: How long?

C: It would be an hour and a half - an hour...But I don't know myself. I was pretty damn drunk.

L: Tch, well you'd better be really sober when we go to trial on this, cause you're gonna haveta get up on the stand and explain this...Now - if - if - if this comes out the way you've told

C: Mnn.

L: me. - I mean the facts. Well, then you should be acquitted. But it's gotta come out! You know - if you don't - an I can't - I can't lead you like I'm doing now. I mean I can't go over eight times how many people went into that room with you - You've gotta come out and say I - I did this and I did that and I did the next thing. Make it cle-ear. Sure I was with _____. I left his room - I didn't take anything with me - I went downta the hotel - I met my friends. They came up to my room for a drink and we went into the hotel - my hotel room. We saw this stuff. None of us had any idea where it came from. My - we all got drunk - he closed the suitcase and put it under the bed and just then the police arrived!

C: Well I don't remember - they said that...(). I don't - I'm not quite sure - Well _____ knows who put the suitcase.

L: Okay - alright - I'll ask them! But you've got to be positive what happened - You didn't fake it - and you didn't know whose it was when you got back there an - that your room wasn't locked - anybody could come or go. A lotta people come and go into your room?

C: Oh well, I know a lotta friends go into my room - they know my door is not locked.

- L: Alright, okay - that's the sorta thing we haveta have - you know - if you don't get up and tell it - they'll send you to jail - it's as simple as that!
- C: Yeah, I know. I never have before - I never pick up anything.
- L: Okay - well you're just, you know, I - you're just gonna haveta tell all of this - when you go to court. And you're going to have to get up on the stand - and say it - when the police came into your room - was George with them?

One strategy for structuring stories that lawyers are well aware of and sometimes use, is that gaps in the observation of the other participants (namely police and complainants and those who are called as Crown witnesses) become slots for inventing what could have occurred (over what is remembered to have occurred) in such a way that the story teller appears "less guilty" than he would have otherwise. More experienced clients are also likely to be aware of this strategy and use it deliberately. In the following passage, one lawyer describes the tactics of a client who, in the lawyer's estimation, is a master of this strategy:

Lawyer B: The "best" story is one that just puts you over the line; the acquittal-conviction line; that is, just enough so that the Crown cannot prove you did it and the balance of probabilities is in your favour. Old Andrew James is a master of this. He always denies it with me; and he denies it in such a way that he leaves a doubt in my mind that he did it. He never lies about something that he can be caught out on. He's smart: he spots the weaknesses in the other side. He gives up all the unimportant grounds immediately. Everything is true up to a certain point and then it isn't true any more. He's just like a good bullfighter: he steps out of the way just in time. Like the other day, old Andrew comes in and I say,

"Okay - What's it about this time?" And old Andrew says, "God, you know, I just can't believe it: I'm at home, my friend John is out working on the car", says Andrew, in complete bewilderment, "The cops came and tore the house apart. What the hell were they looking for? They said John and I shipped a carton of heroin to _____. Now what the hell! It turns out it's about this carton of apples I shipped for a friend. A friend came up to the house and he had a carton of apples. He asked John to send it to _____. I drove him to deposit it at the air freight terminal. The friend didn't have time to do it himself, so I drove John out to C.P. air freight. John signed the papers. Go talk to John. He'll tell you all about it".

So I talk to John. He has exactly the same story. Now both Andrew and his friend John were picked out in a line-up - probably by C.P. Officials. The bind is that the cops got John to write something in the police station, and so they have a sample of his writing to match up with the signature on the papers, which was an alias.

I asked Andrew, "Did you say anything to the cops?" Andrew says, "No, I didn't say anything to the cops. I didn't know anything, so I couldn't say anything." John is screwed because he put down a phoney sender's name and wrote something for the cops. But Andrew is safe there. The cops say, "Was there anything in the box?" Andrew says, "No, just apples". The cops say to John, "Was that your name you signed?" John says, "Yeah, that's an alias". Cops: "Why use an alias to send a box of apples?" John: "The guy that gave us the apples said we should." Cops: "Did you ask why?" John: "No." Well I say to John, "The case doesn't look very good for you".

"Now Andrew, your case is a little different!" Andrew says, "Yeah, I know". He sees the basic fact-patterns. He doesn't tell a big story. He admits certain facts. He looks for the omissions and twists them into something else. Andrew's approach is like that of any good liar: He lies only when he knows he can get away with it. [Underlining mine].

The most outlandish stories are those where the client turns simple matters into obviously gross lies. These are complete denial of fact that can be easily proved. Remember that girl who was in for Vag C [prostitution] the other day? She told an incredible pack of lies. She said she was up from _____ with a friend on a shopping trip. Brought the kids up and all. She said she was downtown and went to have a pee

in a hotel. She was arrested downstairs. I said, "Did you meet a man?" She says "No". I say, "Did you check in?" She says, "No". She completely denied the existence of the man. I say, "If you're lying to me, I'll be embarrassed in court, but you'll go to jail. I have to work on the assumption that what you tell me is true, otherwise there's no point in defending it". It turns out she's out on bail for Vag C in _____. She says, "They're after me, because I'm black". I tell her if there wasn't a guy, the Crown can't prove their case, but they are going to produce him. They don't like to do it, and naturally the guy is uptight about it, but they'll do it. I had to plead her guilty. A bad lie is a complete denial of fact that can be easily proven.

I press clients to tell the truth only about things that the prosecution can shoot down. You have to do that - otherwise you're screwed in court. But I'm not going to press Andrew for instance. He lies properly. You press for truth on certain issues because you don't want to be embarrassed by proceeding on a ludicrous assumption.

The gap-slot strategy then includes telling it the way it happened, except on points where there are likely to be gaps in police observation or evidence. These gaps become slots for exculpatory innovation. The following excerpt shows an example of an interview where the lawyer more or less explicitly invites the client to look over their memory of events to see if they can find such slots and re-cast their story on these grounds.

(B) THE CASE OF THE SIXTEEN STEAKS:

Lawyer B: Perhaps, perhaps. See, the thing is, in any of these kind of cases, these kind of theft things, there's a continuity that's really important. If you take something and whether you paid for it or you didn't, in any of these kind of cases - of, they've got a continual chain of observation of you. If someone can relate the whole thing as it just transpired, of course they're

gonna nail you. The thing is - is there a break in the chain that they can't PROVE, like - if whoever gave you the meat gave it to you, when the manager first became aware of that, for instance, that you walked out with a parcel. See, if their evidence really is - that the assistant manager or whoever it was that accosted you, if he saw you go around the side of the store with what seemed to be BAGS, and nip out. If he then attempted to - uh, if that's their evidence, and that's the only evidence they've got of a theft, then there's a damn good case. You've got a good case because they can't prove that what was in the bag...

C2: Well, you see, there couldn't possibly have been anyone observing us once we rounded the first aisle, went into the cake mixes thing. And uh, then we didn't go to the front of the store. We went down the back of the store again, and um down the right-hand side of the store facing the front, at which time there was the assistant manager at the last check-out counter, before the right-hand door that we went out. And that's the fella that came out after, uh...

L: Alright.

L: Because they didn't SEE you go out past there - they saw you leaving the store, but then there's evidence that you could have gone through one of the cashiers, paid for everything and then gone back into the store with your goods and then proceeded directly out! Which might have been the case.

The classic instance where gaps in one party's observation become slots for reinterpretation is in drug cases where police allege they saw the accused drop or throw a narcotic which the police subsequently recover. In such circumstances the question of police observation becomes crucial as in the following case where the charge is possession of heroin:

(C) THE CASE OF BATES AND THE BALLOON:

C: Well, like I gave these guys the dope, and uh, I had the balloon in my hand and I turned around and walked out of the bathroom, and as I walked out of the bathroom door, uh - there's a hallway - Oh, about ten feet long, uh from the door up to the left going to the kitchen [clears throat]. And I looked up this hallway and seen, uh, Wilson [police officer] standin there, and at the same time I saw him, he saw me. Uh, I got a bit panicky and ran back into the bathroom with the dope and dropped it into the toilet. Now he claims I tried to climb out the window; but as far as I'm concerned, he grabbed me and knocked me up against the wall, and the window happened to be there, and Smithers [another police officer] was on the outside of the window and he grabbed me and pulled me out the window.

(The lawyer brings up the question of whether or not Officer Wilson could see a blue balloon (part of the standard heroin-fixing kit) that Bates had in his hand when spotted by Wilson. The balloon is a very damaging piece of evidence - a crucial one, since the heroin was flushed down the toilet:)

C: Now, I don't know whether he could have seen it from where he was standing. I had it in my right hand and he was to my left.

Lawyer C: You actually had taken the, uh, the balloon in both hands when you looked to your left and saw...

C: Well, I think probably - no, I had it in my right hand, and I - I stopped outside the door, and looked to my left, and I saw him. But, uh, I stopped. I was going to tie the balloon. But instead of turning, I just looked around, and uh, Wilson was there.

L: Was he facing you directly?

C: Yeah - he saw me exactly the same time I saw him, I think. I know.

L: Was he coming toward the washroom?

C: No, uh - he was like I say when I came out of the bathroom. He was () a ten foot hallway into the kitchen.

L: Could any part of it, any part be showing?

C: Think now. Uh, well, it might have been possible, too, because, like - the balloon was open. Like it didn't have a knot in it. We didn't tie a knot in it. So it's like the situation comes down - probably the mouth was showing. Maybe, yeah, maybe it was visible. I think possibly it was.

L: It's uh - I'll say it was probably sticking out.

The lawyer concludes that there is probably not a good enough hole in Police Officer Wilson's observation for reconstruction of the events and relocation or disappearance of the balloon in Bates' hand, and ultimately decides that there is "no defense" and decides to plead the client guilty:

L: I mean there's a lot of damaging evidence. Like you darted back into the bathroom, and flush - frantically flushing the toilet and then the other two - the other two fellows out the window and - and uh - the traces and everything like that - It all looks pretty bad.

In the following case, we have an example of a client misusing the gap-slot strategy by trying to invent gaps in the policeman's observation by having a reliable witness say that the police could not have observed him dropping the dope. However, the lawyer, knowing that the gap-slot strategy works

only on the basis of "actual" gaps (that is, gaps for which the police have no evidence of observation) since the prosecution is easily able to expose invented gaps, explains to the client that he cannot tell a story with invented gaps:

(D) THE CASE OF THE SECURITY GUARD AND THE FALLING DOPE:

The client is accused of possession of marijuana. The police particulars claim that a joint was seen to fall from the pocket of the accused. The accused claims that the policeman could not have seen the falling joint and that there is a witness - a security officer who will support his story. The lawyer objects to this story: first on the grounds that since the client has told him the joint fell from his pocket, the lawyer cannot deceive the court; and secondly, that the client admits that the guard would also be fabricating the story in ways that could be exposed by the prosecutor.

C: Yeah, that's, that's the way I - I'm pretty sure he was. I'm positive that he couldn't see it - pretty positive anyway, that he couldn't see it fall, but, you know, cause I talked to him a lot afterwards, you know - Whenever I see him, or something, you know. Uh, and he said, like, like people have been telling him they're wrong, you know, like the guy, the guard. They've got those guards, uh

Lawyer C: What does he say happened? Does he recall, uh, where the police officer was, or what, what happened, or who saw?

C: Well like, he, he - he goes along with me, but you know I couldn't be a hundred percent sure, if uh - like he saw the policeman before I dropped it.

C: If I could get that guard to show, you know, like that - He'd be a good witness, I think, you know, but I dunno...

L: Why does the guard think he was the wrong person?

C: Well, cause he was on my side, you know -

C: But, uh - he couldn't - it would be hard for him to say, you know, because he wasn't standing right there, so he couldn't say that uh - that I did drop it, because he was standing down the mall. He just sort of went up to the cop and said, "You got the wrong guy", because, uh - The impression that, to give the impression to the policeman that so - one of the other two had dropped it - you know, but he saw me drop it, you know -

L: Was he doing it more as a joke - or something like that?

C: Well, no, uh, I dunno. Well maybe sort of, in a way, to just sort of foul up a policeman, you know, sort of.

L: Are you convinced that he knows what happened?

C: Yeah, he, he knows that I dropped it: He saw me drop it.

L: Uh, well there's no point in calling him then.

A lawyer will help his client with the story in ways that are likely to enhance its defensive power, as long as this is based on suppositions within the boundaries of likely credibility and as long as the lawyer knows he is not supporting an obvious deception known to himself that the prosecutor is likely to be able to expose in court. Though the odd client will expect the lawyer to single-handedly give him a story (He will come into the interview and say, "Well, what's my story?" to which the lawyer would respond to the effect that "That's your job, not mine"), lawyers try in most cases to keep their

own generative influence on the story to a minimum. In the case of the Sixteen Steaks, one of the clients (John, who drove the "get-away" car) was asked by the prosecutor to testify as a Crown witness. In the following passage the lawyer makes explicit the extent to which he will and will not help John with the story he would give on the stand as a witness for the prosecution:

L: If you tell him, if he talks to you and he as - he probably will - He'll want to know what you're going to say, um, I would think. I just - you know, I'm just looking at the practicalities of the thing - what's going to actually happen - it's the everyday functioning of the court. And you just tell him that you're not going to say anything. And that's all. Don't get into a rap with him. Don't get into a discussion with him. Don't say anything to him. You don't have to. Don't - And as I say, I'm, I'm, uh - I can't advise you to perjure yourself. I certainly wouldn't. And if I knew you were per-juring yourself, I'd get off the case, but you can be as nebulous as you want to be.

L: You can get up on the stand, and he says, you know, "I ask you to recall the events of uh _____ th, _____ the whole idea is, "Right the three of us got together and decided we were going to rip off _____ for a buncha meat", right? Well you don't say that! You just say you can't remember what you were doing on _____ the _____ th.

C: Right.

L: You know - you couldn't remember what happened on _____ the _____ th - probably.

L: Look, as I mentioned to you, I'm not going to sit here and go - an-an con-, you know, concoct stories. I can only give you guidelines as to wh- I can advise you to do - that's all. I'm not going to concoct any stories.

C: So you say that in John's case, nebulous answers would be the best.

L: I'm just saying that he can answer in a nebulous way and I'm telling you that I can - as a lawyer, can advise him that - he can do that - that's all. [Slight laugh]. I - you know, you guys have got your head screwed on the right way, hopefully you can figure it out from there. [laughs] I'm not going to write you a handbook! But, believe me - one thing you should always keep in mind, if it comes about, that theft under is something that's punishable usually by a fifty dollar fine. Perjury is punishable by fourteen years imprisonment.

Above the lawyer explicitly advises the client on what to say and how to say it, but draws the line at what he calls "concocting" stories for the client. He sees the boundaries of his influence going as far as giving hints and drawing guidelines.

I will end this section on the lawyer's influence in the generation of the story by showing an instance of what the lawyer does in a case where the client says that he has no idea of what might have happened in the events that lead to his arrest, and therefore thinks that he has no story at all.

(E) THE CASE OF THE DOPE AND THE TWO JACKETS:

Lawyer B: I'll tell you what I've got from the Prosecutor's Office. They say this: _____ the _____ th at 4:05 a.m., at _____ street, searched. One marijuana cigarette found in jacket pocket. Warned, questioned: "Have you any more?" Answer: "I don't have any more - that's all."

C: [Mumble.]

L: Pardon me?

C: I don't know anything about this.

L: Okay - What happened? What happened?

C: You mean, uh - when I got picked up?

L: Right.

C: I don't know - I just woke up there in jail.

L: You just woke up?

O: [Client's wife] He was drunk.

C: I was drunk, yeah.

L: Don't you remember anything?

C: No [laugh] - I don't remember in court, even.

L: What makes you think you were there then, if you don't remember anything about it?

C: Huh - uh, she -

O: I was there.

The lawyer proceeds to drag out bits of information, and piece them together - most of the information coming from the client's wife who was present only part of the time on the night of arrest. The lawyer is able to thus put together a fairly coherent description of the story the client probably would have told had he been able to remember the events of the evening in question. So it turns out that even when the client can not (or claims he can not) remember anything, there

is a story anyway - a story composed of what can be inferentially built-up by the lawyer out of what can be dragged out of the client, and built on the client's location in other people's recall of events in which the client was allegedly involved. The client ends up agreeing that this is what happened, or rather that this is the story to use.

I am now ready to leave criminal stories as a focus in my analysis of the social organization of preparation for court, and move on, in the next chapter, to a detailed consideration of the stories that clients tell in divorce interviews.

CHAPTER IV

INTERVIEWING IN DIVORCE CASES: DIVORCE STORIES

I INTRODUCTION:

This chapter analyses interaction between lawyers and clients in divorce interviews. It provides a different perspective on divorce practice than do studies which are confined to researcher's interviews with lawyers. The most comprehensive study of the latter type is O'Gorman's Lawyers and Matrimonial Cases¹. O'Gorman interviewed eighty-two lawyers practising in New York City. In determining what matrimonial lawyers' attitudes and practices were O'Gorman was effectively confined to taking the lawyers' word for it, because he did not observe them in action. O'Gorman grants lawyers' accounts of their activities the same status as social scientists' accounts of lawyers' activities. If we however take lawyers' accounts as data rather than as findings, we have a different perspective on those activities. If we were to use as a frame of reference the idea that in talking to a researcher the lawyer probably is more influenced by his perception of the interview as part of the public relations demands of his job, than by a desire to "tell it like it is" for him (if he knew how to do so), we would probably discover more about the social organization of the lawyer's work and attitudes. In view of this, O'Gorman's study is

¹Hubert J. O'Gorman, Lawyers and Matrimonial Cases, (New York: Free Press, 1963).

not very instructive. But if just for the moment we ignore the problems with O'Gorman's perspective, and entertain his findings seriously, there are more difficulties: Two of O'Gorman's main conclusions are that matrimonial lawyers evade the law, and that they suffer from a trained incapacity to deal with client emotionalism. To depict lawyers as evading the law is to display a misunderstanding of the workings of the legal system as this is translated into the daily practices of the lawyer's job. "The Law" is something that lawyers use in very adaptive ways to solve the practical problems that their clients bring to them. The ways in which lawyers use the law in divorce cases will be demonstrated in the body of this chapter.

Similarly O'Gorman's claim that lawyers suffer from a trained incapacity in dealing with matrimonial cases misses the essential character of the lawyer's situation. O'Gorman explains matrimonial lawyers' "trained incapacity" as follows:

The characterization of matrimonial clients as individuals who will not, or cannot, act and think rationally suggests that lawyers lack the skill to cope successfully with these clients. Unlike psychiatrists, marriage counsellors and social workers, lawyers are not usually trained to handle emotional problems. Therefore they find, as one informant expressed it, that "It is difficult to deal with a person who is so upset". The difficulty encountered in representing an "upset" client reflects something more than a lack of training; it also indicates the inappropriateness of legal skills, skills based on an objective and logical appraisal of problems.

"You can't use logic in matrimonial matters."

"It's very hard to get marital clients to be objective."

"They're too emotional and just plain unable to listen to reason."

In dealing with matrimonial cases, then, lawyers appear to suffer from what has been aptly identified as "trained incapacity"; their skills function as inadequacies.¹

While I too came upon instances of lawyers who complained about divorce clients' "emotionalism", I also came across lawyers who claimed that doing a divorce was as matter-of-fact as changing a tire. When we look at actual interviews between lawyers and clients instead of interviewing lawyers we see as a structural feature of those interviews that lawyers have practical devices for routinely dealing with "emotional" clients. Lawyers use the technique of adopting an affectively neutral stance. In practice this means that they respond to the client's emotional overtures by not engaging the client on that level. The lawyer ignores the client's emotionalism and answers affectively loaded statements from the client with statements about the down-to-earth, matter-of-fact business at hand. This technique appears to "work" in the sense that the client does not censure the lawyer for not responding in kind or sympathizing (except occasionally and perfunctorily), but usually takes the cue from the lawyer and gets back to the business at hand. This process is demonstrated in the excerpt below:

C: Not that he doesn't...want the kid - it's quite obvious - he doesn't - he never called or asked about him, he could care less about him.

