EXTRA-LEGAL FACTORS IN THE AMERICAN LEGAL SYSTEM

AN HONORS THESIS BY
PETER W. MAYER
PRESENTED TO DR. JACK GLAZIER
DEPARTMENT OF SOCIOLOGY-ANTHROPOLOGY
OBERLIN COLLEGE
MAY 1986
# TABLE OF CONTENTS

Chapter 1 -- INTRODUCTION..................................................3  
Chapter 2 -- THE PHILADELPHIA DEFENDER'S ASSOCIATION........12  
Chapter 3 -- THE LORAIN COUNTY PROSECUTOR'S OFFICE.........25  
Chapter 4 -- CATEGORIZING EXTRA-LEGAL FACTORS...............39  
Chapter 5 -- THE RAPE CASE.............................................49  
Chapter 6 -- WINNING, LOSING, AND SAVING FACE................70  
Chapter 7 -- LINGUISTIC ANALYSIS AND DEGRADATION CEREMONIES.87  
Chapter 8 -- CONCLUSION...............................................102  
BIBLIOGRAPHY.............................................................112
CHAPTER 1
INTRODUCTION

The laws of the United States have been written over time with the intention of providing a framework for fair, legitimate, and uniform legal decisions to be made. Laws attempt to provide national tranquility by providing channels of punishment for those who disobey them. At the same time laws in the United States attempt to avoid any conflict with differing cultural values present in our nation. The laws of the United States are intended to function without regard to the race, sex, or religion of the defendant, complainant, or attorneys involved. Laws themselves cannot help but embody the cultural values of their authors, yet at the same time they are expected to function in a manner that ignores individual cultural attributes. Laws are expected to provide a frame of reference for legal decisions on the basis of rules and values accepted by the culture as a whole. The role of the individual in the American legal system is to obey the laws as they are written or face the penalties proscribed for disobeying them.

If an individual is accused of breaking the law they are brought in contact with the judicial system. The judicial system has a specific set of rules and laws which govern its operation. Originally based on the British system, the American system has evolved significantly. American courts attempt to operate with principles of equality and fairness in mind. The prejudices and biases of the individual are supposed to enter into the legal system as little as possible. In fact the rules and laws governing the legal system are designed with the intention of
eliminating individual bias.

In any cultural system often what is alleged to occur can be very different from what actually occurs, and the U.S. legal system is no exception. Individual cultural idiosyncracies do enter into the courtroom, the law office, and the legislature and there is no way to prevent this from happening. Humans carry their culture wherever they go. Often the outcome of a trial is not determined on points of law but rather is determined on cultural bias and prejudice utilized by the judge or jury in reaching a decision. Conventional perceptions of race, sex, prior conduct, appearance, social standing, and circumstances of the crime held by the participants in a trial often influence the outcome of a case more than the operative laws.

This situation is well known to member of the legal profession. Cultural bias is often manipulated by attorneys at a trial in order to win a case. Attorneys often raise issues or behave in ways that are not designed to prove points of law but are instead intended to appeal to unconscious, subconscious, or even fully conscious cultural values or prejudices which may alter the outcome of a trial. Often attorneys feel pressure to manipulate these biases in order to win a case. Prestige for an attorney is often determined by the number of cases he wins or by the flamboyant manner in which he loses. In order to win cases or at least lose with dignity and style, an attorney must do whatever he can to prove his client's case. So despite the good intentions of our lawmakers, manipulation of extra legal factors does affect the outcome of trials.
The exploitation of conventional cultural prejudices in the courtroom has severe ramifications which affect all people under the jurisdiction of the United States Legal System. The disproportionate number of minorities in American prisons can be seen as a direct result of bias in the legal system. Perhaps more severe than the problems of who is in prison is the problem of who isn't in prison, but should be. The ability to affect the outcome of cases insures that those who can afford the best legal assistance will not be punished. The economic stratification of the United States is such that whites are far more likely to escape justice than blacks or other minorities.