¹O'Gorman, Lawyers and Matrimonial Cases, pp. 89-90.

Lawyer B: Right.

- C: And not that I think I'm going to get a real hassle about this, but I'm not going to - I'm not going to jeopardize my chances with the baby either. I'm not go- it's the thing I want - the guy I'm going with wants - he's the kind who can decide it - and the baby is getting older - I don't want to have to stay at home with my baby forever.
- L: You want - now there are various grounds for divorce - mental cruelty is one, physical cruelty is another, separate and apart is another, adultery is another, insanity and what have you. Uh, to prove cruelty, it's necessary to produce some evidence - you can appreciate, there's a difference between one person - you're not getting on with somebody -
- C: Well it wasn't that - It was more than that.
- L: There's a difference between having a violent dislike for somebody, but physical cruelty must be such an extent where it's causing, or mental cruelty must be to such a degree that it's causing a physical breakdown on your part - and you prove that through a doctor's uh -
- C: Phone the doctor! Huh! In The States you can't afford a doctor - at least I couldn't - I was -
- L: The usual case of mental cruelty is that somebody is uh threatening suicide or does some sort of a physical problem as a result of this - and then a nervous breakdown and we get doctors to testify as to - because one spouse's behaviour, the other is in a state and that's called mental cruelty - mental cruelty has got to manifest itself in some physical way.
- C: Well I definitely wasn't in a very good physical health and when my husband got to go to a doctor, I didn't do anything about it - I was -
- L: But you didn't - it didn't result in hospitalization, on uh - or doctor's care which is usually the test -

C: Well I did have - I had one good night where I had several people that witnessed the fact that George knocked me out by kicking me right here - I mean I had -

L: When was this?

C: It was when we were in Florida. It was shortly before I left the first time.

L: This was in Florida?

C: Yeah.

L: The trouble is how could we prove that here?

It is my impression that apart from the explicit techniques that lawyers use to deal with emotional clients as in the above example, lawyers are relatively immune to such onslaughts since these problems are part of the routine course of events that lawyers meet every day and to which they have comfortably adapted in such a way that clients' outbursts are diffused from emotional impact by a sort of automatic filter in the lawyer's perspective. In the same sense that Sudnow's morgue attendants¹ do not have the layman's dread of the dead body, lawyers are relatively immune to clients' outbursts² and have practical solutions to the problems of clients' emotional behaviour. Lawyers solve legal problems for people in a practice that is conducted much like a business. Training in psychiatry or marriage counselling will not help the lawyer to prepare a petition for trial, which, after all, is his function. As we saw in the last chapter client

¹David Sudnow, Passing On, The Social Organization of Dying, pp. 77-89.

²There was only one instance during my year in the field

of a matrimonial client "flooding out" (to use Goffman's term). In this instance a prospective client sent by a lawyer from another firm stormed into the office the day before Christmas demanding in hysterical tones that the lawyer have an order issued demanding that her husband who had custody of her child return the child to her for Christmas. The lawyer merely explained patiently and calmly that lawyers did not have the authority to do what she was demanding and that if she wanted to instigate a suit disputing custody she should come to the office after the holidays and they would discuss it then. The client continued on in a rage slamming objects about the room. The lawyer did not censor her and did not change his neutral business-like tone. Eventually he gently steered her out of the office. She left the office screaming abusive obscenities about the ineffectuality of lawyers. When the door slammed as she left the lawyer just said to those present, "She wanted custody order. I just explained that everything is closed up for Christmas. We'd see her later. You can understand her being upset about her kid - it being Christmas and all, but, Christ, I'm a lawyer. This is an office, not a madhouse".

emotionalism is also a factor in criminal cases; it is dealt with by the lawyer in much the same way as with divorce clients.

O'Gorman's characterization of matrimonial lawyers is "artificial" in that it is not sensitive to the structuring effects of the workings of the legal system in lawyers' daily routines. In the body of this chapter I will show how lawyers and clients manage the practical problems of preparing for divorce court. First I shall set this process within the context of the legal system to which it is oriented by comparing the legal context of divorce work with that of criminal work.

In both criminal and divorce interviews, the lawyer is preparing for trial in a legal system in which criminal and civil cases alike are considered part of the same adversarial system. Yet even a casual perusal of a transcript from a divorce interview would leave the reader with a distinctly different impression of the nature of the relationship between lawyer and client than he has gained from reading this study up to this point where we have been considering preparation for trial in criminal cases only.

In this chapter I will examine the circumstances of the divorce interview in order to draw out and analyse these

differences in a way that results in a more complete¹ picture of the parameters of the social organization of preparation for trial.

First I shall briefly lay out the relevance of the differences in the process that results in the encounter between the lawyer and the client, and the relevance of the similarities and differences in the imperatives in the workings of the legal system that the lawyer orients to in handling divorce as opposed to criminal cases, then I shall discuss in detail some of the divorce transcripts in order to show particular consequences of the actual workings of these differences as they affect the on-going course of the interview.

(A) COMPARISON WITH CRIMINAL CASES:

(1) Precipitating Events:

We have seen that the "criminal" client arrives in the lawyer's office as the result of forces largely outside of his control: forces in the workings of the legal system as it processes offenders. Going to a lawyer is one of the routine events in the chain of procedures "automatically" set in motion after the accused is caught in suspicious

¹A "full" picture would involve study of many lawyers engaged in all of the different types of practice such as corporate work, mining law, securities, tax work, tort, etc.

circumstances by the police. We have also seen that certain features of the process that "land" the client in the lawyer's office structure to some extent what happens to him in the lawyer's office - and that of these factors the particulars have the strongest structuring effect.

The divorce client, on the other hand, is not charged but he himself initiates proceedings voluntarily and sets them in motion at a stage that omits all the steps, encounters and procedures that for the criminal client precede contact with the lawyer. So what is step one for the divorce client in going to a lawyer may be step four or five for the criminal client. The divorce client chooses to set the legal proceedings of trial preparation and performance in court in motion; if the criminal client had any choice, he would no doubt stop proceedings and avoid trial¹.

The lawyer then is in a different position vis-a-vis a divorce client who is voluntarily initiating his services and can stop them at any point than he is with the criminal client who was sent by Legal Aid and who is required to go to court and defend or plead regardless. The divorce client is shopping for a service which he may or may not buy, and the lawyer is in the position of selling that service. The Legal Aid criminal client and lawyer are brought together as a

¹Remember that the criminal client is usually on Legal Aid and may not even have chosen his own lawyer. Having to

go to a lawyer (rather than handling one's case oneself) is looked upon by some criminal clients as just another imposition placed on them by the people in power. The courts discourage anyone from going to trial without a lawyer. Some Legal Aid criminal clients do not bother to contact the lawyer who has been assigned to their case, and may not bother to "show up" for an appointment if the lawyer is successful in trying to contact them. They may not make or keep an appointment with their lawyer because they see their case as "hopeless anyway", or they give preference to other priorities on their time or they "just don't like lawyers".

One occasionally finds resentment at having to go to a lawyer among divorce clients as well - though it is more likely to be expressed as a frustration at not being competent enough to handle their own case with a do-it-yourself divorce kit. The following client came to a lawyer only after failing in an attempt to use the layman's divorce kit:

"I imagine it can [be done] if you've got the brains, but I just looked at it and thought, 'I'm not as smart as I thought I was! Ha, ha, ha!' I couldn't remember who the petitioner was and who the, ha, ha, other person was - I've tried to get - to try to do this before, you know, and, uh, nobody was interested in helping. Everybody wants two hundred dollars as a retainer, or whatever you call it. And who has two hundred dollars!"

result of the workings of the legal system and payment automatically comes from a third party (the government) so that the buyer-seller dimension of the relationship is entirely absent. The buyer-seller aspect of the divorce client situation as we shall see is strongly reflected in the structure of the interview.

(2) Focus of the Interview: The Particulars
and the Grounds:

We have seen that in criminal interviews, the particulars have the single most dominant structuring influence. The lawyer puts the onus of either defeating or confirming the particulars on the client. He more or less backs the particulars until the client shows him good reason not to do so. The production and effect of the particulars are part of the history of the client as he is shuffled through the system, and they speak to identify the client to the lawyer in terms of probable type of offender¹.

In the divorce interview, the lawyer does not have a set of particulars on the client. The only information that he has comes from the client himself and is accepted at face value; and the lawyer's efforts are directed towards documenting rather than challenging the information offered by the client. The lawyer does not challenge the divorce client's stories because they will not be challenged in

¹In divorce cases, the lawyer does not have a set of

on the client and so does not have the same preconceived notions about what actually happened in the events that the client may refer to in the course of the interview. That is not to say that lawyers do not have preconceived stereotypical ways of "looking at" divorce clients: The following are some opinions about divorce cases expressed by different lawyers:

Lawyer B: "Now divorce and matrimonial cases are really interesting and not nearly as easy to classify. They are basic human relations disputes, not disputes with society. Whereas in criminal cases, either they make their living at it or they don't. In matrimonial cases, they really feel wronged. In criminal cases they don't. People confide in you in matrimonial cases. They never do in criminal cases. In matrimonial cases you find out what they are like as people. In criminal cases, it's just certain incidents. In matrimonial disputes over maintenance you really get to find out about people - where they're at."

Lawyer E: "I have my own ideas on how divorce clients behave according to social groupings. Like lower class women accept their fate: pay the money they have to and get it over with, but the higher the social bracket, the more money they have, the greater the demands, the bigger the fight it is."

Lawyer H: "Matrimonial problems always boil down to either money or sex: they're not getting enough of either. If you see a good-looking, well-dressed woman come in, you know what the problem is."

Lawyer S: "Women divorce clients always fall in love with their lawyers. It's a transference just like the psychotherapist. Happens every time. First couple of times I was flattered, then I took no notice. Just part of the routine."

court, unless the divorce is contested. In interviews where the lawyer knows the divorce will be contested he still does not challenge the client's stories, but instead goes into more stories in more detail and attempts to document them more carefully. He does not challenge them because even though they will be challenged in court, they will not be treated like criminal stories which are pitted against a version (the police story) that the court automatically accepts as being more reliable, but will be compared with another lay version of events (that is, the spouse's counter-stories) that will be judged by the same standards as the client's version.

These considerations make for a strong difference in the interpersonal tone of the lawyer-client relationship. In criminal interviews, the lawyer puts the client on the defensive and evidences a fairly hard-core, skeptical, debunking attitude. He does this because he must prepare his client for the same attitude on the part of the prosecutor in cross-examining. In divorce interviews the lawyer definitely gives the client the benefit of the doubt, and has an accepting, accomodative, but still business-like attitude. His attitude is accommodative because he wants to encourage the client to buy the service he is offering; his attitude is accepting because he must encourage the client to talk freely to a certain extent so that he can focus in on the material he needs for trial preparation; but his attitude

is at the same time business-like because he wants to discourage potential divorce clients who will not be able to pay his fee, or who are undecided or frivolous regarding the decision to divorce, or who, because of the circumstances of their marital history present complications and difficulties that make processing the divorce too costly for the lawyer in terms of time, effort, and probable success.

The parallel in terms of structuring influence and overall importance of "beating the particulars" in criminal interviews is "getting up the grounds" in divorce interviews. The law requires that in order to get a divorce, it has to be provided that there are "grounds"; that is, that the marriage "broke down" in one of the ways allowed in the Divorce Act¹.

¹The grounds as cited in "The Divorce Act" (assented to February 1st, 1968), (Roger Duhamel, Queen's Printer, Ottawa), pp. 189-90, are:

- "3. Subject to Section 5, a petition for divorce may be presented to a court by a husband or wife, on the grounds that the respondent, since the celebration of the marriage,
 - (a) has committed adultery;
 - (b) has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;
 - (c) has gone through a form of marriage with another person; or
 - (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.
- 4. (1) In addition to the grounds specified in Section 3, and subject to Section 5, a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the grounds that there has been a permanent breakdown of

their marriage by reason of one or more of the following circumstances as specified in the petition, namely:

(a) the respondent

(i) has been imprisoned, pursuant to his conviction for one or more offences, for a period of not less than three years during the five year period immediately preceding the presentation of the petition, or

(ii) has been imprisoned for a period of not less than two years immediately preceding the presentation of the petition pursuant to his conviction for an offence for which he was sentenced to death or to imprisonment for a term of ten years or more, against which conviction or sentence all rights of the respondent to appeal to a court having jurisdiction to hear such an appeal have been exhausted;

(b) the respondent has, for a period of not less than three years immediately preceding the presentation of the petition, been grossly addicted to alcohol, or a narcotic as defined in the Narcotic Control Act, and there is no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period;

(c) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent;

(d) the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it; or

(9) the spouses have been living separate and apart

(i) for any reason other than that described in subparagraph (ii) for a period of not less than three years; or

(ii) by reason of the petitioner's desertion of the respondent, for a period of not less than five years, immediately preceding the presentation of the petition.

(2) On any petition presented under this section, where the existence of any of the circumstances described in subsection (1) has been established, a permanent breakdown of the marriage by reason of those circumstances shall be deemed to have been established."

Just as beating the particulars is the object of the criminal client's story, getting up the grounds is the lawyer's object in directing the potential divorce client to narrate certain events in the history of the marriage in order to search the history of the marriage for grounds-building material. And here the lawyer shares the onus with the client - he does not set up the grounds as a standard the client must pit himself against, but, jointly with the client, "re-runs" the course of the marriage to see which of the available grounds can be most easily documented.

(3) The "Legal" Context of Divorce Work:

In divorce cases, as in criminal cases, the client's version of events is the concrete focus of interchanges between lawyer and client in the interview; however, the client comes into the interview as a result of very different forces; and the lawyer, in deciding how to handle the case, is orienting to a different set of imperatives in the workings of the legal system. In examining how the lawyer gets and assesses stories in the particular context of the divorce interview we will be able to expand our discussion of the social organizational features of trial preparation.

In preparing for court in divorce cases, the lawyer is working with a set of imperatives that differs in many respects from the set of imperatives he orients to in criminal cases; although divorce cases, like other civil

matters and like criminal matters must fit into the adversarial system; and, theoretically at least, the courts look on divorce cases as two parties with conflicting interests fighting to achieve opposite goals, in practice, in most divorce cases, that is, in uncontested divorce, the adversarial positions are a matter of form only¹. In uncontested divorce, the other party (the respondent) does not challenge the petitioner's right to a divorce nor does he challenge the allegations set out in the grounds for divorce. The respondent may not even be present at the proceedings; however, the judge must take care to see that the interests of the respondent have been, theoretically at least, protected. Technically, the judge acts as a sort of surrogate for the respondent to see that an "injustice" is not done. It is presumably also part of the judge's duty to sort out "rigged" cases from "legitimate" cases - or rather, since it is common courtroom knowledge that most uncontested divorces are "rigged" or "collusive" in the sense that the opposing parties have agreed to divorce via the party that digs up the "best"

¹Lawyer in conversation over the phone with divorce client:

Lawyer D: "Two people aren't supposed to get together and agree on a divorce. Yes, I agree it's stupid. The courts treat divorce as a normal court action: two people with opposing interests fighting it out. But when it comes right down to it - in court, with most of the judges, this is just an act."

(most convenient and expedient) grounds¹, the judge is concerned to sort out divorce cases that meet the requirements of not seeming to be rigged from those that do not "ring true" in the accepted ways.

The petition should be set out in such a way that, if required, the grounds could be proved and the client should be ready to, if called upon by the judge, tell the stories underlying the grounds in such a way as to "make them stick". Judges' criteria for adequacy and proof above and beyond the minimal formal requirements are apparently variable: some are "tougher" than others, especially regarding support for mental cruelty as grounds².

¹Lawyer B: "In theory there is no collusion in divorce, but in practice that's what happens. Like last week, the wife came in; we were looking for adultery. There was no way we could dig it up on the husband. Next week the husband comes in with documentation for his wife's adultery, so he sues her. Actually there are certain things you can agree upon - maintenance, disposition of property, child custody and support."

²One lawyer elaborated on this as follows:
Lawyer A: "Cruelty's the dicey one. The law's not clear; and on any given set of facts different judges will have different standards. It depends on the judge. If you are describing your client's spouse's miserable, rotten behaviour, and the judge has a wife who's twice as bad and he's had to live with it for twenty years, he's not going to grant the decree if he can help it. Another younger judge who's a bit more sympathetic about the jams that people get themselves into probably would give your client the decree."

Documentation and "proof" are necessary in both criminal and divorce cases, but the requisites are different. The divorce client will be called upon to bear witness in court¹, but usually not to tell his stories, except by answering yes or no to the lawyer's "leading questions"², and will not be cross-examined unless the divorce is contested. The petitioner's lawyer states the facts set out in the petition required for court procedure and the client merely confirms or denies them (whichever is appropriate) as pre-rehearsed. As far as the client's contribution is concerned, a series of single words, "yes" or "no", establishes the grounds. Obviously, in these circumstances, the constraints on credibility are not as demanding.

As a matter of ethics, the lawyer must be satisfied that the grounds are verifiable before setting them out in the divorce petition: but he does not need to satisfy himself to the extent that he has "evidence" as in getting up a defense for a criminal matter. The story as translated into grounds for divorce needs documentation in terms of names and dates and places, but, if even these facts are unavailable, a special affidavit can be used to get the petition through.

¹As mentioned earlier, all divorce cases take place in Supreme Court.

²See Appendix E for official procedure for uncontested divorce: "Examine petitioner as to contents of the petition by means of leading questions (if uncontested) to confirm each statement in the petition as follows:..."

In divorce cases, as contrasted with criminal cases, what counts as "evidence" or as having "proved" something is different. In the usual, standard uncontested divorce, "proof" lies virtually in the fact that a lawyer has put his signature to the petition and has documented the grounds with dates and addresses and places (or if these were not available has sworn out a special affidavit). "Proof" lies in a sense in professional integrity and the assumption that lawyers are capable of sorting out legitimate from "rigged" grounds for divorce and will not be party to obviously rigged divorces. Lawyers do not phone around or send out detectives to check on the divorce client's stories, but rather use their own means¹ of sorting out what will look

¹In the following excerpt of a conversation between a lawyer and myself the lawyer refers to one such "means":

Lawyer C: The lawyer has to swear that there are no grounds for reconciliation.

P: How can you be sure?

L: Well, there's no way of doing it, really - you just use your own judgment - actually if it goes as far as drawing up the petition, setting the date and all, it's usually past the point of no return. You weed them out right at the start. I've done about thirty divorces and I've turned back three who had grounds; I sent them away. Tell you why. If a guy comes in really distressed, really upset - he discovered his wife in flagrant YESTERDAY - and is obviously very upset and angry and wants to do something about it. So I say, "Why don't you think about it over the next couple of weeks, before we do anything!" Actually in cases like that, I take my lawyer's hat right off - I should be advising him if he goes back to his wife and forgives her, he loses grounds, but I don't do that - obviously he's going to get over it in a few days, and it would be a waste of his time and mine to start up a divorce.

right on the divorce petition and what will not, and of what is likely to be challenged and what is not. It is quite feasible for a client to, for instance, come in and say that he and his spouse have been living separate and apart for the past three years and to document this by giving dates and addresses, when in fact he and his spouse were not separated; but it is unlikely that clients would do this because the lay party is ignorant of the fact that lawyers do not in fact check up. The lawyer could find out very easily by phoning a relative or friend of his client, but does not do this. The control lies not in the checks, but in the client's knowledge that the checks could be used and his ignorance that they are not used. The lawyer uses the threat value of statements such as "If the judge suspects that there is any collusion going on, he'll throw it right out the window" in much the same sense that in criminal cases he uses a perjury threat as a warning to clients who are insisting on wanting to go on the stand to tell a story infused with obvious lies.

It is the duty of the lawyer to play a part along with the judge in ensuring in all cases of divorce, regardless of the selected grounds, that there is no possibility of reconciliation of the two parties and that there has been no

collusion in relation to the petition¹.

In cases where the grounds laid out in the petition are adultery, it is the lawyer's duty to ensure that there has been no connivance² or condonation as well as no collusion and no possibility of reconciliation³. In practice, however, for cases where adultery is the selected grounds, this duty is usually treated perfunctorily. The lawyer seldom probes beyond a simple assurance from his client that these requirements have not been violated.

¹See The Divorce Act, pp. 191-94, paragraphs 7, 8 and 9 "Presentation and Hearing of Petitions: Special Duties":

"(c) 'Collusion' means an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial, support, division of property interests or the custody, care or upbringing of the children of the marriage;

(d) 'Condonation' does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose;"

²"No connivance" means that the petitioner may not encourage the respondent to behave in such a way as to make available grounds for divorce - or a better way of putting this is as follows: the petitioner must not have encouraged the behaviour that is being used as grounds for divorce.

³This is set out in the divorce petition as follows: "Where a decree is sought under Section three (adultery) to satisfy itself that there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner has condoned or connived at the act or conduct complained of, unless, in opinion of the court, the public interest would be better served by granting the decree."

Lawyer C: Okay - well maybe you could just give me a, a sort of breakdown of what, uh - you know - your difficulties arose early in your marriage I take it, you know - if you make a rather general statement here, but at the same time, enough to show the court that you've really tried to resolve everything, but -

C: Um-hmn.

L: And without - I'm not trying to prompt you or anything - but we have to, more or less show that this discovery in August of her prior adultery...

C: Um-hmn.

L: you know was the final straw, sorta thing, uh, from then on there was absolutely no possibility of any sort of reconciliation.

C: Yeah, I see, that makes a lotta sense, yeah.

L: Now - if - it should come out that you were attempting to

C: reconcile after that fact...

L: reconcile after that fact, it uh, it would be difficult, because it would be an indication then, to the judge

C: Um-hmn.

L: that in your mind, there was some possibility that you could forgive her for

C: Um-hmn.

L: adultery, you see. And, the three cardinal things are - with respect to divorce - and adultery, are that you - they're rather artificial, - but they, they are in effect: you can never forgive your spouse for adultery -

L: uh, you can never form any agreement with your wife or your spouse to uh, manufacture any of this adultery,

C: I see, oh, of course not.

L: and you cannot either, by either your actions or through any intention on your part, uh, encourage her to commit adultery.

C: I didn't do that! [laughs]

L: Okay - so in other words, we have to show that the marriage broke down as a result of, well it was breaking down, I guess, before this, but uh -

C: Yes.

L: This was the final thing.

C: Yeah.

L: Okay.

In the above excerpt we see that, because of the collusion, connivance, condonation, and reconciliation clauses, a single incident of adultery per se does give grounds for divorce, but must be backed up by some intolerable situation, especially one showing that the respondent's adultery was an index of his general very-difficult-to-live-with character. If the respondent committed adultery once when very drunk; or when very provoked by enticement, or when incited by the fact that his wife had refused to have sexual intercourse with him for the last ten years; or if the wife taunted him into doing it; or encouraged him to do it; or forgave him for doing it - the adultery would not count as grounds for divorce. The adultery must be placed in the general context of being an intolerable act that irreconcilably estranged the petitioner. So a single act of adultery, if used as grounds for divorce would have, as a result of the client's stories to look like the last straw in an accumulation of inconsiderate and humiliating acts, or like something that probably was

done repeatedly, or under such conditions that it makes further conhabitation unbearable for the petitioner.

And so, in such ways, the episodes that must be set out in the grounds for divorce and that are selected out of the client's stories by the lawyer are indexical: they are supposed to be indices of a general state of marital disharmony that is the fault of the respondent. The lawyer works with the client to make the episodes not only indexical, but indexical in specific standard ways; for example, physical cruelty is always laid out in the petition as causing "great emotional upset, humiliation, and embarrassment" as well as whatever physical bodily damage was inflicted. If, for instance, physical cruelty occurs in public, it may be translatable into mental cruelty as well - public mistreatment counting in court as more damaging than private mistreatment¹.

¹The lawyer has this in mind when in the following excerpt he asks if the jealous behaviour in question occurred in public:

C: Well he was so erratic - I was afraid to speak up. I was afraid to uh, you know, what did he do? - Well he was very jealous of me. If we went to another couple's home, and if I didn't keep my knees together the way he thought I should, or if I () too far, then I was being, uh - a tramp, I guess you might say - uh - he - you know. He, oh - he called me all kinds of names - you know.

Lawyer B: In public?

C: No, no - it's all in private - he's never done this in front of any of our friends - never. On the way home one time especially, I was wearing this dress - it was very simple, but, it - [laughs]. It was one of these fold across the front and, like - you know - I always kept my legs down - I know how to sit in a dress, but - isn't you know, very low. All the way home he was badgering me about it - and I was bawling by the time I got out. And no matter what it was that I wore - he always thought that I was trying to get other men's attention...

(4) Initiating Proceedings:

Going to a lawyer for a divorce is a voluntary action (except in the sense that the petitioner may feel "forced" into it by circumstances). The Legal Aid Society does not provide funds for divorce matters, except in "unusual" circumstances¹. As a result of an understanding between the Law Society and the Legal Aid Society, any lawyer is expected to do one "free" divorce a year when requested to do so by Legal Aid. Legal Aid via the government pays the "costs" of the divorce; that is, the cost of filing and serving the petition, but does not pay the lawyer a fee for his time or for the services of his secretary. So, in effect, doing a divorce for a Legal Aid client costs the lawyer money; and hence, the lawyer is likely to perform this duty somewhat

¹This is set out on p. 2 of the Handbook of the Legal Aid Society: "Exclusions: Legal Aid will not be given in any of the following matters:

(1) Divorce and matrimonial causes, including judicial separation, nullity, alimony actions, maintenance orders, alienation of affections, etc., unless the applicant has been referred in writing by a qualified social worker who must recommend such Legal Aid for the benefit of infant children, or the applicant has obtained a letter or recommendation from a qualified medical practitioner indicating that the health of the applicant may be endangered by the continuing matrimonial problem."

reluctantly¹. The following example displays this attitude. The client is expecting that her divorce will be paid for by some social agency, but does not know that she would have to apply to Legal Aid and that Legal Aid would be unlikely to provide funds since her situation is not at all "desperate"². The lawyer assumes that she will be the usual paying divorce client, but when he discovers towards the end of the interview that she has no funds to pay for his services and is expecting "the welfare" to pay for it, he tells her that she must apply to Legal Aid and tries to discourage her from requesting him as her lawyer:

Lawyer C: So, uh...what arrangement would you make for...paying the fees in this case?

C: Well aren't the welfare supposta pay it for me?

¹The following excerpt from an interview with a Legal Aid employee elaborates on this point: "Every lawyer in town must do one divorce if asked. We go through the list alphabetically. A lot of lawyers try to get out of it. A senior lawyer will pass it down to a junior in his firm. But the divorces that Legal Aid take are big problem types - bizarre things. Juniors can't cope with them all that well. This is a problem because these cases are really bizarre - big problems. Lawyers will say they are too busy or they don't do that kind of work."

²Lawyer B: "Let's see...Legal Aid - you saw them and they - they don't back any divorces unless there's...it's a very bad situation - that somebody's getting beat to within an inch of their lives or some darn thing."

L: I don't think so - welfare doesn't pay it - uh Legal Aid would it - uh, but they won't pay our fees - all they'll pay is - just the cost -

C: Well, what's the fees like?

L: is just the cost of disbursements - Well our normal fee is three hundred and fifty dollars for a divorce...

C: Hmn.

L: That's quite a lot of money - probably in your pre- present situation -

C: Well I have a friend that I knew before used it after uh - after three years - I was talking to him for a few minutes an he says after three years, he says the twenty-five dollars, he said - Well I haven't been talking to him and says that was it - I haven't phoned or anything.

L: Looks like a person should be -

C: - An wher- what's her name says she got hers - she says to the L- Legal Aid, or whatever it was - or welfare - that's what I - the lady that phoned the other day - she got hers that same way, and that's what I was told ta do.

L: Um-hmn - you'd haveta apply for Legal Aid then. Now I don't know - you might not get me as a lawyer, if you apply for Legal Aid, but that doesn't really matter if it's uh - a simple - separation case - it doesn't. It's probably the simplest type of case tuh - ta put through. The only problem with our position of taking it on a Legal Aid basis, is that, uh - we don't - you know - we don't get paid any fees for it at all...by Legal Aid. Legal Aid doesn't pay you any fees - uh, all it does is - as you know there are costs involved in...filling a...divorce petition and going to court - those aren't legal fees - those are the things that the government charges...

C: Um-hmn.

L: And all that Legal Aid does is pay for you, uh, it doesn't pay any legal fees for you, but uh, of course if Legal Aid paid us to do it, then we would do it on that basis - but, uh - you would have to apply for Legal Aid first and then ask them to cover you and they'll appoint uh, a lawyer, uh

C: Well, I -

L: for that purpose - I did - I didn't realize that you were gonna be doing this on a Legal Aid basis before you called

L: If you could get - yeah, if you could get some money - it would really help, because it's really difficult - for us to do it, you know, on a Legal Aid basis. Even with Legal Aid, we don't - it hardly even paid our secretary.

C: Yeah, I know. Ninety-five dollars won't go very far in a month, especially when you pay rent in the meantime.

L: Exactly - sure - so you're in the same position - well - you go over to Legal Aid, and uh - ask them for an application and tell them you wanna get a divorce and they'll give you the application and they'll fill it out for you - and they'll, they'll either appoint us or appoint another lawyer, but it doesn't really matter, the case is a simple-

C: Well I'm gonna tell them I want the same one that I've already been to -

L: You - you will, eh?

C: I think you're good.

L: [Slight laugh.] O-ka-ay! Uh - it makes it a little bit difficult because, uh, as I say - we don't get anything for it, but this doesn't - this shouldn't really matter...

C: Unless they can get it outa him - but I - this is another thing I don't know...cause I haven't got a clue. I know one thing - he hasn't been supporting me - medical reasons. Well - if I were - well if I were...capable, I'd go back to work.

L: Um-hmn. Well, that's alright then - you go over there and apply for Legal Aid and then, uh - tell them about your - you know the situation that you have and they'll uh - they'll get the application through and I imagine since the - well almost guarantees that you'll get Legal Aid granted to you because of your position with, you know, social security.

L: Okay, I'll keep this information here.

C: Yes, would you do that please - because if I get it, I'll bring it back over, uh - because I'm going over there right now.

L: Okay they might, they might uh, as I said, they might appoint another lawyer to do it, but that's neither here nor there. You wouldn't be any worse off. I'll tell you that. I-I - you'll be just as well off.

Almost all of the clients who come in for a divorce are "paying" clients as opposed to criminal clients who are mostly on Legal Aid where the lawyer automatically gets an adequate fee.

Lawyer C: "You see - the usual - for an uncontested divorce, the usual fees are four hundred and fifty dollars plus disbursements which are usually fifty dollars. I don't charge that much - because I think for most cases it's unconscionable - some cases - it's worth it because you have to do an enormous amount of work - if there's any dispute about custody or maintenance or anything like that - that's a lot more work - for some things it is a lot simpler."

The four lawyers in this study hoped to charge the minimum suggested fee (\$450.00 as set out in the handbook put out by the Law Society), but would put through a divorce for \$350.00, which is considered very cheap in the legal community. For \$350.00, the circumstances of the divorce have to be made simple and uncomplicated so that the lawyer is paid adequately for his time - which means that he cannot afford to go beyond the simple one or two hour interview and the time involved in boiling the material gained in those interviews down into the standard petition format in preparing for court. Beyond this, he would require extra payment.

All of the clients in the data I gathered were able to afford only the minimum fee which meant that the lawyer selected out the simplest possible way of handling the divorce. This involved using either adultery or three years separation as grounds - or physical and mental cruelty only in instances where there is a clear-cut case and easily attainable and documentable proof.

Lawyer B: Alright - well - from what you tell me - I don't think from what you're saying that without some strong medical evidence, which is usually the case, unless there's some STRONG, damn good strong reason why there was no medical evidence, which I don't think exists here - then you can prove adultery, cruelty. See, these cases, any evidence you give on almost - for any grounds, must be substantiated, by some other witnesses. Except - well you can substantiate this very easily - and the easiest thing to prove of course is that you've been separate and apart for three years; but you will be in a year and a half.

C: [Mumble] I know he was dating - he admitted one night he took this girl to the drive-in.

L: But how can you prove any of those things - you prove it either through somebody who is going to testify that they committed adultery - your husband, or a girl, or a detective can say that these were the circumstances, but you can't get on the stand and say - even if your husband told you he came home one night and said that he screwed around with Betsy Lou or whatever it is - that evidence alone will not support a divorce based on adultery because the only evidence that is - of the adultery is what he told you. It's not direct evidence; it's indirect evidence. You need direct evidence - in most divorces. I've got three divorces on this month where hopefully at any rate, the person being sued for divorce will actually be there and can be called to the stand to give evidence that they actually committed adultery - and that would be enough, and that would be, that would be -

C: And what - is there nothing I can do with the fact that he - I know he wants a divorce, because he - that's all I ever hear from him - and yet I wrote him and told him that I never had any child support - no support whatsoever since - it's been a complete (). So I wrote him and I said well look, it's over - it's been over for a year and a half - we've never even spoken to each other in a year and a half. He's had this girl friend I hear through my other uh, friends - I go down there and they tell me about - I wrote and told him I knew about Jane and if this is what he wanted it was great, why wouldn't he make it easier - and confess to this, because he is obviously sleeping with her - I mean let's not be funny about it - but of course I don't get any answer - he's so damn lazy, he won't take two minutes of his time to do a damn thing, and yet it really makes no difference to him! If, if we get the divorce cause I know he wants it - so what can I do - my hands are tied - he won't make any kind of effort. He - he's just leaving me strung out, I mean -

L: There's a case there then - there are ways, of course, around this - for instance, adultery is one of them. I'm working on the assumption that the sky is not the limit - regarding how much you're willing to pay to get this done. In theory, it is possible to, not to subpoena, but to go down there - I could fly down there - take affidavit evidence from witnesses and take - bring them back up here - and that's done sometimes - assuming there's no-one fighting it - it's still gonna cost you five hundred dollars. I mean this - I assume is out of the question. There's just no way this is gonna happen. It's also possible that for your husband to give affidavit evidence, commissioned evidence, that could be brought before the court that he committed adultery. Naming the other party - that's - a possibility - but it isn't gonna be easy! It won't be easy - with the, the doctor's evidence, the cruelty thing is pretty well out. Your situation is typical of hundreds of thousands of people, but they can't prove that -

C: But -

L: The other way to do it is to wait another year and a half.

The fact that most divorce clients are paying clients means that part of the interview will be taken up by negotiations for payment of fees¹, and the fact that the client is someone from whom the lawyer must collect a fee, may mean that he is treated somewhat more diplomatically than someone whose fee payment comes automatically from the government.

Lawyer B: It's as simple as that. But uh, that's the problem with retainers, because, um - all lawyers experience - if you don't get any money in before the actual event, you never do-o.

C: I can understand that - I can, yeah.

L: That's the - that's the problem with that, now - I'm going to suggest. This is it - you see, if you don't want to umn - we can get this probably - we can get your divorce through in - three months, or less - the question is - to my mind regarding fees - whether or not you, you can pay me anything before that date...

C: Well, uh [sigh] - Christmastime, I'll be working full time at Woolworths, uh - I have no - you know I don't pay room and board - or anything like that.

L: Oh you don't - who pays?

C: - Cause I look after - I look after, um - this fellow that I live with and his son - you see, I look after them, in exchange for

¹Lawyers are aware that clients "shop around" for a lawyer: for instance by going to more than one lawyer for an initial interview and "sizing up" different lawyers in terms of their fee policy. They then select the lawyer offering "the best deal". In the meantime they do not inform any of the lawyers that they go to for the first "free" interview that they are "just shopping around". Shopping around is apparently most commonly done by telephone: "Shopping around is usually done by telephone. I never discuss fees over the phone. If they ask for fees, you know they're shopping. I tell them I'm selling a service, not a commodity." (Lawyer E)

L: Oh, I see.

C: for room and board more or less, and uh - I don't have any um - I have one bill with Niagara Finance in which I've got about - I pay about fourteen dollars a month on it - and I've got - maybe fifty dollars left to pay them.

L: Mnn.

C: So I don't have many things - as far as expenses are concerned...so I could probably - I don't know what to say, you know, uh, I mean,

L: Well, I'll tell yuh -

C: as far as-

L: Well I think - let me put it this way - just let me - make a proposal to you - the usual thing - because it's fifty dollars - is for disbursements. If this thing is uncontested - y- uncontested - you know - not just the trial - it's...most of the contesting goes on beforehand - you spend eight days before the registrar and you do all sorta things. I don't think- But I'll charge you three hundred dollars plus disbursements - and that'll be about three hundred and fifty dollars - TOTAL. The only other option that you would have would be to ask for costs against your husband - and you don't wanna do that - So that's fine - that's up to you; but you see my position is that - if you don't have any money - and you won't ask for costs, and your husband's got it - I'm paying for the divorce rather than your husband! [laughs].

C: Mn, yes.

L: You see what I mean - I -

C: I understand this I - I

L: But I'll - that's, that's...uh - a fee that I say that I'll - I'll you know put your divorce through for and I'll try to - try to get it done as quickly as possible.

C: Well, now what would you like to see me do as far as, as, as, as - paying you is concerned? - Like you-

L: w-

C: Would you like half of it before the...

L: Well what - right - I would like to get obviously as much of it retained before I do the work as possible - of course. Because what happens is - in some cases that - people do not take the retainer until right before trial - most of the work's been done - the thing falls through at the end and you get nothing for the time you've already spent. That's the problem. That's the whole concept of retainers - too many legal actions don't go all the way because someone backs out - you know - [laughing]. Um - But what I want before I get like before I get the writ down - that's twenty dollars for the petition to be registered and filed - uh - I'm gonna have to be covered for things like that - I can't finance those things - I have to - have that kinda money in trust right away. Umm - but I'll tell you what - uh - we can do - we can start - you can retain me for as much as you've got - just as long as it at least covers what I know it's going to cost me initially. It's gonna be twenty dollars for the petition - it may - it could be up to twenty dollars for serving the petition - The sheriff has to do it and so on. If they can't find your husband - if he's out of town, they've gotta make two or three trips back and forth; an the sheriff'll have to swear an affidavit - so his bill might be up to twenty dollars - that's forty dollars right away. Now there's not much more than that. There's very little more in the way of disbursements - in undefended divorce - most disbursements add up to, in most cases that are undefended - about fifty dollars. Those are what the disbursements are. Any other monies paid into retainers are my fees - but I must have a retainer on disbursements or I can't do anything [pause] ...You understand that - I-

In criminal matters, for paying clients, the lawyer is usually much less accommodative regarding delayed payment of fees and usually requires a retainer of at least half of the full fee before he will do any work on the case, and of course, as in divorce matters, the remainder before trial. This

difference arises not from a consideration such as "lawyers trust divorce clients and do not trust criminal clients", but that the lawyer's attitude to divorce work is different from his attitude to criminal work because the practical operatives in each area is different.

Getting divorced is not a necessary consequence to being in marital trouble in the same way that going to court is a necessary consequence to being "in trouble with the law". It is possible virtually ("for most intents and purposes") to end a marriage without going through a divorce, by simply leaving the marital domicile for residence elsewhere. It is also possible "in more and more circles" to then live with a partner who is not one's legal spouse - in respectability and non-harrassment. Some young lawyers say that they regard divorce as a luxury that most people do not "need", but choose to "buy" for certain specifiabile reasons: (1) "legal" reasons, such as wanting to marry again; (2) "financial" reasons, such as a guarantee for or against maintenance and child support, or a guarantee of a certain split of the marital properties; and (3) "emotional" reasons such as feeling that getting a divorce closes doors, settles things, leaves one "feeling better"¹. These of course are not the reasons that get laid out as "grounds for divorce" in the divorce petition.

¹In the following excerpt from a divorce interview the lawyer specifies these reasons to a client:

Lawyer B: Um - Why do you want a divorce? [Slight laugh.]