RESEARCH AND METHODS: PHILADELPHIA

Research for this study began in the Fall of 1984 when I was participating in the Philadelphia Urban Semester. As part of the program I selected an internship with the Philadelphia Defender's Association (the public defender for the Philadelphia area). The Defender's Association is a private non-profit corporation that the city contracts to be the public defender. Because of the independent status of the office, salaries are much higher at the Defender's Association than at almost any public defender's office. Many of the attorneys at the office have chosen to make their careers there rather than use the office as a stepping stone for entry into a large law firm. Because of this, the Defender's Association of Philadelphia is recognized as one of the finest public defenders offices in the country.

At the office, I worked with attorneys in the Major Trials Division, and the Special Defense Unit. The Major Trials Division is responsible for all felony cases which were directed
to the office. Usually attorneys in Major Trials appear in Common Pleas Court rather than Municipal Court. The Special Defense Unit is a select group of lawyers who specialize in insanity defenses and cases involving unusual circumstances or unusual clients. Although the office doesn’t handle murder cases some surprisingly bizarre cases came through the office while I worked there.

My position in the office was that of a student of law and participant-observer doing field work in the ethnography of law. Because of my unique position, I worked closely with the attorneys, and I was able to follow them around on a daily basis rather than just stay in the office as a paralegal often does. I worked with the Defender’s Association for five months and in that time I observed over fifty trials. By the end of my internship I was not only observing cases, but actually participating in the preparation and trial proceedings. I did a significant amount of research in preparation for trials. Usually this involved finding Pennsylvania Supreme Court or Superior Court cases which dealt with the issue we were trying to prove in our case. I also wrote several post trial arguments, which are legal documents presented to the court after a verdict has been declared. The arguments counter the decision rendered by the judge and ask him to reverse the decision he made. In addition I was also able to interview clients both in and out of prison. This would involve discussing the facts of the case and inquiring about possible witnesses with the defendant. I often did this without the supervision of an attorney from the office.
These duties placed me precisely in the role of a participant observer. A more perfect arrangement for studying the defense perspective of the justice system is difficult to imagine. I was able to work comfortably within the legal culture while at the same time conducting research. Because of my status as a student, I was able to ask many of questions of the attorneys which might not have been asked by another researcher without student status. Attorneys in the office felt comfortable with my presence and in talking to me. I was able to sit in on almost every type of interaction that occurred in the office ranging from private interviews with clients to end of the day "bull sessions" between friends.

RESEARCH AND METHODS: ELYRIA

In the Fall of 1985 when I accepted an offer to work on an honors project in the Department of Sociology-Anthropology at Oberlin College I was able to secure an internship with the Elyria Prosecutor's Office. In this setting I wasn't able to work as closely with a specific attorney as I was in Philadelphia, but I was able to observe nearly twenty trials. In Lorain County Ohio the job of County Prosecutor is an elected position. Gregory White, a Republican, has been County Prosecutor for over five years. The political nature of the office differentiates the prosecutors from the defense more than any other factor. The prosecutor in Elyria as in Philadelphia, in order to get re-elected must get a high percentage of convictions. In Lorain County the prosecutor claims to have an 80% conviction rate. Generally attorneys work in the prosecutor's office until a different prosecutor is elected.
Like any office, however, attorneys occasionally leave for other jobs.

Adding the prosecutor's perspective to my knowledge of the legal system has assisted me in gaining a broader understanding of our criminal justice system and its problems. The research I conducted with the Elyria Prosecutors was oriented far more towards observation than participation. As in Philadelphia, I was often able to interview attorneys informally after a trial, which increased my understanding of the reasoning behind their behavior in the courtroom. In this way I came to see the often pivotal role of extra-legal factors in the administration of justice. Attorneys were not reluctant to appeal to biases or perceived prejudices of judges and jurors. Often it appeared they felt pressured to do so by fellow attorneys who expected them to either win cases or lose with style. This is discussed in detail in Chapter 6.