-
- C: I just want to, to just get clear of him - I would like a new life. I don't feel that I wanna be a married woman - uh - you know - running around and - I just wanna - you know, I want to be free.
- L: Right, sure, um
- C: I would like to - I hope someday to find a decent man and
- L: Um-hmn -
- C: You know that I can spend the rest of my life with I - I don't like being alone - I feel like half of something that isn't there, you know.
- L: Sure, I understand that.
- C: Uh, I've been like this before - I don't like it - it makes me feel very insecure, so, that I would like to - you know - start going out again and enjoying myself a little bit and -
- L: Sure - well the reason I asked - I was curious about whether or not you had any views of future marriage or anything -
- C: Well I sure hope so - some day!
- L: No, but I mean right now, though - that's what I was referring to.
- C: Not at the moment.
- L: See there's - there's really three reasons why people get divorces: one, they want to marry someone else...
- C: Mostly, probably!
- L: Well - in some cases - and uh - for other reasons that they start divorce proceedings in order to secure their financial positions through interim maintenance, and final () and that kind of thing - and the third reasons, I think are emotional reasons - and that's the reason you want a divorce.
- C: Mnn.
- L: Because right now it's not blocking you from any other things - you're not interested in the financial - and getting married - you're not gonna do that right away anyway - so - your reason is just as valid as the others - um, now, so I would be, you know, uh willing to get this together and draw up a rough draft - there's quite a bit of digging in something like this, because it's not alleging, uh, adultery, or something certain - that's all there is to it - there are all these allegations.

In the following exchange one lawyer makes it clear that he regards divorce as a luxury. This exchange took place between two lawyers directly after an interview in which one of the lawyers talked to a woman wanting a divorce. (The tape recorder was left on by chance.)

Lawyer D: (L2) What, uh - heinous crimes has she?

Lawyer B: (L1) Oh, well - it was just a matrimonial thing.

L2: [Groans]

L1: Trying to get a divorce - her husband lives in The States so that's where they were living really, and...She wants mental cruelty [sarcasm] - that he upset her and all this stuff, and she's never been to a doctor or uh - you know!

L2: Nahh-naah!

L1: She's never really been here either - no witnesses!

L2: No domicile.

L1: Besides - well she's alright on that count, but she's uh - she's alright - she's here - she's been here for a year and a half () I just - "That's too bad", I explained! Funny female rationale - she said, "Well - if I can't get a divorce - then I want some support!" [laughs]

L2: [Laughs] How do they do it!

L1: They tie it hand in hand!

L2: Really!

L1: I mean if you got the divorce, you wouldn't ask for the support - if you can't get that, you want the money!

L2: Yeah!

L1: () to the lousey ()! So I sent her down to Family Court.¹ With the State he's living in - there might be an arrangement for support.

L2: Sure!

L1: [Laughs] I kept telling her she just has to wait for just less than a year and a half if she wants to.

L2: Sure.

L1: She seemed a little surprised at my whole attitude! [laughs]. What are you - you know why - I always ask, "Why do you want a divorce!"... "Well I, uh -" [laughs].

L2: Really! Good for you!

L1: Oh shit, yeah - they are always taken back. Because they never know!

L2: [Laughs.]

L1: This is really funny - if you put it on the right level - this is a pure LUXURY, you know.

L2: Yeah, yeah!

L1: [Laughs.] She says she wants to marry somebody else that's down in The States.

L2: Yeah.

L1: Well why marry him! Why go from the pan to the fire!

(Here is an excerpt from the interview between lawyer and client showing what the lawyer is referring to in the discussion above:)

¹Family Court handles such matters as support and maintenance in a system like small debts court where lawyers are not usually involved. The lawyer could appear with her at Family Court, but it would not be worth his time since the fee for such a matter would be low.

Lawyer B: Let's - let's just be realistic - you're - this is why I asked you why you wanted a divorce. A lotta people don't even know why they want a divorce. Some people want a divorce so they can marry somebody else - it seems that can be blatant nonsense right on the face of it.

C: [Laughs.] Well that isn't my uh - that's my goal.

L: Well maybe so - but just think of the ludicrousness of that for just a moment.

C: Well I got a bumner the first time around, that's all!

L: Well that may be, but -

C: Well this guy's ten years older than I am - this boy friend I have - he's a well-established furniture maker - fine furniture maker.

L: Yes, but I'm just suggesting to you that you're not thinking about the immediate future - so you might not get married for a year and a half - or a half a year, you might be able to get a divorce, but assuming that to serve him would be no hassle, whatever - nice and clean - um, and really I () to you - although you're thinking about remarriage in the future that the real reason you want a divorce is for purely emotive reasons: you want to get a feeling of relief from the whole thing - which is an understandable, uh -

C: Well that - and also the fact that I cannot - I can't raise my kid on my own right now - by being in the position I'm in - one thing I - I can't afford - my parents, I'm living with them now, which I don't like, but I can't get out - on the salary I'm making right now - I'm only making - not even three hundred dollars a month and I can't get out - I wanna tell you something - the baby-sitter I have lives way up the hill - so I haveta get a bus.

L: How is a divorce gonna change that?

C: Well a divorce in one way - the fact that I can get remarried and I'll have this support - is the main reason.

L: Support doesn't flow from marriage, you know.

C: No, but it certainly - in fact, I mean it's there, I - I can have my own home with him together and I can raise my own kid the way I want to - I can't do it in the situation I'm in right now.

L: Can't you? Thousands do-o!

C: No, not in the home I'm in, I can't. Not with my mother and father - Well, my mother - I don't disagree with mother, but my father -

L: I see.

C: He'd raise them his way - not my way.

L: I see. Okay - well that explains a lot of it, you know - Unfortunately - it looks from what you tell me that you're just going to have to wait () because unfortunately your home scene is such that you can't do whatever is right for you without going through the legal mumbo-jumbos - is exactly what it is -

We see that a lawyer's attitude to divorce work is very different from his attitude to criminal work. In criminal cases he sees himself as helping someone out of a "jam"; in divorce matters he is providing someone with something they think they need; divorce is a luxury that clients buy. Though lawyers want to persuade clients to buy their services, at the same time they want to be sure that the potential client "wants" and "needs" a divorce, because, after the initial interview, the "natural" drop-out rate is high due to clients deciding not to get a divorce after all, or to go to another lawyer, or to wait a while, etc. The lawyer does not want to invest "any more effort and work" than he "can help" in a client whom he is not sure is going to "go through with it".

In this section we have seen that lawyers regard divorce as a luxury in most instances and that they feel that the "real" reasons for wanting a divorce seldom coincide with the reasons supporting a divorce petition (grounds for divorce); it will be interesting now to see how lawyers go about "getting up the grounds".

(5) What Actually Happened and the Grounds:

Both criminal and divorce stories presumably have a basis in "real life": What Actually Happened. In the case of criminal stories told in defense of charges on minor criminal offences, the real life referent is usually an "incident" - a specific happening in time and space for which the police feel they have "evidence" of the commission of an offence¹. In divorce cases the analogue of the What Actually Happened is why did the marriage break down. In divorce stories, the What Actually Happened is likely to consist not of a single incident, but rather of the general character of years of domestic life. It is difficult to conceive of describing the whole of one's marital life, apart from having some set of relevances to use in selecting, setting up and laying out descriptions. This set of relevances is discovered by the client when he goes into the

¹For an excellent phenomenological discussion of "What Actually Happened" see Melvin Pollner, "On the Foundations of Mundane Reasoning", (Unpublished Doctoral Dissertation, The University of California, Santa Barbara, June, 1970).

lawyer's office and "picks up on" the lawyer's directions regarding what to talk about and how to talk about it. In the latter part of this chapter I will analyse examples of this process of converting marriage histories into grounds.

A record of the marriage up to the point of intitiation of divorce proceedings may or may not display a breakdown; that is, the What Actually Happened may not turn out to amount to what it would be required to amount to in order to qualify as grounds for divorce. So the client, with lawyer guidance must retrospectively construct a breakdown of the marriage that will meet the requirements of the Divorce Act.

Except in some instances (for example, where the selected grounds are adultery) there is not, as in criminal cases, a specific occasion from which to model the grounds. It may be that there are episodes of importance that the client sees as steering him toward the decision to divorce, it may also be that the client has decided to get a divorce for what he sees to be his general feelings of unhappiness in a situation that he cannot characterize specifically in terms of the features that he finds upsetting. However, the law requires that in divorce petitions the grounds for one party seeking a divorce from another be set in terms of specific incidents documented by dates and addresses as indices of proof; and the divorce client will be asked by his lawyer to give his feelings, or his domestic life in general, an episodic base:

C: Have you lots of time?

Lawyer A: Well I hope that we could narrow it down, actually, as much as possible...Now - what I'm looking for...

C: I could give you a general story of it - you might say -

L: Well-

C: Plus a date or two.

L: What I'm looking for are - there's probably something that you can narrow it down to...that he does, that upsets you. There are things that he he does...that upset you.

C: Um-hmn.

L: These are the things - I wanna know...what they are.

C: Well...

L: We have to allege specific things

C: Yes, I -

L: and it has to have an effect on it.

We see that divorce clients must be able to put their domestic lives in account form: they must translate their domestic lives, abstracting the emotions and events of years of daily interaction, in a question period of an hour or so, into stories which the lawyer can boil down into suitable grounds for divorce. Lawyer and client may or may not know at the outset the categories into which the client's possible tales of woe must be fitted. The practical facts appropriate for the grounds for divorce are not necessarily the "natural" facts of a situation of marital distress, but the interpreted facts that lawyer and client pick out and elaborate as being

the facts that will fit into the most appropriate and expedient of the given grounds for divorce (three years separation, adultery, physical and mental cruelty, etc.). How many and what specific grounds among the possible available ones are used in the petition is a matter that is sorted out at some time during the interview.

Lawyer C: First of all you're going to want a divorce - that's the idea, isn't it?

C: Yeah, yeah, because I want to get married again.

L: Want to remarry - so the whole problem is whether you have the grounds.

L: Your grounds would have to be uh - something analogous to adultery, eh?

C: Um-hmn.

L: And -

C: And you can add mental cruelty to that - I'll tell you why.

L: Okay. Let's go on adultery first.

C: Okay.

L: When and where and with whom?

C: Uh... [groan]... [sigh]. Let's see now - I'm gonna haveta think - we were married...in June. It was when we came back. It was October. I guess it was September of the same year. . . . I can't, I can't say the exact date. Probably Jane [spouse] would have a better idea. . . .

In the above interview the lawyer does not begin by asking the client what were the reasons for the breakdown of the marriage, but bears down on the specific grounds. The

lawyer will direct the client to agree to what are for the lawyer the simplest and easiest grounds. In uncontested divorce usually only one ground is necessary; and the lawyer searches for and gets the client to agree to, the "easiest" or "best" grounds. Generally speaking; that is, apart from the particulars of individual cases, the first and easiest grounds for the lawyer are three years separation, which requires merely documentation of separate domiciles throughout the three-year period in the form of dates and addresses. Since the spouses in the above example have been separated only a few months, the most convenient grounds are not available. Adultery is the next easiest choice from the point of view of the lawyer. The remaining grounds tend to be considered as more complicated, "messy", and difficult to establish - or, as in the case of addiction to alcohol or a drug¹, imprisonment for over five years, and insanity - rare in occurrence. Using physical and mental cruelty as grounds is generally more complicated for the lawyer than adultery. Lawyers claim that it is more difficult to get the client to tell "the right stories" and to select out the elements of mental cruelty from those stories and to establish proof that

¹Addiction as grounds is used apparently only in conjunction with mental cruelty; that is, that the respondent's addiction caused the petitioner to suffer mental pain. The actual grounds set out in the petition are usually mental cruelty.

will be acceptable to "any judge"¹.

In the above interview the lawyer fixes on adultery as his preferred grounds and evades immediate direct consideration of mental cruelty, "Okay, let's go on adultery first". Since this is a simple case of uncontested divorce, the lawyer is not interested either in multiplying grounds (using both adultery and mental cruelty), or in using mental cruelty as the sole grounds. Since single grounds are sufficient, the lawyer is not interested in going into the complications of mental cruelty when plain and simple adultery will accomplish the task of establishing grounds for divorce. The lawyer's directive, "Let's go on adultery first", is a diplomatic evasion; and the lawyer knows that in the course of the adultery talk, the client is likely to forget about mental cruelty. The interview proceeds and neither lawyer nor client re-introduce the topic of mental cruelty throughout the interview. It is interesting, though, that the client sees that his own life material can be turned into things like "mental cruelty" and that he offers this categorization to the lawyer. However, the way the client

¹The ease with which a petition goes through is said to depend on the grounds: mental cruelty being the one that is least easiest to predict as having been set out sufficiently or not sufficiently. Some judges are apparently much more exacting than others in their requirements of "proof". Lawyers claim that there are judges who will let "anything" pass as mental cruelty and there are judges who are believed to dispute everything.

sees the divorce situation in terms of this categorization happens in this case not to be responsive to the problems of trial preparation as the lawyer sees these problems.

(6) The Grounds and Contested and Uncontested Divorce:

The way a lawyer handles an interview in cases where it is certain that the divorce is not going to be contested is very different from the way he handles a case where there is a possibility of the divorce being contested¹; and this affects the number and character of the stories that are brought out in the interview. In cases of contested divorce, the lawyer uses not just single grounds, but as many as possible and lays them out in a more detailed way and takes greater pains in documentation.

In the usual uncomplicated uncontested divorce, the lawyer selects and establishes the grounds for divorce in the course of a single interview of from one to two hours. In the case of a contested divorce, it may take many interviews to accumulate the material needed to lay out the grounds and

¹There are two kinds of contesting (a) Contesting in order to bar the divorce - or prove the grounds; (b) Contesting that the respondent, not the petitioner should be granted the divorce; that is, "counter-petition" by presenting reasons why the respondent should be granted a divorce. In (a) if the respondent is successful, no divorce is granted. In (b) if the respondent is successful, he, rather than the petitioner, is granted the divorce.

to prepare for trial¹. In cases of contested divorce the trial more closely evidences adversarial conflict where both parties (petitioner and respondent) are present and each is represented by a lawyer (but not by a lawyer and prosecutor as in criminal cases)².

In the same sense that the criminal client's story must counter the likely police story, in cases of contested divorce, the divorce client's stories must counter the spouse's probable version of those same stories. The lawyer has to see that he and his client are properly prepared for the respondent's counter stories ("the other side of the story"). The client's stories must be told in court in cases of contested divorce and will be cross-examined by the respondent's (or counter-petitioner's) lawyer. The petitioner's lawyer must himself be prepared to meet and to cross-examine the petitioner's versions of his client's stories and

¹Several uncontested divorce cases are scheduled for a single morning or afternoon in court - a single case taking not usually more than five minutes to "go through". Contested divorces on the other hand are scheduled not with other divorce cases, but are put on the list of general civil trials. Contested divorce cases usually last for at least one full day, but may continue for a few or even several days.

²In fact some cases of contested divorce could be seen as representing adversarial conflict at its extreme. I ob-

served one three-day contested divorce trial, each party suing the other (counter-petitioning) on the grounds of mental cruelty, in which the judge made the following comments in summing up his decision:

"This case has been typical of some matrimonial disputes: that is, with a high degree of bitterness and incrimination, and mutually directed venom. The marriage existed for fifteen years - albeit tumultuously - and resulted in the birth of three children. It cannot be disputed that there was an intolerable degree of incompatibility and mutual distaste. Eventually she moved out of the bedroom, but they continued other marital relations. But soon communication virtually came to an end. The final separation came when she left taking the three children.

It is very difficult to sort out the conflict of evidence when a relationship founded on connubial love ends in hatred. In their obsessive desire to win the case and injure the opponent, they get truth confused themselves.

Mrs. _____'s evidence I accept generally speaking. Though she dredged deep and far back into the history of the marriage and is a skilled and articulate exaggerator and a good advocate of her own cause with a Cassandra-like catalogue of accusations, there is still an ample substratum of believable evidence so that she succeeds in her allegation of cruelty. Mr. _____ got the truth confused with obsessions. He is so intensely subjective that he is a victim to what so many in such a dispute fall heir to. His pre-occupation with sex went so far as to constitute cruelty.

The wife's petition on the grounds of cruelty succeeds."

any "new stories" set out in the counter-petition. Respondent and petitioner via their lawyers must meet each other's allegations point by point - therefore the lawyer must call on his client for more stories and for more elaborate stories and more highly documented stories than would be adequate for a simple uncontested divorce. This is somewhat similar to the difference in the type of story that a lawyer requires from his client as a defense in trial and the story that will pass for purposes of speaking to sentence where the story is not challenged; that is, where there is no point-for-point battle. In cases where the lawyer knows the divorce is not going to be contested, the preparation for the other side of the story, in terms of elaborating, documenting and multiplying grounds is likely to be token and minimal, although the assumed and likely "other side of the story" is always vaguely present in the lawyer's mind as an implicit standard underlying the characterization and documentation of the grounds for divorce.

So it is in the circumstances of contested divorce that the client has the fullest opportunity to tell "all" the stories in full detail, limited more by memory and imagination than by the lawyer wanting to stick briefly to the business of getting up single "simple" grounds as adultery or one year separation - since in contested divorce the lawyer usually thinks it best to set out as many grounds as possible and to be prepared for the counter grounds.

In contested divorce obviously there are no problems regarding the collusion stipulation. As far as uncontested divorce is concerned, though, lawyers claim to know that most uncontested divorces are "collusive" in the sense that the petitioner and respondent did get together to agree to divorce and did agree on the grounds, especially where adultery is used as grounds and the respondent agrees to admit his adultery so that there will be no problems with proof¹. In view of this, it is interesting to see how the lawyer handles the "collusion" part of the interview (that is, when he gets the information he needs to make the statement in the petition that there has been no collusion)². The lawyer usually just simply says, "Was there any collusion?" and expects the client to know enough to say "No" and leave it at that. If the client looks puzzled, the lawyer will say,

¹It used to be the common practice that "adultery" was staged with a hired adultery partner to be found in bed with the respondent by a detective hired by the respondent with the petitioner's full knowledge and approval. The hired woman was usually a professional whose name appeared on more than one divorce petition, and who was familiar to the judge as someone whose occupation was "co-respondent for hire". The courts turn a blind eye and a deaf ear to this situation and treat the petition as routine. The young lawyers in this study claim that this practice is not as common as it used to be in general and is seldom used among their peers. The person "named" in the petition is more likely to be the actual "adulterer" or a mutual friend of the parties to the divorce who is willing to "admit it".

²Often the issue is not raised at all; that is, the lawyer simply assumes there has been no collusion and does not bring up the question in the interview.

"You can't get together and agree to divorce - there must be no collusion. Was there any?" In putting it this way, the lawyer is obviously structuring the answer he will get. The client ought to know enough having heard just that, to say "No, there has been no collusion". What counts as collusion could of course be a complicated legal question. The way that lawyers "define" collusion for clients as "not getting together and agreeing on a divorce" does not make clear what constitutes "getting together and agreeing". However the very word "collusion" has a derogatory connotation. Asking someone if they "colluded" is sort of like asking them if they cheated; and so the way the question is set up and phrased provides sufficient clues for the answer. If the lawyer were to ask instead of "Was there any collusion?", "Did you talk to your spouse about getting a divorce?" and "How did you discuss it?" he would probably get a different kind of answer in terms of how it can be translated into whether or not there was collusion. Not knowing the technical¹ meaning of collusion, the client may not count what they said to each other about getting divorced as collusion; whereas, technically, it might have been. The client does not know the technical meaning and naturally takes it in the everyday pejorative sense. The "collusion" is actually between lawyer and client and between judge and lawyer to

¹See above p. 266, footnote for the technical definition of collusion.

deal with certain categories of things in certain ways in order to make them seem appropriate and sufficient according to the established courtroom standards.

In conclusion of this section on the grounds and contested and uncontested divorce and of the introductory part of the chapter let me note that whether or not the divorce is contested and the grounds that get selected can be seen as the most directive influences on the kind of stories that get told in the divorce interview. As we shall see in the interviews discussed below, the whole history of the marriage gets coloured in terms of the selected grounds for divorce. The grounds say what the facts in the story must amount to, in the same way that the charge in a criminal case tells the client what the facts in his story must not amount to. While the criminal client usually comes in with some sort of story designed to show that he "didn't do it", at least not exactly how and why the police said he did, the divorce client comes in with some sort of "tale of woe" ("being wronged", etc.) designed to show that he should be granted a divorce "against" his spouse. A person who comes to a lawyer for a divorce will have to make himself out to be the injured party; (if one is the injuring party, one cannot try to get charged for a divorce - unlike turning oneself in or giving oneself up in a criminal matter). Regardless of the client's emotional involvement in the divorce action, the lawyer's interest in divorce stories is similar

to his interest in criminal stories - he focuses on the aspects and possibilities of the stories that are translatable into what he needs to get the job done - in divorce cases to "work up the grounds" and in criminal cases to "beat the rap". In the same way that he avoids the moralities of the criminal case, the lawyer avoids the emotionalities of the divorce case and pragmatically attends to the practicalities of processing the divorce.

Example 1:

C: Okay - then going along that line, what can I do in order to be provided with support.

Lawyer B: Alright you can phone me and go down to the Family Court and tell them you are in a position of non-support - that your husband is not supporting you - Do you think he's working? Now - there's no sense going through something like this if - if he's just a stump and you can't get blood out of him.

Example 2:

Lawyer A: Did he do anything...drastic? I mean, uh, did he...

C: What's drastic?

L: Well, you know -

C: Bruises?

L: Bruises, did he break any bones, er, uh?

For the lawyer who is "doing his job" of processing cases in the most efficient and comfortable way possible given the pragmatics of his working conditions, the "hard-core" practical attitude evidenced in the above examples seems "natural enough". For the client, though, who is going

through a major change in social status and life history, a different set of relevances are in operation. How the lawyer gets the job of preparation for trial done in the context of the interplay between these two sets of relevances will be worked out in the remainder of the chapter as I analyse "divorce stories".

I have now completed the main features of the relevant differences in "criminal work" and "divorce work". These imperatives should be kept in mind as a background for the remaining sections of the chapter in which I discuss the actual workings of divorce interviews.

II CLIENTS' RELEVANCES AND LAWYERS' RELEVANCES:

I will begin my analysis of divorce interviews with a case of contested divorce because it is here that clients have the fullest opportunity to "tell it from their point of view" and to "reveal" their relevances so that we may see how this affects the lawyer's work.

As is usual in preparation for trial in contested divorce, the lawyer must try to "dig up as many grounds as possible" in order to meet the challenges and counter-allegations that will be put forth by the other party. In this case the lawyer gathered his material over the course of several long interviews and used a comparatively non-directive approach in guiding the client to assemble the necessary stories so that the lawyer could see what grounds were

available. In this instance, divorce proceedings are being initiated after twenty years of marriage in which there are four children and custody of the children is likely to be in issue. The lawyer is acting for the wife.

Lawyer : () Alright what else does he do? We got into that aspect of it. What other things can you think of - specific things that he might have done or does do.

C: Well - my sister's little boy died - when it was six weeks old. We'd never seen it of course and he lives in Calgary - and we got the news that he died. And it just happened that mother was staying overnight. My mother was staying overnight - at the house. And in fact I was glad it happened that she was there - and we got the news, early in the morning that - the boy died. Well - there didn't seem to be any question of mass. It was Sunday - we were gonna go. As it happened, uh, my husband didn't pay the rent or something - he had his pay cheque, so he says I've got the money, I'll see to the () this way, that way - you know - I'll borrow the money from Peter to pay Jack. One way or the other, you know, but we're gonna go. () car and uh - we picked up my other sister on the way, uh, and her husband in Redville. So it was my mother, my husband and I got into the car - phoned my other sister that we were going to get them that day and continue going to the funeral - because my husband had to be at work - by Monday (). When we got to the house there - the trip was fine - everything worked out - there wasn't

L: Redville?

C: time to do anything. Pardon?

L: The house at Redville? Or Greentown?

C: Greentown, uh, there were uh, very little sleeping spaces. Of course, this was a sudden thing. One of those queer deaths. Everybody sad. Talking and what not. So there was five of us coming into her house - which was - this was her fourth or fifth child we think. So there was no room for all of us to stay. So it was my sister, my other sister

from _____ and her husband, and my husband - and I - we said we'd stay in a hotel together, I mean for one night - It wouldn't matter one way or the other - it would be easier all around. That night my husband decided to make love to me and there was two double beds in that one room. We took them together and naturally I was just... appalled because I was crying all night for my sister's baby. I felt sad about it. This was the night he decided to get cozy. And I couldn't say anything - he forced himself on me - I-I () And I asked him not - of all nights, not tonight. Nothing more was said. That day or the next day, he got home. Dropped - first he dropped my other sister and her husband. We got home - my mother stayed with - my sister that lost her child - with the idea that they would send her back to _____ by plane.

L: When was this, now, Mrs. _____?

C: 19___. Oh - five years ago.

L: Oh, this was five years ago.

C: Um-hmn - in the winter of - [sigh]. When we got home, he started subjecting me - very, very mean. Very - mnn - I can't even put it into words - cranky! "Do you know that it was our last hundred dollars and - you didn't even thank me for it - that I took you - and your old lady up to your sister's place." He kept pushing himself into it and he can get very mean-looking at the same time. "And your mother's gonna fly home! Who the hell does she think she is!" I didn't know what brought this on, Mr. _____, I couldn't even - there's no logic to this - this reasoning.

L: Mnn.

C: I finally came out and asked him - I said, "Is it because I got quite angry and put off with you that night?" "Well", he said, "it's the least you could have done for me in return!" I says, "Well that wasn't the time or the place" and of course this

L: Right.

C: came into the argument and it was a month old, that argument - for what! I was ungrateful. We were in debt, because of my family! And his brother died before that - he took a plane trip back and forth - to me that was fine! If that was the way it had to be, it had to be. You don't argue over a funeral!

L: Has this ever occurred at other times? When he forced it on you - in a sexual...way?

C: Yes, at the craziest times! My grandmother's funeral, too, I was -

One of the first features to be notices about this story (and all of the others this client tells) is that it takes her a long time to get to the point and that the lawyer allows her to take a long time to get to the point - the point being that her husband tried to force her to make love in fairly "public" surroundings at a time when she was grieving. This is the relevant incident, but it is prefaced by the details of what happened the night before, what the financial circumstances were, who was staying at her house when the death news was received, exactly who came to the funeral and where they lived - seemingly irrelevant details to the extent of who got into the car and who phoned who - all in a tale about indiscreetly forced sexual attention.

The story is started a long time before what is going to turn out to be the operative part occurs. There is a sort of historical build-up to introduce what both the client and the lawyer recognize as the heart of the matter. Though the lawyer would be much happier if the client began with the heart of the matter, the client gives her stories a sort of

"realism"¹ that could not be achieved by simply "coming out with the punch line". Just as if she were writing a play, the client begins with a few scenes of "nothing happening" (relatively speaking) so that when it finally does happen, it happens against an environmental context of life-as-usual and so picks up dramatic force by contrast and also achieves authenticity: then the "action" is properly embedded in everyday detail. It is a simple matter for the lawyer to "pull out" the points he needs. The sort of "grounding" work that the client achieves by starting her story so far back also makes the action seem more damaging because of its unexpectedness by providing a setting which lays the ground-work for different

¹Another client used the strategy of starting at the action proper (that is, omitting a sort of historical build-up) and filling the climactic event itself with an almost second-by-second description of the action; but she too self-monitors her story to make it reasonable and mundane. Even at the height of the emotional part where she describes her husband throwing her up against a dresser in a cold bathroom and demanding that she undress, she stops to point out that the reason there was a dresser in the bathroom was that it was a big bathroom:

"...of course since I didn't get undressed, he couldn't look at me. So then I got up, I went to the bathroom and he came to the door and I opened the door for him, and he came in and started saying all these ironic things and I was just not paying attention and he expected me to fight back or cry or make some scandal. I don't know. I was tired of it, so I didn't even listen. So I didn't even react. So then he came over and he pushed me. There - it was a big bathroom and he pushed me against a dresser that was there. 'Take your clothes off', and he said, 'Take your clothes off'..."

expectations - that is, a normal night's sleep instead of a night interrupted by inappropriate and unexpected sexual advances. It also makes it clear that she in no way provoked this "assault". They had not been quarrelling - she had not been enticing him or frustrating him. They were all just going about the business of getting to the funeral, when "out of the blue" her husband tries to "molest" her. The way she tells the story lets us know that she did not deserve that treatment. She establishes her credentials with the lawyer as an ordinary person going about her life in the usual ways. She tells her story "naturalistically", pointing to the things she was attending to at the time, and not building up professionally an "artificial" tale by dramatically telling only those things that are relevant to build up to the climax of the inappropriate assault. It also has the effect of making her husband seem strange by giving his behaviour a context that makes it seem unmotivated and unexpected and completely inappropriate. (He too should have been so deeply involved in the death of his small nephew that sex was "the farthest thing from his mind").

From the point of view of the busy person, especially the lawyer who is likely to see himself getting paid by the

minute¹, this mundane detail seems very irrelevant and tiresome; but to the client it is properly relevant: that's how it happened for her. The incident would not have had its effect on her were it not for all the things she was involved in prior to its occurrence. Instead of very efficiently saying merely, "I wasn't doing anything to provoke him in any way - I was grieving and caught up in the funeral arrangements", she details the funeral arrangements and the trip - and thereby provides the sense of what it was like for her - without remarking that that is what she is doing.

To the lawyer, however, this insistent detailing only slows down the job of getting the points he needs to put in the petition. For him it would be best if clients came out right away, right off, with the heart of the matter; and if he needs further detail, he can ask for it specifically. The client however has a different set of relevances. He wants to get up the grounds too, but he also wants to be sure that

¹In the following excerpt from my field notes taken during a visit with the three lawyers a few months after completion of my field work they joke about having a system like taxi drivers for charging clients: "Back down to office. Go to pub with the boys. Telling me how short and money-oriented their interviews now are. Lawyer B and Lawyer D work out a system with a great clock that ticks off a dollar a minute. They turn it on with a great click when the client sits down. The client talks; it ticks away: TICK, TICK, TICK, dollars, dollars, dollars! Joking about asking the client again how much it hurt." (Police brutality is a favourite "beef" of clients that lawyers see as a big time waster.)

his side of the story comes out the way he wants it to - that is, that it normalizes and justifies his own behaviour (that is, tells it how he thinks it really was for him no matter how it might have looked to anyone else and no matter what the other party involved is likely to say) - while radicalizing and denigrating the behaviour of the other party to the divorce action. The client finally has a chance not only to air his grievances, but to get some action on them via the divorce proceedings.

The following story by the same client in which an avalanche of detail precedes the point that is relevant to the grounds for divorce shows more clearly the difference in relevance of lawyer and client:

Lawyer B: Okay - So I just want to cover that aspect of it at once: One: he - there's accusation and secondly he - he makes it uncomfortable for you to go anywhere.

C: Very uncomfortable.

L: Does he ever - has he^o ever accused you with your friends about - personal friends - was that the sort of thing that happened?

C: Yes, I won't even go so far back as twenty years. I'll just go as far back as May: my birthday. My sister-in-law, well my husband's brother - his wife, had given me a surprise birthday party. This is something that - once in a blue moon thing that we'd do. And of course we were all asked down and it was quite nice. But it wasn't my birthday. My birthday was on a Saturday. This happened to be on a Friday - or my birthday was on a Tuesday. She asked us over on a Saturday. Fine and dandy. Not too much was said about that! Monday - the following Monday, this other brother had blown in with

his wife from (). Well as it turned out that weekend we were at this party, and uh - Sunday we went to bed late for some company coming in or something or other - Monday he got a call from his sister's place that Bob's in town. Would we like to cime over? Well I was very, very tired. I'd - was canning that weekend, too. So he says, "Well go ahead if you want". Well naturally I felt it was quite alright if he goes. I didn't know Bob - his wife was there - his brother's wife.

L: Mnn.

C: Otherwise he'da left town. So Bob's in town - fine. I said, "I'm too tired - you just go ahead if you want" (). And he didn't get home until two-thirty - which is fine! If he didn't come home at all - as far as I was concerned.

L: Mnn.

C: But as it turned out - when he had left - and shortly after - a friend of mine from the old neighbourhood came at - she said, "You know I've just remembered it was your birthday". And she - Ann just came over and gave me a, a little gift () towels and some nylons. I thought that was awfully nice, you know. We got to talking. First thing you know it was around midnight. She didn't come over till about nine o'clock! She said, "Gee, I must go". And I said, "Listen he's been gone about five hours now and I - just can't see him being this much later" - because I knew he was tired! And of course we went and we could talk our whole night away. It wouldn't bother us one bit! He finally came home about two-thirty. And we waited and (). And I said, "Fine - would you mind running Ann home - we were waiting for you for a while". So he did. He ran Ann home and he went to bed after that. And, uh, the next day I happened to show what she brought me and he said, "Oh, what did you have to do to get that from her!" Now why couldn't he say "Wasn't that nice of Ann!" It wouldn't be so hard! He had to make something out of it. In fact his exact words were: "What did you give her!"

L: Uh, with what kind of innuendo, though. What - what did that mean to you, or what did that convey to you?

C: No logic to it at all - I couldn't figure it out, but

L: B-

C: his attitude that whatever I - do with a person, whether it be male or female - there's something dirty in it.

L: Well that's what I mean - I didn't know whether that was the

C: Yes.

L: innuendo or not to that.

C: Yes, I'm sorry.

L: Okay, alright.

C: Of course that put a - damper on it - as you can see.

L: Right - there's never been any - there's never been any - truth to his allegations of infidelity?

C: Absolutely none, whatsoever.

In the above excerpt the point was so carefully embedded in detail and build-up that the lawyer claims he was not sure what the point was - he could not clearly pick it out, and has to ask her to explain. The client probably felt up to that point that she had made it euphemistically clear that her husband was accusing her of a lesbian act.

In the above excerpts the grounds have not yet been selected and neither lawyer nor client knows which grounds will be available, but both know they must work up as many as possible and document them as strongly as possible. In the meantime the lawyer has little choice but to let the client talk about her problems in marriage in her own way - whatever

that may be - and to monitor her stories for aspects that he can abstract and work up into grounds. As this type of interaction continues and he begins to "get somewhere", he can start to be more directive:

- C: Well of course he said I had to work - long as I could and I was very, very sick of course. But I went ahead and I worked...I needed a few baby clothes - after all, it was my baby...So I bought the baby clothes with that before I quit work - and he wouldn't even allow me to quit work.
- L: Well, just, just one thing at a time now. Right, you've given me some background there - but he - he's - he ac- he's accused you of sleeping with various people that you know, is that the...
- C: Yes, the insurance man, the egg man, the milk man - you name the man, I've been with him!
- B: Just by innuendo, or does he say that - you know, that you?
- C: Just to be mean!
- L: No-no - does he - does he say, does he suggest this by innuendo - like how - you know - what did you do for that? Or did he say, you know, I think you've been sleeping with him - well what's, what is...?

In contrast to the above case of contested divorce where the facts of the situation are such that it takes a long time to select and establish the grounds and where the grounds must be as highly documented as possible, the way in which the lawyer handles the interview will be different where the available grounds are quickly selected and easily documented. From the lawyer's point of view, the easiest grounds to work up are three years separation. The answer to one straight-forward question usually establishes whether

or not this is available as grounds; whereas, many elaborate stories may be necessary before the lawyer knows whether or not there is likely to be a good case for mental cruelty. However, if the grounds are three years separation, the lawyer does not need "stories" as the raw material for working up the grounds, and does not direct the interview in a way that would solicit such stories. Where three years separation¹ is available as grounds, the lawyer's main task is to document the separation via exact dates and addresses. It is not necessary for the lawyer to go into the reasons for separation, but only to document that the parties to the divorce did in fact separate. Though the lawyer neither needs nor encourages stories, he is likely to get them anyway, as in the following two examples. In both examples the grounds are three years separation and are quickly selected at the outset of the interview. In the first example the client lets slip a few very minimal capsulated stories. In the second example, the client tries to tell all the stories as fully as possible, but is blocked by the lawyer.

Lawyer B: What kind of income does he [respondent] have?

C: Gee - I - I'm not sure. He - he's a journeyman and I guess they get four-something an hour - five - I don't know.

¹This is lawyers' talk for "Marriage Breakdown". Marriage breakdown is evidenced by three years separation. This is the only way marriage breakdown can be legitimized as grounds. See footnote above, p. 258, part 4.

L: He probably makes good money at any rate -

C: Yeah I would th-

L: What he's - Well, but you certainly don't want to...charge him.

C: Nope.

L: Hmn.

C: You see - I'm the reason for the breakup of the marriage - well, uh -

L: It usually takes TWO - I

C: I took [laughs].

L: find doing divorce work it usually takes two - to break up the marriage.

C: Well I took the - You see I committed adultery. My husband didn't like sex and I did. So I committed adultery after we'd been married about a year and I uh, sorta took the first plunge. And that was the reason for the - you know, break-up. Actually it ended six months after we were married. I mean it was so obvious from the very beginning that uh, it was uh, you know, a mess [laughs].

L: I see - well - I just - alright, well what do you think you can afford to pay?

In the course of discussion of the lawyer's fee and how it is to be paid, the client quite automatically gives a skillfully capsulated story about the marriage break-up. This story and the other stories that the above client told were minimal in terms of length and detail, and also number, and they were told incidentally and in a natural way. In the following example where the lawyer's selected grounds are three years separation, the client obtrusively, but nonetheless skillfully, tells stories that just keep coming in spite of the obstacles repeatedly thrown in the way by the lawyer who

would like to simply stick to the business of documenting the separation. For the client, every question put to her by the lawyer is an opportunity for her to fill the lawyer in on the details of her past relationship with her husband and her present knowledge of him.

(Start of interview:)

Lawyer C: Now before we go any further, it would probably be the best idea to uh, examine right at the outset what grounds you were contemplating.

C: Well, mental cruelty, desertion.

L: How long have you been separated?

C: It's over three years. Sixty-_____. In May he broke my jaw. It's the same year. I got married on the 2nd of _____.

L: You've been separated for three years, that's grounds on its own.

C: Yeah, well, we've been - it's over three years.

L: It's over three years, alright, you have the grounds, then, fine.

C: It was sixty-_____, May, sixty-_____, officially, uh Boxing Day - it was before Christmas when we separated for s- for good. Well he was messing around with somebody else, I've even got the pictures.

L: Okay - well that's alright - that won't be necessary.

C: And apparently this one died'a dope. And I mean I've never seen - I heard he was in jail and then I heard the other day - I went into the meat market of Sam's I mean, not of Sam's, but the _____? Some wo- some woman came up to me - "I heard you were murdered", she says.

Even though she knows that she has the simplest grounds for divorce ("It's over three years"), the client

complains right from her first utterance and then skillfully slips into her answers to the lawyer's factual questions, the details of her complaints. When asked simply how long they have been separated, she tells time in terms of physical abuse markers: "It's over three years. Sixty-_____. In May he broke my jaw - It's the same year.) Next she slips in adultery, again using a complaint as a time teller: she has been separated for three years and the separation took place not only during the year her husband broke her jaw, but also at the time that he was "messing around with someone else".

Within her first five turns at talking she has complained of almost the spectrum of grounds: mental cruelty, desertion, physical cruelty, adultery. And later on, she brings in addiction to alcohol or drugs. Even after three years, during most of which she has not seen her husband, the issues seem to be still raging in her mind. She seems to be so caught up in relating her marital history that she violates the ordinary rules of relatedness in conversation and continues on her own track in spite of the lawyer's attempts to keep to what he sees to be the business-at-hand. The lawyer too carries on regardless. He more or less ignores her ramblings and sticks to the face sheet questions he needs for the divorce petition. She manages to slip into the conversation that things are such that the rumour is that she has been murdered. Later she lets on that it was her husband who was supposed to have murdered her and that he was rumoured to be

in an insane asylum. She takes little heed of the lawyer's initial lack of response and subsequent negative sanctioning of her "sneaking in" her tale of woe. This state of affairs continues generally throughout the interview, though the lawyer manages occasionally to "get her back on the rails" by a combination of bluntly telling her that her talk is irrelevant and by resuming his data questions; but she continues to slip complaints into her answers to face sheet questions, even though it has been clearly established that they will use separation as grounds:

L: Do you know where he was born?