DOING ETHNOGRAPHY

In this study I make extensive use of the cases which I observed in court. Although what is presented is not a full ethnographic description of each case I observed, I have attempted to follow the procedures for doing good ethnography. These procedures include careful participant observation and note-taking, in-depth review of past literature on the subject, and interviews with various informants who provide insights into the culture being studied. As an anthropologist, I have utilized participant observation as my research technique. This paper is an ethnography of law. Accordingly, I detail the cases I have
witnessed and then attempt to compare, contrast, and analyze the similarities and differences between the offices I have worked in, the communities which housed these offices, and the legal system in two distinct regions.

In the course of my field research I have also surveyed the relevant literature in the anthropology and sociology of law. In doing this research I came to the conclusion that in the anthropology of law in particular, there is a great deal of work that needs to be done on the American Legal System. There are a number of excellent ethnographies of justice systems in smaller cultures all over the world. Max Gluckman's two fine ethnographies of the system of jurisprudence among the Barotse people and E. A. Hoebel's work among the Cheyenne are among the best. But anthropologists have not taken it upon themselves to study the legal system in the United States to any great extent. Maxwell Atkinson and Paul Drew have written a detailed linguistic analysis of the American courtroom titled, Order in Court and there are numerous works in the sociology of law, but there is very limited anthropological research in the United States justice system. This thesis is but a small attempt to begin to fill this void.

ANTHROPOLOGY OF LAW

My supervisor and friend at the Philadelphia Defender's Association first asked the question, "Just what is the anthropology of law?" Since then many people who I have come in contact with have asked me the same question. This is certainly a fair question, but that doesn't make it any easier to answer. The anthropology of law really begins with an ethnography of a
legal system or culture and then involves an analysis of that data. What makes the anthropology of law so unique is that it allows for a much broader perspective in the study of law than other disciplines offer. Leopold Posposil writes,

In contrast to some of the other social sciences it (anthropology of law) does not carve out from human culture a segment such as the economy, political structure, law, personality structure, or 'social relations', but conceives and studies human culture as an interrelated whole. Law should be studied as an integral part of the cultural whole, not regarded as an autonomous institution (1971: x).

The anthropology of law is a far more flexible approach to the study of law than even the sociology of law. The cultural context in which the legal system operates is essential to a full understanding of the legal system. The role of the individual in the legal system should not be discounted either. E. A. Hoebel writes,

An anthropological approach to law is flatly behavioristic and empirical in that we understand all human law to reside in human behavior and to be discernible through objective and accurate observation of what men do in relation to each other and the natural forces that impinge upon them (1954: 5).

Because law resides in human behavior an individual can have an impact on the legal system. As I found in my research, in the courtroom the individual can have a surprising impact on the outcome of a trial. Anthropology and ethnography provide an excellent framework for the study of law and legal systems. The broad perspective and flexibility they provide allows for unique and penetrating research to be conducted.

This paper would not have been possible without the cooperation of the Philadelphia Defender's Association and the
Lorain County Prosecutor's Office. In order to preserve the anonymity of persons and cases in this paper all names, places, and other identifying features have been changed. The facts of the cases presented and the courtroom dialogue have been changed as little as possible. Although none of the dialogue presented is taken from tapes or transcripts, it represents a faithful recreation of what was said. I would also like to thank Dr. Jack Glazier and Dr. Perry Gilmore for their assistance and guidance.
CHAPTER 2 -- THE PHILADELPHIA DEFENDER'S ASSOCIATION

CITY HALL, PHILADELPHIA

On a gray and cold day in Philadelphia Bruce Colson, my supervisor at the Defender's Association, and I stepped into a second floor courtroom in City Hall. City Hall is the center of Center City Philadelphia. It sits on the intersection of Philadelphia's two main streets, Broad Street and Market Street. The mayor's office and most of the city's courtrooms are located in City Hall. On top of the building stands a statue of William Penn. No building is Philadelphia is allowed to be built higher than the top of that statue. In Philadelphia, City Hall isn't only a historic building, it's a very important place. It's the centerpiece for the entire city, even though most Philadelphians have never set foot inside it.

The courtrooms in City Hall are beautiful. The most striking feature of the rooms is the dark stained furniture which resonates with the great legal minds who once worked in the same room. Occasionally as I sat in one of the hard but comfortable wooden chairs at the defense table I thought of some of the great criminal minds who also spent time in these rooms. Perhaps a famous gangster even sat in the very chair I was in. The judges in Philadelphia sit on a platform in enormous leather chair protected by a long dark oak desk. In front of the desk sit the stenographer, court clerks, and bailiff. For the most part these court officers are working people who have spent their whole lives in City Hall. Many have worked in the same room with the same judge for over 25 years.

The court officers are separated from the rest of the
courtroom by a wooden railing not unlike a banister. This railing is called the Bar of the Court. Two medium sized tables are lined up against the railing. They are set on opposite sides of the room. One table is banked on one side by the jury box. This is usually a two tier platform enclosed by a railing. Inside sit fourteen identical chairs, waiting to be occupied. (The two extra chairs are for alternates) The prosecutor always sits closest to the jury. That's a law in Pennsylvania. By default the defense is given the other table. A jury box is usually found on the left side of the courtroom, but there are exceptions. Because courtrooms vary so much, often an attorney will arrive extra early to a room he has never worked in before to familiarize himself with the surroundings.

Behind the attorneys are anywhere from thirty to one hundred and fifty seats depending on the size of the room. This is where family members, the press, and observers sit. Lining the walls of every courtroom in City Hall are enormous portraits of judges and other city officials who have spent time in the building. In one courtroom I counted fourteen portraits. Every person in the portraits is a grey haired distinguished looking white man wearing either a black robe or a suit and tie. Each courtroom has the aura of holding the entire history of the American Legal system and in many ways they do. Not ten blocks away from City Hall is the famous Independence Hall where the Constitution of the Unites States was written. In Philadelphia the law and the culture surrounding the law are of utmost importance.

KEITH JAMES - ROBBERY AND SIMPLE ASSAULT
We walked into the room and sat down at the defense table which in this courtroom was the table nearest the door. Our client Keith James was upstairs in the "lock up". This is the term they use for the holding area located on the seventh floor. Defendants who are not out on bond or bail are brought from the county jail and put into the lock-up until their trial. Each night they are transported back to the jail and then if they need to return they are brought back to City Hall the next day. Mr. Colson asked me if I would go upstairs and talk to our client and make sure he was prepared for his court appearance and hadn't changed his mind about the manner in which he wanted his case handled. This was standard procedure for Colson and me. We would usually meet with our clients once before the trial to get information and find out if they wanted to plead guilty. Then on the day of the trial we would visit them in the lock-up to make sure they had not changed their mind. It's quite embarrassing when a client backs out of a guilty plea at the last moment.

Often times it appears like the defense attorney is pressuring the defendant into the plea. Often this is the case, but not always. Some guilty pleas are the result of pressure from the attorney, but most often defendants are told they will receive a lighter sentence if they plead guilty. Usually a guilty plea is worked out carefully in advance with the prosecutor and judge. Technically the judge is not allowed to be involved in the negotiations, but many defense attorneys will not plead their clients guilty unless they have some concrete assurance of the sentence that will result.

I saw James and he confirmed that he still wanted to take
his case to trial. Keith James was eighteen years old. He and two other young men his age had been arrested for stealing a pair of expensive glasses from a person on the street. The complainant-victim alleged that a gun had been used in committing the crime. James claimed that he had nothing to do with the crime, but his story didn't seem very convincing, particularly since both of the other men arrested for the crime had pled guilty. It seemed likely that one of them would testify against James in exchange for a lighter sentence.