C: Well that's all he put on there.

L: _____ [Town], _____ [Province].

C: But this is where he tried to phone, phone some - I don't know whether his parents are in Ontario, or what, or his wife, or what, I don't know.

L: Okay - do you recall what his birthdate was? Do you recall celebrating any birthdays with him, or -

C: No, no - I don't actually know.

L: He never told you, eh?

C: The only - the way you could find out is at the police station, because they've got his record. He's got a record. In here, this is one of the notes that I got in sixty-_____ from the same girl under a different name.

L: Well, that's not -

C: And uh, this is some of the () or some darn thing. And this is another one that she wrote to me at the same time.

L: What's this got to do?

- C: Well that's the only - one of the times he was in the bucket and - cause I guess when he bailed, bailed her out I guess or something. I don't know, and there's a note.
- L: That has nothing to do with this, though.
- C: No, and there's another note, the same time, eh, no- That this was be- uh, before that because this was taken, this was taken around in September when I was in the hospital. Approximately in September sixty-_____.
- L: September sixty-_____.
- C: And this is a note that I - that I put - once found - but he's also going under a different name, I - which I managed to find out, but I don't know. It was in, uh - he lied so damn much, you didn't know which was which. And here's one. One of the - one of them also. Oh no - that's (). He forged two hundred dollars of my - cheques at the time when I was in the hospital and I said like - the police asked him what he did with them. He said he ripped them up. And here is another bill that I paid off. And that Fred Asher-
- L: What does all this have to do with your divorce?
- C: As long as I
- L: This all, this all has nothing to do with the divorce,
- C: All I want is
- L: his girl friends, or anything like that - you've been separated, you see,
- C: Yeah, as long as
- L: over three years.
- C: It's over three years, that's all it is.
- L: So you don't need uh, to worry about any girl friends or any accounts that he's paid - that's all irrelevant.
- C: He never paid that - I did.

L: Right, well - that's - that's neither here nor there.

L: What's your occupation, then?

C: Well I've been on welfare ever since, well - I forget what month it was - whether it was June, or it wasn't too long after we got married that he went to jail for forgery.

L: Yes.

C: And he wanted me to stand by him. So I stuck by him. I didn't know nothin about it.

L: Um-hmn.

C: In fact till after we were married and then he was in - and so he got out. Well the welfare had come to see me. And he's got - well on the day I was supposed to pick up my check.

L: You have no idea where he's living now?

C: No.

L: But you think he's working at the hotel?

C: Well somebody mentioned that and then somebody said that uh, when was it - the tenth and I went to _____? And the woman walks up to me and says, "I heard you were murdered", she says, "Your husband's supposed to have murdered you, that you were out in Bluebrook uh"- That he was supposed to be out in Bluebrook clinic, or someplace; but, I phoned there and they have nobody by that name. She just about fell over, and I said, "You're kidding!" And I never heard any more about it. And she - she said she's heard he was around. She hadn't seen him. She said it was a rumour that she'd heard. She said she didn't know whether it was true or not, and I said, "Well", I says, "I'm the livest looking corpse you ever saw!" And medical - the doctor told - well even the doctor told me, even the hospital, uh, welfare worker told me to get away from him before I had a...breakdown.

L: What was your surname at the time of your marriage? I guess it's on here.

The above is an interesting example of a client subverting the "natural" constraints imposed on story-telling by the selected grounds. Though the lawyer is quite blunt in his attempts to minimize the client's "irrelevant" talk:

"This all, this all has nothing to do with the divorce.";

"So you don't need, uh, to worry about any girl friends or any accounts that he's paid - that's all irrelevant.";

"Right, well that's, that's neither here nor there." The lawyer however does not go as far as to tell her to "shut up" and enforces that as a request or command, since this would not be an expedient thing to do in a situation where he is hoping to sell a service to a potential client who may take offence and who has the option of buying the service elsewhere. Since this is a person from whom the lawyer has to collect a fee, he must attend to the diplomatic aspects of the interpersonal structure of the interview as well as to the pragmatics of the workings of the legal system. And so we find in divorce interviews interludes of chit-chat and an obliging attitude that are characteristically absent in interviews with Legal Aid criminal clients - oriented to establishing rapport with the potential divorce client:

Example 1:

C: So what price, uh, could we quote my - my mother-in-law - my...future mother-in-law?

Lawyer C: Well - is - what - is three hundred and fifty dollars too high for you - is that uh, a bit of a shock?

O: [Client's girl friend] Yeah! [laughs] ...I don't know - like yuh see - the thing - we'll be paying it back, eventually.

C: Yeah, eventually.

L: This is our problem - well on top of - on top of regular fees, there's disbursements, too...

Example 2:

(Excerpt takes place during an interview which was interrupted by a long telephone call between the lawyer and one of his clients in jail.)

Lawyer A: Sorry about that - I can hardly cut'em off when they're in prison: they get one phone call a week, so...

C: Oh no! [laughs]

Example 3:

C: He belted me again and pushed me against the refrigerator door! [laughs]. I'm not kidding!

Lawyer B: With your head!

Example 4:

C: So, uh - he really didn't know how to go about finding jobs an...uh,

Lawyer C: No.

C: holding [laughs] you know, holding a job...He had the idea he was to become manager of a...national bank in two days, sorta thing.

L: Oh, yeah!

Though the lawyer must attend to the diplomatic aspects of his interaction with the client, at the same time, his main relevance is the practical business of seeing how he can convert the client's complaints and stories into a form that would be required for laying out sufficient grounds in

the divorce petition. He is continually monitoring the client's stories for usable aspects. His response to tales of beating and ill-treatment is not sympathy or shock or polite interest, but an interrogative focus on how they can best be documented, and suitably translated and dressed-up for an adequate petition for divorce:

Lawyer B: Alright - your daughter left her purse in the house, right?

C: And _____ went into a rage because she couldn't locate it. He then wholloped her on the back of the leg with the bottom of his shoe - she had a red mark.

L: Which end - the heel of the shoe?

C: The back of the shoe - the mark was there for three days because of it. At the same time, he took a hold of her by the throat, and that was my decision to leave. I fought him - when he was doing this.

L: At the same time - right -

C: I fought him at the time, and he gave me the usual - took me by the throat until I could ().

L: What - until you were almost unconscious?

C: No, I was conscious.

L: Well when he grabbed you by the throat and tried to choke you -

C: I was dizzy - I was absolutely dizzy.

L: He choked you?

C: Yes - later he denies - this is the standard way, you know.

In this passage we can see how the lawyer is shaping and moulding the client's descriptions into descriptions that

will be appropriate for the petition. One dimension of this conversion seems to be conciseness or explicitness: In asking which end of the shoe the spouse used, that is, in asking for more explicit information, the lawyer is presumably working with a cruelty dimension: Striking the child with the hard-edged heel of the shoe would probably inflict more pain than striking with the smooth, flat, front end; and hence, would be seen as more of an act of cruelty than a normal spanking procedure.

The lawyer contracts the client's longer and more vague description, "and he gave me the usual - took me by the throat until I could- ()...I was conscious...I was dizzy - I was absolutely dizzy." into a powerful single-word rendition: "He choked you", and since this is how it appears in the petition, we can assume that the lawyer takes this description to be self-evident as an account appropriate for building in sufficient grounds:

(d) That on or about the 23rd day of _____, 19____, the Respondent flew into a rage when the Petitioner's child _____ misplaced her purse and was unable to locate it. The Respondent then struck the said child on the back of her legs with the bottom of his shoe leaving a red mark on the child's leg for three days. As the Respondent struck the child, he held her by the throat whereupon your Petitioner grabbed the Respondent and he responded by grabbing your Petitioner by the throat and choking her causing your Petitioner bruises, great physical pain, emotional upset, humiliation and embarrassment.

"Causing your petitioner _____, emotional upset, humiliation and embarrassment" (where the blanks are

filled in with descriptions of physical injury corresponding to the facts of the particular case) is the standard form in which all petitions for cruelty are expressed. In this instance, the client did not tell the lawyer that she felt emotionally upset, humiliated and embarrassed, nor did the lawyer ask her to confirm that she did.

Though sometimes, as in the following excerpt with the same lawyer and a different client, the lawyer does go through this sort of confirming procedure,

L: Alright, now - does he ever do this in front of the kids?

C: Strange as it may seem - hardly ever!

L: What about in front of friends and so on?

C: Yes, he does...

L: Which is embarrassing?

C: Oh! Yes, of course, it embarrasses me...and I think it's even more embarrassing to even argue the point there - so I don't say anything, which makes me look guilty.

it does not seem to be necessary (since it is usually omitted); so that we can see that for all practical purposes, the legal world accepts emotional upset, humiliation, and embarrassment as a natural and inevitable consequence of behaviour that fits into the legally accepted descriptions of behaviour that is taken to meet the courtroom criteria for probably sufficient grounds.

In the example below, the lawyer quite candidly makes explicit his practical relevance in converting the client's descriptions into descriptions that are more powerful for the purpose of filling out the petition:

Lawyer B: Well maybe I should get into some of the
- few more of the details of the way he treated
you - to determine first of all - whether I think
you've got the grounds for divorce or not. Now
you say he beat you on several occasions?

C: I don't like to use the word beat - but I guess
that-

L: Ah - it's a good graphic word!

In addition to bearing down on possibilities in given descriptions set forth by clients, the lawyer also uses the strategy of letting the client pursue lines that are not directly consequent to the questions he was using to get at the features he was working towards up to that point:

Lawyer B: Which resulted in many arguments, many
battles - and it was all - nonsense.

C: Right.

L: And that the result of these battles - he would
commit physical-

C: He would follow me right to the laundromat - I'll
tell you that. Right - and follow - to prove that
I actually went to the laundromat.

L: He didn't trust you to go out alone then?

C: No.

L: Okay - that's - that's you know, that's the kinda
stuff we need.

C: Yeah - Oh, he followed me many times! If I went to do my clothes or shopping, and I wasn't back - or I - you know - figured that I'd have it done - He'd, you know - then he would - he'd wonder where else I would be. With my two girls with me! You know! [laughs.] It's kind of ridiculous.

At the beginning of the above passage the lawyer is working towards gathering the appropriate material to sufficiently set out physical cruelty as grounds. When the client interrupts him with a description that does not follow up the lawyer's comment about physical violence, the lawyer does not counter with a statement such as, "Yes, but I'm asking you if he committed physical violence", but encourages the client to continue on her own track because he sees that he can make something out of her new offering. The respondent's unreasonable jealousy in following her to the laundromat will be useful because inordinate jealousy is something that is standardly used for petition purposes as contributing to mental cruelty as sufficient grounds¹.

Clients seem to have difficulty knowing what is a "mental cruelty story" to tell. In the above example where physical and mental cruelty are the selected grounds, the client was able to narrate examples of physical cruelty, but throughout the interview she did not do so with mental cruelty. She talked about nerve trouble and being upset - but only in

¹It is set out in the petition as follows:

"(ii) That the Respondent caused your Petitioner great emotional upset, humiliation, and embarrassment by his extreme and unjustified jealousy.

(a) That on numerous occasions during the course of the marriage, the Respondent would follow your Petitioner as she went about her daily shopping and laundry chores in order to satisfy himself that she was in fact performing those chores.

(b) That on numerous occasions the Respondent would, after the Petitioner and Respondent had visited friends, insist that your Petitioner had been attempting to attract the attention of other men and called her various insulting names.

(c) That on more than one occasion in the City of _____, the Respondent, while driving a car which contained your Petitioner and her two children was driving in a wanton and reckless manner in order to frighten your Petitioner, and on at least one of those occasions, the Respondent said he would kill them all.

(d) That on numerous occasions the Respondent would wake up your Petitioner in the middle of the night and insist that she justify her activities during the day, his demands being the result of his unjustified jealousy of your Petitioner.

(e) That as a result of the physical beatings as mentioned above in paragraphs (i), (a) (b) (c), your Petitioner's children refused to be in the company of the Respondent unless accompanied by your Petitioner, causing your Petitioner great humiliation, emotional upset and embarrassment.

(f) That on numerous occasions as aforementioned in paragraphs (i), (a) - (d) your Petitioner's children were witnesses to the beatings suffered by your Petitioner causing her further emotional upset and embarrassment.

connection with incidents of physical cruelty. The lawyer, though, as we see, constructed the case for mental cruelty using mainly jealousy as the basis. Jealousy was mentioned by the client originally only in passing, but was taken up at length by the lawyer. We note that the lawyer also makes double use of the physical cruelty stories - physical harm inflicted is used for the case for physical cruelty and mental suffering that was a component of the client's descriptions of the physically cruel incidents is used as part of the case for mental cruelty.

Presumably the client too is interested in the practical relevances of getting up the grounds and getting the divorce through, and though the client provides the stories that are necessary for the petition, the client is seen by the lawyer as slowing down the process by "getting sidetracked" and "going off on tangents" or doggedly attempting to pursue what, for the practical legal purpose at hand, is an irrelevant trail. For the sake of making and sustaining sufficient rapport to get the materials he needs, the lawyer discourages this sidetracking only to a certain extent.

Since I worked with and interviewed lawyers, not clients, it is more difficult for me to speculate about the client's motives, purposes and satisfactions in the interview, but I can examine and comment on some common aspects of the stories that are told in divorce interviews. One such common theme appears to be the characterization of the spouse.

There are general similarities in the attributes standardly assigned to the spouse as a character in the stories. These similarities can be seen as stemming from the general situation for which the stories are told: the client must make it out that there are marital problems which are the fault of the spouse. This accounts for the elements of inexplicability, for the suddenness, the unexpectedness and unprovokedness used in characterizing the spouse's behaviour: for if the spouse's grounds-for-divorce behaviour were provoked, expected, explainable, that would mean that the "fault" must be shared by both parties rather than allocated totally to one spouse, in which case it would be difficult to properly get up the grounds.

In addition to the general getting-a-divorce situation, the specifically selected grounds can be seen as further defining the roles that are allocated to the characters in the story. Different attributes are needed for instance for successfully characterizing someone as an adulterer, than for characterizing them as physically cruel or mentally cruel. (In the following example the selected grounds are physical and mental cruelty:)

C: And I believe - well I had asked _____
[spouse] if he would go for medical help, and he
wouldn't. I-I knew that he had a problem, because
the outbursts - and the things that happened be-
tween us were over nothing at all. You know -
absolutely nothing. He () for nothing at all.
Like one day for example, one day she lost her purse
in the house. She just couldn't find it. He
went into her room and he - and he started to

really overdo it you know. And of course when I tried to stop him, I got it as well. So it's things like that, and they are very, very minor things. So anyway, I asked him if he would go to a marriage counsellor with me and he wouldn't. So anyhow I went to a marriage counsellor on my own - a Mr. _____ on _____. And went to see him. And he told me - he said I should leave him while I, while I could, you know.

So anyway after I left _____, he was all for going to a psychiatrist, then he still hasn't (). But after I left, he said, he would, you know, and, uh, in fact he said he had and I spoke to him a short time after that and I guess he'd forgotten he said he had and he hadn't. He's a very confused person, you know. So I spoke to him the other day. He said he still hasn't made an appointment. So there's no way I could help him. I tried to get him to go a few times, at different times, you know. And there's just no way of talking to him.

L: Well now - what's your financial situation?

Above we see a way of describing someone who at one time must have been considered one's true love, closest soul mate, ideal partner for life, in a way that implies abnormality, unaccountability, strangeness, unprovoked meanness, even near insanity.

The client quite naturally connects going to the doctor for nerves with what she felt was wrong with her husband. She characterized him as someone with a mental problem bad enough, in her assessment, to be in need of medical help. As support for her assessment, she points out that he would have emotional outbursts over incidents that in the ordinary world do not upset ordinary people - at least not to

the point of outbursts. She emphasizes that it was very, very minor things that upset him: the example of her small child misplacing her purse. One supposes that the "normal" reaction would be sympathy for the child and an attempt to help her find it - not an emotional outburst. Most people can be "talked to" - especially people with whom one presumably has built up shared modes of communication in the course of living together; but she claims that there is no way of talking to her husband - the fault being his, not hers - and that makes him seem strange indeed. She says her husband is a very confused person. We use this term in ordinary talk to mean that someone "doesn't know what's what" in the ordinary ways that all the rest of us know what is what. We imply that they have an emotional imbalance or uncertainty that is impairing their ability to know what is what in the way that all the rest of us know what is what.

On the other hand, in order to depict someone as an adulterer, it is not necessary to go into elaborate explanations about their character - presumably any kind of person having marital problems can commit adultery. In the example below where adultery is the selected grounds, the client describes his "adulterous" wife as "an attractive woman" and stresses that they did not "get along" because of sexual maladjustment following an operation undergone by the respondent (the client's wife), and interference by a friend who courted the respondent. There was no attempt to characterize

the respondent as strange, mean, etc. The closest he came to this was in saying that she had a "really funny attitude" toward him meeting the man she was living with at the time:

Lawyer C: And she admitted each time that she was still living with the guy.

C: Oh yeah - she - like she said - well he's coming at five o'clock and I gotta be there. And uh, I gotta make him supper and uh - I don't want you to meet him, and uh

I went there once, you know and I - and she was - she had a really funny attitude that time. Like she said: "Yeah, go away! I don't want to see yuh!" You know - ha!

But in this case, too, the client makes the break-up of the marriage out to be the fault of his spouse in that she left him for another man and refused to live with him at a time when he still wanted to live with her.

L: The two of you were having marital problems right from the start, I take it.

C: We were having marital problems from the moment she had an o- she had to have an operation in Toronto - uh - she had a ruptured spleen and an infected ovary.

L: Mnn.

C: And I guess - like my hunch is she subconsciously blamed it on me - although I had nothing to do with it - like even the doctors thought I was some kind of bully - er, you know - for - that I beat her up er sumthing - because she had - you just don't get a ruptured spleen just like that! You know.

L: Umn.

- C: And the doctors didn't believe it - but - she herself, you know - what we did - horsed around you know like - how people do - on the bed and stuff - you know - blow hard enough to - to rupture her spleen! And she - she even said to me - later, you know - like from that moment on, our - sexual relations went from say sixty percent down to zero...
- L: Okay - I think you've got a case then - it's just a matter of - ensuring that he comes to corroborate - what your wife told you. She admitted it - and we call him
- C: Yeah.
- L: to uh say that he did it and that's
- C: Yeah.
- L: all the evidence we need to prove adultery.

The "right" stories (from the point of view of the lawyer) in adultery cases are not so much stories about adultery as about how the client discovered the adultery:

- L: When and where and with whom?
- C: Uh, [groan]... [sigh] - let's see now - I'm gonna haveta think - we were married sixty-_____ in March. It was when we came back. It was October, November, I guess it was November, of the same year - November - December - I can't - I can't say the exact date - probably _____ would have a better idea.
- L: November - December...when? Sixty_____?
- C: No, uh-uh.
- L: Sixty-_____?
- C: No, that would be sixty-_____ - same year - cause we were married in sixty-_____. We went to _____
- L: Yeah.
- C: in sixty-_____, came back to Vancouver, around October, in sixty-eight so it would be - I can't say the exact time - is it important?

L: Yeah - really important.

C: Well I could find out from _____.

L: Well anyway, you feel it's uh - December, around December, eh, in 19__.

C: Yeah.

L: Alright, when did you find out about it?

C: Uh, April, sixty-_____.

L: And uh - how'd ya find out?

C: Well I was talking to the man who, uh - whom she wenta bed with -

L: Who was that?

Unlike the characters in criminal stories, the characters in divorce stories are not "filmy" and unrealistic. Characters in divorce stories come out as sounding "true to life", if in a stereotyped way, partly because of the detailed grounding work that is used to set them in a background of mundane normality; they seem to be types "we all know".

The excerpt below is from an interview in which the client characterizes her husband as a typical lazy, selfish Latin-American who allows his wife to work while he is out late every night:

C: One time, uh in _____ [city] for a while - I was so - I got to the point where I couldn't stand the sight of him. So, uh, at that time I was working in a restaurant and I - and - they were very good friends - and I hated the thought of going home! First of all because he was never home. He came in late at night, you know. I would be sleeping. Mind you I was never jealous so I never even bothered really asking him, you know - finding out exactly what he was doing -

whatever was making him late - and so I used to stay around after work and talk to the people at work. And uh, one of these - he, he didn't like that too much, but - I sort of explained to him a little bit - It was my only chance of ever talking to anybody other than the dumb kids we lived with; and uh - he didn't like it. So anyway I think he'd had it in him for some time.

The client is about to describe a scene in which her husband is physically violent to her (see above p. 304, footnote). She is going to show how her husband's physical violence was an unreasonable reaction to behaviour of hers that was a reasonable response to neglectful behaviour of his, just as earlier in the interview she depicted her husband beating her for nagging him for not trying to get a job to support their small child. In the excerpt above she builds in the reasonableness of her own behaviour compared to her spouse's behaviour very skillfully. She gives as the provocation for her husband's physical violence the fact that she stayed after work at night. Staying around "at work" after work could be seen as an unwifely thing to do, and in fact as something which would cause a husband concern if not anger. However, before she says that she stayed around at work after work, she builds in the reasonableness of doing so, so that by the time she says that she stayed around at work after work, it seems like the best thing for her to do under the circumstances - the circumstances being attributed to her husband's neglect in not being home for her to come home to. She did not want to be home alone "with the dumb kids they lived with" worrying about

what her husband was doing out late; so, she stayed to talk to the people she liked at work after work. Instead of just saying:

So, uh, at that time I was working in a restaurant and I - and they were good friends - and I hated the thought of going home! And so I used to stay around at work after work and talk to the people at work.

she puts her reasons for staying at work before she actually says she stayed at work, so that by the time we hear that she stayed at work, her staying at work seems reasonable.

In the example below the grounds are adultery and the client begins by saying that the trouble was, "He didn't like sex and I did". Right from the very start and throughout the interview, the client slights the character of her spouse while making herself out to be what is considered "normal". In the following excerpt where lawyer and client are discussing how long the divorce is likely to take and whether or not it can be processed by the time of the client's expected child's birth (fathered by someone she is presently living with, not by her legal spouse), the client bases her concern on what she sees to be faults in her husband's character:

C: I just don't want - uh, somebody said my husband could make some kind of a, a, a, legal claim of some kind - because I'm pregnant at the time I'm still married to him, you see.

Lawyer B: That's rather unlikely, though, isn't it?
I mean not looking at it from a legal-

C: Yes, it is.

L: Just looking at it from the practical-

C: He's kind of a weird guy, you know - he's kind of odd-ballish, uh - like he wanted to get a divorce from me, and that was fine. He was going to get it on the grounds of adultery; and I said, "Well that's fine, although I don't see why, when we've got the three years separation here". And he said, well he was going out with this girl who was nineteen years old and he wanted to impress her. You know - that's the kind of guy he is - a kind of-

L: Well-

C: An, and - uh - that's why I don't want to ask for any support. I don't - I-I, I've, haven't had any support.

L: No hassle, right, okay.

The example that she cites to demonstrate her husband's character as "odd-ballish and weird" does not really accomplish the task: wanting to impress your girl friend with masculine initiative is not considered weird or odd-ballish in our culture - nor is wanting to divorce one's wife on the grounds of adultery when adultery has clearly taken place, for there is normal emotional satisfaction in that - perhaps more than in using the more efficient three years separation as grounds. However, the "He's weird and odd-ballish" statements probably have the effect of making what follows them (wanting to impress his girl friend by suing for adultery) appear more character-damaging than they would have if not so prefaced. The other stories that are told in this interview are stories that the client fits in voluntarily as incidentals in the business of documenting the separation:

L: Alright, now have you made, have there been any attempts to reconcile?

C: Well - just, just as far as, um, as talking about it, um - we've talked about it on a number of occasions; but it's just - w-we don't like each other, at all, you know, and uh - We've decided we're better off not really even trying you know. There, there's a lot of hard feelings.

L: Have you had any dealings with him at all?

C: There are things that mean a great deal to me that I brought along before we were married and that kind of thing - and he just won't let me have them, you know. Or at least he hasn't up until now. But he, uh - being as I'm going to pay for the divorce, he is prepared to be a little more reasonable.

The client's last words in the interview make her husband out to be some kind of unaccountable, undesirable person, and makes the whole occurrence of their marriage to be just a matter of meeting a "nut". The fact that he was a "nut" is used to excuse her from responsibility in having something to do with getting married and with the marriage breaking down. But surely in all marriage plans, there is some fond hoping, but she re-interprets the whole pre-marital and marital situation as happening like: "I ran into this goof and just happened to get married and of course it didn't work out."

C: Oh yeah life can be so simple until you run into goofs like that - I think that's-

This brings us to another recurring quality about divorce stories: where the client automatically gives the present interpretation (the interpretation for the purposes of the divorce interview) precedence over the interpretation

at the time in the past when the event occurred - and not noticing that this is a "strange" thing to do:

Lawyer A: Y'see, cause - but, uh - just - briefly what seems to be the problem. And I'll - I'll just make a few notes on this - and we'll get into that more-

L: Yeah, uh - generally the, uh breakdown of the marriage - any, you know, specific things you can think of.

C: Mainly, uh - the whole thing boiled down to - we got married because I was pregnant, or - we didn't think we were getting married for that - now I realize that was the only reason. There was a lot of pressure, you know. Like, uh, that, that was the thing to do. To have a baby

L: Um-hmn.

C: without a husband [laughs], you know, especially in _____ [Catholic country].

The client begins by giving a single reason for marriage failure: the marriage did not "work" because they did not get married for reasons that would ensure or facilitate its working - they got married simply because she was pregnant (the implicit assumption to which this is put in opposition is that people normally marry because they think they can live happily together and because they want to share the same life - not because they feel "forced into it" by assumed social pressure regarding the expected birth of an unplanned child). She is not saying that the marriage broke down, but that it just never got going, or never had a chance to get going because they got married for the "wrong reasons". She adds that at the time that they were married, they thought

they were getting married for the right reasons, but she now realizes that the real reasons were the "wrong" reasons, and not the reasons they thought at the time were the reasons. She seems to take it for granted that it is natural that retrospective interpretations can be seen as more accurate than how it looked at the time.

In a sense this is a strange thing to do: after all we do not go about describing what we are doing as what we think we are doing, but as what we are doing. She does not explain how it can be that the later reading of events is the definitive one, that is, how our present reconstruction of events can be "better" than how they actually seemed at "the very time". It would seem that common sense allows our intentions to undergo that kind of transformation: for neither did the teller give an explanation, nor did the hearer ask for one - they both apparently took the retrospective interpretation as a natural understandable way to look at things. This I-thought-at-the-time versus I-now-realize device does important work for stories in the divorce situation. Members' automatic acceptance of it as a "natural" concept allows the client's past life to be reread in the light of the present purpose at hand - getting a divorce by reworking the character of the marriage in ways that "come off" as sufficient grounds.

The example below shows a similar instance of the power given to retrospective interpretation:

- C: You see, I'm the reason for the break-up of the marriage - well, uh-
- L: It usually takes TWO - I
- C: I took [laughs].
- L: find doing divorce work, it usually takes two - to break up the marriage.
- C: Well I took the -, you see I committed adultery - my husband didn't like sex and I did - so I committed adultery after we'd been married - about a year - and uh - I sorta took the first plunge [pause] and that was the - reason for the - you know, break-up - actually it ended six months after we were married. I mean it was obvious from the very beginning that, uh, it was uh [clears throat] you know - a mess [slight laugh].

The client above seems to take it as an inevitable consequence of her husband not liking sex and of her liking sex, that she should commit adultery and that that should be the natural reason for the marriage break-up; however, a sentence later she goes back on her own analysis by saying that the marriage ended, really, six months before her adultery, and then by saying that it was "obvious from the very beginning that it was a "mess". What host of reasons are implied here is a matter for speculation; at any rate, in saying this, she reduces her adultery to a symptom rather than a cause - the real cause as implied probably being something like "incompatibility". "It was obvious from the very beginning that it was a mess" is probably a retrospective interpretation of the type discussed in the preceding example; that is, at the time she did not think it was a mess, but now she realizes that it was. It is unlikely that they would

get married if it was obvious that it was a mess - obvious from the very beginning - because at the very beginning was when they decided to get married and it is unlikely that she would decide to get married if it was obvious that it was a mess.

The above example is typical of what the lawyer might consider inconsistencies and irrelevancies in client's talk; and what the client at the same time considers to be the heart of the matter. This situation is another instance of the class of cases where we have laymen who know that they have troubles, but do not know the solutions, and the expert who knows the solutions but has to discover the problems by questioning and drawing out the non-expert. The lawyer has to engage in normal interactional routine in order to get the materials he needs to solve the layman's problems. What he extracts from the client in routine interaction is the data he needs to diagnose the problem and implement the solution. What I have basically shown in this chapter is how the expert accomplishes his task. Regardless of the extent of client ignorance or clumsiness in interaction, the lawyer is able to get up the grounds for the petition.

In principle, the meeting of expertise and ignorance might raise problems. We have seen in this chapter that there are routine ways by which the expert can extract what he needs from interaction with the layman no matter how much or how little the layman knows.

For the sociologist it is instructive to detail the differences in perspective and relevances of expert and layman and to examine how both expert and layman manage the course of the interaction so that for both the purpose of the meeting is achieved: for the client there is some satisfaction in telling the story of marital trouble in a way that, while it meets the lawyer's requirements, it also gives him the satisfaction of having his point of view documented and authorized in the petition. We have seen that client ignorance about the requirements of the petition and the lawyer's perspective is an advantage from the lawyer's point of view because it enables him to "bluff" the client regarding such matters as collusion and proof, and a disadvantage in that the client must be controlled and prodded and influenced in various ways to get to and stick to what the lawyer sees as the point, because, for the client there is beyond "the point" a vast, interesting and important structure which displays the character of the marriage and the client's stake in the problems of the marriage and in getting a divorce, as the client sees and interprets these things for the situation in the interview.

In the next chapter I will conclude this study by drawing out the main character and major implications of my analysis of criminal and divorce interviews in the social organization of preparation for trial.

CHAPTER V

SUMMARY AND CONCLUDING REMARKS

The primary contribution of this study is the intimacy of its portrait of the practical workings of that part of the legal system which is manifested in the routine practices of young criminal and divorce lawyers in their daily encounters with clients. Such detailed ethnographic material has hitherto been unavailable to sociological analysis which has been largely confined to survey interview data. One of the important issues brought out by the character of this work is that survey interview research lends itself to results that imply a different model of social organization than do ethnographic studies.

A basic assumption of survey interview research is that what people report about their activities serves as a description of those activities and can be granted "scientific" status when repeated as part of the researcher's report. In reporting about his activities as a lawyer, the lawyer does not acquire new ontological status: he is still being a lawyer: he is perhaps doing the "public relations" part of his job: he is not posing as a scientist. It is part of the ethnographic frame of reference to treat people's self-reports not as conclusions, but as part of the data, part of what is to be studied and observed in the context of their telling. While survey interview research treats what members say about their activities as "scientific" accounts

of those activities, or examines the relationship between what people say about what they do and what they "actually" do in terms of such notions as "honesty" or "accuracy", the ethnographer treats members' self-reporting as an activity in itself in terms of its own properties and accomplishments. In this sense, for the ethnographer, what members say about what they do is studied in the same way as what they do: the "saying" is a kind of "doing"¹, but it is a different kind of doing than the activity of the researcher in studying members' culture and should be afforded a different status.

Over the course of more than a year I daily watched lawyers "being lawyers" and interacted with them as a normal functional part of their working routines. I was able to see how the structure of the legal system sets up the kinds of occupational and interactional structures that constitute being a lawyer. Looking at the lawyer's job outside the context of the working demands of the legal system leads to misunderstandings such as O'Gorman's characterization of matrimonial lawyers as inadequate marriage counsellors² and Carlin's³ polemical characterization of the practice of law in terms of what he sees as the non-observance of ethical

¹See "Performative Utterances" in J.L. Austin, Philosophical Papers, (London: Oxford University Press, 1970), pp. 233-55.

²See above, Chapter IV, p. 246.

³Jerome E. Carlin, Lawyers on Their Own, and Jerome E. Carlin, Lawyers' Ethics, (New York: Russell Sage Foundation, 1966).

norms. Although Carlin is qualified as both a lawyer and a sociologist his perspective is limited by his removal from participation in or observation of the actual daily practice of law. In his study of individual practitioners in Chicago¹, and in his study of law firms in New York City², Carlin relied wholly on interviews with lawyers. In both studies he focuses on "malpractice" - which he finds to be associated with lower socio-economic background and the less prestigious types of practice (minor criminal work, commercial work for small businesses, etc.). While he states that infringement of ethical norms is responsive to the pressures of certain types of practice (as well as being associated with certain social biographical information) he is not able to convey the workings of the relationship between the structural demands of certain kinds of practice and the way in which those lawyers perform their jobs. If he had been able to do so he probably would not have claimed as he does that what some lawyers do is "ethical" and what other lawyers do is not ethical, taking the definition of six lawyers (presumably "ethical" ones) as the basis for discrimination between infringement and non-infringement of ethical imperatives. Had he for instance relied on the "lower class" lawyers for his definition and identification of ethical and non-ethical

¹Carlin, Lawyers on Their Own.

²Carlin, Lawyers' Ethics.

practices, he may have found that "higher class" lawyers engage in unethical practices more often than lower class ones do: though, in any case, such an approach by-passes the routes to discovering the essence of the lawyer's situation. By starting with a definitional decision regarding what is ethical and what is not, Carlin shut himself off from seeing how these categories or other categories are actually used and related to by members. The ethnographer on the other hand is committed to allowing terms and categories, and their employment as part of the resources of the setting, to emerge from the study. If Carlin had conducted an ethnography of the practice of law, then he would have been forced to come to terms with what "ethical" practices signified in the context of doing law, the criteria oriented to, the consequentiality of assessment of ethical, unethical, etc. He would probably have come to understand that there might be bounded occasions when lawyers make ethical considerations explicit - such as when being interviewed on the topic of lawyer's ethics by a social scientist - but to decide ahead of time that lawyers' interview accounts about ethical norms are to be "measured" against "actual" practice as reported by other lawyers is to blind oneself to whatever may actually be going on with regard to the practice of law.

Had he been able to observe the lawyers in his sample at work, Carlin may have discovered that distinctions such as

ethical and non-ethical practices should be discarded in deference to the organization of the practice of law in response to the daily demands of the workings of the legal system as it gets translated to suit the structure of various types of practice. As Hazard points out in his forward to Lawyers' Ethics:

There is room for disputing the significance of some aspects of Professor Carlin's data and more ample room for doubting some of his interpretation of the evidence.¹

and more pointedly in his critique of Lawyers on Their Own:

Professor Carlin is acquainted with the substance of the law and legal procedures and brought this technical knowledge to bear in conducting his study. Indeed he described these solo lawyers in terms of their function in the operation of the legal system. That he may have done so one-sidedly is not nearly as interesting in long term consideration than that he did so at all. My chief disappointment is that his analysis of the practice and functions of those lawyers was not as full and detailed as I think he could have made it. With greater detail about the kinds of things these lawyers did in their practice, we would have a clearer idea of the relation between the social function of elements of the legal profession and their organizational and status characteristics.²

Like Carlin, Grosman in his study of prosecutors focused on the difference between ideal norms and actual practice, found a gross "discrepancy", and recommended that the behind-the-scenes bargaining so characteristic of the

¹Carlin, Lawyers' Ethics, p. xxi.

²Hazard, "Reflections on Four Studies of the Legal Profession", p. 54.

prosecutor's job be brought out into the courtroom so that it could be subject to the rigors of courtroom procedure - without consideration for the fact that the courts are already overburdened, and without appreciation of the practical efficiency with which deals between prosecution and defense are executed. Grosman's study, though, comes closer than does Carlin's to an understanding of the routine workings of the daily practices of the lawyers interviewed. However we must look to Sudnow's ethnographic study of the social organizational aspects of the relationship between public defender and prosecutor for a full sense of the actual workings of "bargain justice". The present study offers a working example of a different area of the legal system: private practice in minor criminal and divorce cases. My data demonstrates certain structural properties of work in criminal and divorce cases. I will now summarize these properties by bringing together the main findings scattered through the last three chapters.

In chapters Two and Three we saw the ways in which lawyers' work in criminal cases is constrained by the workings of the legal system. We saw how the lawyer's office is a link in the chain that begins with apprehension and ends with judgment in the courtroom. In deciding how to handle the criminal client's case, the lawyer looks back in routine ways to certain specific features of the situation of arrest and of the police handling of the description of the circumstances of arrest, and looks forward in equally routine ways to the

probable situation in court. He must then shape his preparatory materials to the contingencies that seem expectable, based on the organization of his practice and his generalized stock-of-knowledge about "that type of case" as he and others have experienced it in the past.

More specifically, I examined the production and assessment of stories in terms of the features that illuminate the social organization of preparation for trial. I found that there were two main influences on the structure of the lawyer-client interview: one relating to the situation of arrest - the particulars; and the other to the expected situation in court - credibility. These were the main topics discussed in the chapter on criminal stories. The following are some of the structuring effects that were discovered in the analysis of the particulars and of credibility:

The Particulars: Before the client walks into the office, the lawyer has already "read" the client in terms of the particulars. The particulars act to inform the lawyer not only of what kind of case he has to cope with, but also, in some ways, of what kind of "criminal" he is as this relates to type of offence and possibly mode of operation, as well as to probable guilt and to how hard it is going to be for the client to come up with a story capable of defeating the particulars. In this way the particulars themselves may serve to generate typifications for the lawyer, stereotyping

his client "before the fact" (of meeting him and hearing his story); and so the client is facing not only the content of the particulars but the way in which the particulars may "prejudice" the lawyer as to his likely moral character and probability of guilt. We see then that the particulars have strong implications for the way the lawyer handles the case and for the client in terms of what he will have to overcome in order to successfully tell a story. When the particulars are presented to the client as hard facts against which he must either pit himself or fall back, this is an artifact of the way the lawyer orients to his job in minor Legal Aid criminal matters where the lawyer cannot afford (in terms of time and effort) to do his utmost to break the particulars down himself via fieldwork, etc., (although presumably he could be paid to do so). It is a feature of the type of practice conducted by young "Legal Aid lawyers" that for the practical purposes of trial preparation in volume, the particulars are granted this status as a hurdle for the client. The particulars are used not only as a hurdle for the client but also as a way of organizing the interview and of controlling what the client will say. Here the lawyer is using the particulars as an agenda. I analysed some of the equally artful ways in which clients deal with the lawyer's artful use of the particulars.

Credibility: We saw that a story that is likely to be successful in court must not only meet with the inculpatory allegations in the particulars in exculpatory ways, but also

must meet the court's standards of credibility. In assessing credibility, lawyers look not only to the internal features of the story itself in terms of such notions as "plausibility" and "consistency", but also to how the story matches up with certain characteristics of its bearer and of the context in which it is told. Lawyers have learned that when a judge listens to the story, he is hearing not just a story, but a story told by a particular someone in a certain kind of predicament, as a defense. The relationship between the story and its bearer and the context in which it is told is important in the judge's assessment and therefore to the lawyer in his preparation of the case.

Credibility is also something that is imparted to stories in the standardly accepted courtroom ways, such as providing "independent", "reliable" and "believable" witnesses. Credibility does not depend on whether or not the lawyer believes the story, but on whether or not he thinks it will be possible to make it believable in court, that is, on whether or not it is "documentable". In this way credibility becomes an organizational characteristic, as well as being a story-inherent characteristic; and the social identity of the witnesses become indices of believability. The social identity of the complainant was also seen as having a structuring influence on what stories can successfully be told. If the complainant is a store detective or manager or other person in a "responsible position" in society instead of someone in the general social category of the accused,

their stories are granted the same sort of automatic authenticity in court as the police story, and are therefore harder to defeat than stories told by such lay persons as the other party in a "bar room brawl".

Finally we noted that standards of credibility are different for stories that are geared to speaking to sentence on a guilty plea than for stories prepared for possible defense at trial. For the purposes of making a guilty plea on a minor crime, inconsistencies and flaws (unless glaring) in the client's story are likely to pass by unnoticed, or are permissible because, due to the volume of cases that have to be processed, the lawyer knows that the court routinely does not invest the time and interest that would be required to prove in any detail the stories attached to guilty pleas - and so the features of guilty plea stories are attended to and treated differently than the features of trial stories: guilty plea stories are usually "just listened to" by the judge and register in his mind in a general sense as being mitigating or not mitigating and may vaguely influence him in determining sentence.

In the final part of Chapter Three we examined the limits of the lawyer's structuring influence on the story apart from considerations of the particulars and credibility.

We saw in Chapter Four that in divorce interviews the lawyer orients to how the case will be processed at trial.

The parallel in terms of structuring influence and overall importance of "beating the particulars" in criminal interviews is "getting up the grounds" in divorce interviews. The way in which the lawyer works up the grounds is responsive to the structural constraints of the routine processing of divorce cases in Supreme Court. We saw that working up the grounds in the lawyer's office is a structured procedure following the same general routine regardless of who the client is and what emotional state he is in. The lawyer's procedure involves allowing the client to tell enough biographical materials to find resources that can be worked up in standard ways into the most convenient grounds available. There are no practical routines for instructing the client to give only the materials that the lawyer needs, the lawyer necessarily allows the client to tell the history of marital troubles in his own fashion and attempts to direct the telling in order to unearth the specific pertinent details that he needs for preparation of the petition.

We saw that the episodes that must be set out in the grounds for divorce and that are selected out of the client's stories by the lawyer are indexical: they are chosen as indices of a general state of marital disharmony and they must be set out as indexical in specific standard ways; for example, physical cruelty is always described in the petition as causing "great emotional upset, humiliation, and embarrassment" as well as whatever physical bodily damage was inflicted. I

showed how during the course of the interview the whole history of the marriage is interpreted in terms of the selected grounds for divorce. The grounds say what the facts in the divorce client's story must amount to, in the same way that the charge in a criminal case tells the client what the facts in his story must not amount to. In addition to what grounds are selected, another factor strongly influencing the structure of the divorce interview is whether or not it is expected that the divorce will be contested. In preparation for trial in contested divorce, the lawyer must try to "dig up as many grounds as possible" in order to meet the challenges and counter allegations that will be put forth by the other party. Consequently the lawyer usually gathers his information over the course of more than one interview. In the usual uncontested divorce, the lawyer selects and establishes the grounds for divorce in the course of a single interview of from one to two hours. In contested divorce the lawyer uses a less directive approach in guiding the client to assemble the necessary stories.

Apart from negotiations regarding the fee, the lawyer's first task in the divorce interview is to select the appropriate grounds for divorce. In uncontested divorce usually only single grounds are necessary and the lawyer searches for and gets the client to agree to (what are for the lawyer) the "easiest" or "best" grounds. We saw that lawyers have a private hierarchy of "good" and "messy" grounds (ranging

respectively from three years separation and adultery to mental cruelty) and that lawyers enforce these preferences. The chapter on divorce interviews also focused on the difference in relevances of the matrimonial lawyer and his client and how the lawyer gets the job of preparation for trial done in the context of the interplay between these two sets of relevances. We saw that it is to the lawyer's advantage to allow the client to, for instance, take a long time to "get to the point" and we saw why for the client it is not "a long time to get to the point", but the natural way to tell the story. The client may be disappointed that the lawyer's response to tales of beating and ill treatment is not sympathy or shock, or polite interest, but an interrogative focus on how the stories can best be documented and suitably translated and dressed up for an adequate petition for divorce, but the client nevertheless is getting the service he requested, that is, a divorce. There were similarities to be noticed in the ways in which clients told stories in the divorce interview. I noted that there were general similarities in the attributes standardly assigned to the spouse as a character in the stories and that these similarities could be seen as stemming from the general situation in which the stories are told. For instance, the client must make it out that there are marital problems which are the fault of the respondent; for example, he must make his spouse out to be an adulterer. We saw how artfully clients do detailed grounding work to set the marital episodes they depict in a background of mundane

normality. I noted also as a feature of divorce client's stories that a present interpretation, that is, the interpretation for the purposes of the divorce interview is unheedingly given precedence over the interpretation at the time in the past when the event occurred, and that it was taken for granted by both lawyers and clients that retrospective interpretations can be seen as more "accurate" than how it looked at the time.

In the conclusion to Chapter Four I remarked on how expert and layman manage the course of the interaction so that for both the purposes of the interview are achieved.

There are certain commonalities and differences in the way that lawyers work in criminal and divorce interviews. The lawyer's interest in what the client says in criminal and divorce interviews is similar: he focuses on the aspects and possibilities of the client's stories that are translatable into what he needs to get the job done - in divorce cases to "work up the grounds" and in criminal cases to "beat the rap". In the same way that he does not attend to the moralities of the criminal case, the lawyer ignores the emotionalities of the divorce case and pragmatically attends to the practicalities of processing the divorce. We find in divorce interviews an obliging attitude that is characteristically absent in interviews with Legal Aid clients. This is oriented to establishing rapport with the potential divorce client, since the divorce client in contrast to the usual

criminal client, who is being supported by Legal Aid, is someone from whom the lawyer has to collect a fee. The practical consequence of this is that the lawyer must attend to the diplomatic aspects of the interpersonal structure of the interview to a greater extent than in criminal cases - as well as to the pragmatics of the workings of the legal system.

As was pointed out in Chapter One, the pragmatics of the workings of the legal system come down to the administrative and practical pressures of the jobs in the legal system as these jobs are interpreted and performed in routine ways by practitioners - who are not so much interested in "seeing justice done" as in getting their daily job done as efficiently as possible. In the case of my lawyers this meant processing Legal Aid cases in volume with summary attention to each, except in instances where the client wanted to pay for special attention; it also meant that in criminal cases lawyers oriented primarily to preparation for trial rather than to the guilty plea via the deal as did Sudnow's public defenders. I do not, however, want to make judgmental remarks about the comparative merits and demerits of private and public defender systems - nor about the ways in which the lawyers that I observed practised law. Nor will I end with the usual perfunctory remarks on how to improve the legal system.

Instead, I take it that one of the contributions of this thesis is to provide an understanding of the workings of the legal system that is neither the lawyer's nor the layman's view.

Thus this study has set out neither to confirm legal ideology that the legal system can be adequately described in terms of "justice" and "fair play" and such concepts as the rule of law and "due process", nor to confirm lay-critical views that the legal system is unfair, cumbersome, irrational and bureaucratic. The focus has been on the adaptive and rational character of those daily practices that sustain the workings of the legal system.

Set in "modern" Canadian Society, our adaptation of the heritage of British Law may seem, as is often said, - even by practitioners: "an ass", but the men who implement it are not; they are adaptive and practical and rational in their daily work activities. In any occupation which is supposedly governed by ideal norms, the investigator so motivated will find discrepancies, but a focus on the difference between the "ideal" and the "actual" as a perspective is likely to be insensitive to the day-to-day realities of the lawyer's world of work.

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APPENDIX A

CHART OF CASES IN TRANSCRIBED INTERVIEWS

<u>Interview No.</u>	<u>Lawyer</u>	<u>Charge (or Reason for Interview)</u>
1	A	Possession of Housebreaking Instruments
2	A	Wounding
3	A	Trafficking in Hashish
4	A	Trafficking in Hashish
5	A	Divorce
6	A	Divorce
7	A	Theft Over Fifty
8	A	Impersonating Police Officer & False Pretences
9	A	Robbery
10	A	False Pretences
11	A	Breaking & Entering; Possession of Stolen Property
12	A	Theft Over Fifty; Possession Under
13	B	Possession of Stolen Property
14	B	Entering Canada by Stealth
15	C	Divorce
16	B	Divorce
17	B	Advice regarding Stolen Motor Bike
18	B	Divorce
19	B	Incorporation of Company
20	B	Having a Breathalyzer of over .08
21	B	Robbery

<u>Interview No.</u>	<u>Lawyer</u>	<u>Charge (or Reason for Interview)</u>
22	B	Importing Drugs
23	B	Theft Under Fifty Dollars
24	C	Possession of Heroin
25	C	Assaulting a Police Officer
26	C	Impaired Driving
27	B	Dangerous Driving
28	B	Custody of Child from Children's Aid
29	B	False Pretences & Theft Over Fifty
30	C	Possession of Marijuana
31	C	False Pretences
32	D	Theft Under Fifty
33	C	Divorce
34	B	Theft Under Fifty
35	B	Theft Under Fifty
36	C	Indecent Assault
37	E	Breaking and Entering
38	E	Breaking and Entering
39	B	Theft Under Fifty
40	B	Possession of Marijuana
41	B	Breaking and Entering; Attempted Car Theft
42	B	Possession of Marijuana Possession of Stolen Property
43	B	Refusing to Blow
44	B	Advice regarding Confiscation of Goods by Court
45	B	Dangerous Driving

<u>Interview No.</u>	<u>Lawyer</u>	<u>Charge (or Reason for Interview)</u>
46	B	Possession of Stolen Property Theft Under Fifty
47	C	Possession of LSD for the Purposes of Trafficking Possession of Marijuana
48	C	Theft Under Fifty
49	B	Theft Under Fifty
50	B	Possession of Marijuana
51	B	Possession of Hashish, Possession of Marijuana
52	B	Possession of Hashish, Possession of Marijuana
53	C	Breach of Probation
54	C	Possession of Hashish
55	B	Possession of Dangerous Weapon
56	B	Vagrancy C; Possession of Marijuana
57	B	Divorce
58	B	Possession of Dangerous Weapon
59	B	Possession of Dangerous Weapon
60	B	Theft of Telecommunications
61	B	Breach of Probation
62	B	Advice regarding Defective Motor Bike Purchase
63	B	Unemployment Insurance Offence
64	A	Robbery
65	A	Theft Under Fifty
66	A	Unlawful Assembly

<u>Interview No.</u>	<u>Lawyer</u>	<u>Charge (or Reason for Interview)</u>
67	A	Robbery
68	A	Advice regarding Canada Evidence Act
69	A	Joy Riding
70	A	Possession of MDA
71	A	Arson
72	A	Divorce
73	A	Divorce
74	B	Divorce

APPENDIX B
FORMAT OF POLICE REPORT

POLICE REPORT TO CITY PROSECUTOR

Date of Incident)	(Date this report made out,
Time)	(Accused's name, address,
Place) A	B	marital status, record,
Charge)	(occupation when last worked,
		(jobs held in last year,
		(record and general bail
		(information.

C

"Description of incidents"

D

Investigating Officer -
Name & Number, Shift hours,
Leave days, Holidays

APPENDIX C

LEGAL AID APPLICATION FORMS FOR CRIMINAL AND CIVIL CASES

Form LA1

PERSONAL

- | | | |
|-----|-----------------------------------|------------|
| (1) | Name (in full) | Age: |
| (2) | Offence(s) Charged | |
| (3) | Usual or Home Address | |
| (4) | Citizenship | |
| (5) | Present Address | Telephone |
| (6) | Marital status | |
| (7) | Dependents and their ages | |
| | Do you now support your children? | Your Wife? |

CIRCUMSTANCES

- (8) (a) Occupation
- (b) Employer Place Earnings \$
- (c) If unemployed give date last employed
- (d) Last employer
- (e) Can you return to your former employment?
If "No", give details
- (f) Total Earnings in past six months \$
- (g) Assets
- | | | |
|---------------------------------------|----------------------|-------------------|
| Cash \$ | Savings \$ | Car (make & year) |
| Real Estate \$ | Owing to me \$ | |
| Do you have any other assets whatever | | |
| Total Income at present | | |
| State Sources | Wages \$ | Pension \$ |
| | Social Assistance \$ | Other \$ |
- (h) Total Debts or other liabilities \$
- (i) Wife's (Husband's) Income \$ Employer
Her (His) Assets
- (j) Can you obtain assistance from relatives or other
sources, if "No", give details

PREVIOUS LEGAL SERVICES

- (9) Have you consulted a lawyer regarding this matter?
If "Yes" give Date and Name of Lawyer
- (10) Have you had legal aid before? Date
What was the result?

Form LA2

- (1) Name Age
 (2) Present Address Telephone
 (3) Marital status
 (4) Dependants and their ages
 (5) Are you supporting your wife Your children
- (6) CIRCUMSTANCES
 (a) Occupation
 (b) Employer Place Earnings \$
 (c) If unemployed, give date last employed
 (d) Last employer Place Earnings \$
 (e) Can you return to your former employment?
 If "No", give details
 (f) Total Earnings in past six months \$
 (g) Assets:
 Cash \$ Savings \$ Car \$
 Real Estate \$ Owing to me \$
 Stocks or Bonds \$ Other
 Total income at present \$
 State sources: Wages \$ Social Assistance \$
 Pensions \$ Other
 (h) Debts or other liabilities
 (i) Income of husband (wife)\$ Employer
 His (Her) assets \$
 (j) Can you get help from relatives or other sources?
 If "No", give details
- (7) Have you consulted a lawyer about this matter?
 If "Yes" give: Date Name of Lawyer
- (8) Have you applied for Legal Aid before?
 What was the result?
- (9) MY PROBLEM IS AS FOLLOWS:

APPENDIX D

LAWYERS' GUIDE FOR CONDUCTING DIVORCE INTERVIEW

1. Full names & addresses & occupations & income of Petitioner & Respondent & Co-Respondent (if there is one). Also any capital finances of either party.
2. Determine the grounds and then obtain detailed particulars thereof.
3. Ascertain whether there is any possibility of reconciliation and if not determine reasons for same.
4. Ascertain whether any attempts at reconciliation have been made and if so obtain particulars of same. Advise of facilities for same that are available.
5. Particulars of marriage:
 - (a) date of marriage
 - (b) surname or maiden name of wife before marriage
 - (c) place of marriage
 - (d) marital status of spouses at time of marriage
6. Domicile & jurisdiction
 - (a) residence of both spouses
 - (b) date of cessation of cohabitation
 - (c) domicile & commencement of same
 - (d) places & dates of birth of both spouses
7. Determine whether anyone involved is under any age or disability.
8. Obtain the names, dates & places of birth of all children.
9. Ascertain who has had the custody and responsibility for the upbringing of the children in the past and any plans for the same for the future, and the reasons therefor.
10. Ascertain which of the children the Petitioner claims custody of, if any; and the facts upon which the claim for same is based.
11. Ascertain whether there have been any other domestic and matrimonial proceedings anywhere at any time.

12. Obtain the dates of any written or oral separation or financial arrangements between the parties.
13. Determine beyond a doubt that there has been no collusion, condonation or connivance in regard to these proceedings.
14. Determine what additional relief is desired:
 - (a) custody of children;
 - (b) maintenance, and for whom, and whether interim, permanent, or both
 - (c) costs.

APPENDIX E

LAWYERS' GUIDE FOR PROCEDURE FOR UNCONTESTED DIVORCE

1. Case called.
2. State: "May it please your Lordship I appear for the
Petitioner and we are ready to proceed."
3. File: (1) praecipe showing "No Answer Filed" - Exhibit 1
(2) Registrar's Certificate of Pleadings and
Proceedings

(Clerk hands this to you - you enter it as
"Exhibit 2")

(It shows that proceedings are in order.)
4. Petitioner is called and sworn in - let the trial judge
ask her to sit down. Ask her beforehand to take right
glove off - it avoids embarrassment.
5. Judge, pursuant to Section 8 of Divorce Act, inquires of
Petitioner (and Respondent, too, if present in court) as
to the possibility of reconciliation: "It is my duty, etc..."
6. Examine Petitioner as to the contents of the petition, by
means of leading questions (if uncontested) to confirm each
statement in the petition as follows:
7. You are the Petitioner in this Action?
8. Is _____ your (husband or wife?)
9. Particulars of marriage:
 - (a) Where and when were you married?
 - (b) What was you wife's maiden name prior to marriage?
 - (c) Status of each prior to marriage.
 - (d) Produce certificate of marriage (or photocopy) and say:
"I produce and submit for your inspection a (photocopy
of a) marriage certificate issued by and under the hand
of the Registrar of Vital Statistics in and for the
Province of British Columbia. Is it (a copy of) your
marriage certificate?

(Enter as Exhibit 2)
 - (e) Produce photograph of Respondent and say: "I now pro-
duce and submit for your inspection a photograph of a
(gentleman or lady). "Can you identify the person in
the photograph?"

(Enter as Exhibit 4).

10. Domicile:

- (a) Where do you reside?
- (b) How long have you actually resided in British Columbia?
- (c) Do you regard British Columbia as your permanent home?
- (d) Have you any intentions of leaving British Columbia and living elsewhere permanently?
- (e) Where have you actually lived during the past twelve months - during the past ten months?
- (f) Where has your spouse actually lived during the past twelve months - during the past ten months?

11. Ask witness: "You are seeking a divorce on the grounds that you have not lived with your (husband or wife) in excess of (three or five years, depending on who left whom)?" (or "on the grounds that your husband or wife has committed adultery?" or cruelty, etc.)

(a) If the grounds are Separation or Desertion, ask:

- (1) When did you separate?
- (2) Have you since your separation lived or cohabited with you (husband or wife)?
- (3) You had been married for _____ years before you separated?
- (4) Who left whom? (Relevant only regarding costs)
- (5) What brought about your separation?
- (6) What communication, if any has there been between you and your (husband or wife)?
- (7) What are the chances for reconciliation?
- (8) At the time you gave instructions to proceed with your petition for divorce was the matter of reconciliation canvassed by your solicitor with you?
- (9) Are you satisfied in telling this Court that your marriage is at an end?

(b) If grounds are adultery or cruelty, ask the witness the questions in (a) above but wait until you have finished with him or her before calling evidence to prove the grounds (e.g. other witnesses, detectives, landlady, etc.)

12. Where were you born and when?

13. Are you or any party to this action under sixteen or any disability? ("disability" should be explained: lunacy, illness, imprisoned, etc. Say: "By that I mean..." and explain)

14. Are there any children born as a result of this marriage?
15. If so, ask:
 - (1) how many
 - (2) names and birth dates
 - (3) who supports them
16. Have there been any proceedings instituted in respect to this marriage either in a court of competent jurisdiction or in the Parliament of Canada?
17. Have there been any applications under any statute or for alimony or maintenance in Family Court.
18. Is there any Separation Agreement or any financial arrangements made in writing between you and your (husband or wife)?

If "Yes"
 - (a) produce (one copy of) it
 - (b) identify for the judge (ask witness if that is (a true copy of) the agreement)
 - (c) explain its provisions to the judge
 - (d) file it as "Exhibit 5"
19. If grounds are break up of the marriage and grounds under Section 4 Divorce Act ask: "Did you and your spouse agree that (he or she) would manufacture this evidence in order to enable you to bring these proceedings?"
20. If grounds are adultery or grounds under Section 3 Divorce Act:
 - (a) Has there been any Condonation on your part with respect to these proceedings; By that I mean "Have you forgiven your (husband or wife) of (his or her) adultery?"
 - (b) Has there been any Connivance on your part with respect to these proceedings; By that I mean have you stood idly by and encouraged the adultery?
 - (c) Has there been any Collusion between you and your (husband or wife); By that I mean have you and your (husband or wife) agreed that (he or she) would manufacture the evidence of adultery or appear to commit adultery in order to enable you to bring these proceedings?
21. Tell Judge: "That is all for this witness."

22. Then call witnesses to prove adultery, etc.
23. Turn to back of petition - tell Court that you have no further questions.
24. Ask Court for relief sought:
 - (1) Divorce
 - (2) Maintenance to be referred to the Registrar
 - (3) Costs
25. Judge gives decree nisi and order.