The crux of the case was the issue of the gun. The complainant told the police that he saw a flash of silver which he was fairly certain was a gun. From the police report it seemed he was uncertain which of his attackers was holding the gun. This was an important point. If James was found guilty of committing a crime with a gun, he could be sentenced under the mandatory minimum law. In Pennsylvania the mandatory minimum law says that anyone convicted of committing a crime using a firearm must be sentenced to a mandatory minimum sentence of five years in prison. Conceivably a person could do five years for stealing a Tootsie-Roll if they used a gun while doing it. We had to find something that would at least prevent the mandatory minimum from being imposed. Not all the judges in Philadelphia abide by the sentencing law. Some feel it is unconstitutional, but others follow it to the letter. Unfortunately for the defense, Judge Lester who was to hear the James case was a firm believer in the new law.

From a defense perspective the only advantage of having a
judge who sentenced under the mandatory minimum was the possibility that the judge might be less likely to convict a person knowing he would be sentenced to such a harsh penalty. Judges who sentence under the mandatory minimum were often more likely to find reasonable doubt and judge that the defendant was not guilty on the firearm charge.

James was charged with five different counts the most serious being robbery and simple assault. In Pennsylvania the charge of robbery indicates that something was stolen and force or the threat of bodily harm was used in committing the crime. Simple assault is the infliction or threat of infliction of bodily harm. We weren't as concerned with the charges of conspiracy and receiving stolen property, which James was also charged with. If the biggest charges could be beaten then the smaller ones would follow. Our best chance in the trial was to attack some of the inconsistencies in the complainant's testimony. At the preliminary hearing he stated that it was James who had the gun; however, at the guilty plea of one of the co-defendants, the complainant had testified that he wasn't sure who had the gun. We also hoped to be able to place most of the blame for the robbery on the other two defendants since they had already pleaded guilty.

The trial began in the early afternoon. Judge Lester always took a long time to get things rolling. Colson, James, and I sat at the defense table. Harry Hartson, the prosecutor assigned to Judge Lester, sat alone at his table. The trial was quick and simple. The prosecution produced three witnesses - the complainant, and two police officers. To our surprise the
complainant testified that it was not James who was in possession of the gun during the crime. The prosecutor was as surprised and upset as we were surprised and happy at this testimony. Realizing the Commonwealth's case was in trouble the prosecutor tried to question the witness so as to elicit the response he wanted.

Mr. Hartson: Are you certain that it was not Mr. James who held the gun to your neck that day, sir?

Complainant: No sir, I'm not certain, but I'm pretty sure it wasn't him.

When Mr. Colson got up to cross examine the witness he tried to cast even more doubt on the situation.

Colson: Now you have said sir that it wasn't my client Mr. James who had the gun. Is that correct?

complainant: Yes.

Colson: Well then, are you at all certain that Mr. James was even present that day?

Complainant: Yes sir, he was there he just didn't have the gun.

When the prosecution finished putting on their case there was a short recess. Colson stepped to the side of the room with James and me. He was agitated and nervous. "Look, I don't think we should put on any defense. They haven't proved anything. They can't prove you did the robbery, and I don't think they can prove the simple assault either. I think we'd only be hurting our case to put you on the stand. What do you think about that?" Colson was facing a dilemma very common to
defense attorneys - should they put their clients on the witness stand. One of the attorneys at the office reasoned the dilemma to me as follows: "I look at it this way. If it's a jury trial I put the guy on the stand unless he's a total scumbag and has absolutely no credibility. You see, if I don't put him on, the jury thinks he hiding something and bingo, they find him guilty. Now if it's a waiver trial (judge only) then it's a tough decision. In general I don't put him on unless I absolutely have to. I really don't like letting the prosecutor have a free rein to attack my client."

James didn't mind not testifying at all. He had said from the beginning that he "wanted to get away from this thing with probation." Right now things looked even better than that. Colson was smart not to put James on the stand. Once the defendant takes the stand the prosecutor can throw just about anything at him. In a judge-only trial, this could be very damaging. In a jury trial an aggressive prosecutor may be viewed as badgering the witness which can damage the prosecution's case. A judge who has presided over many trials is less likely to feel the same way. Since we opted for a judge trial, keeping James away from the stand was a good idea.

When we had all assembled back in the courtroom, Colson announced his intention to rest the case without putting on any testimony. Hartson half-smiled and nodded his head. Judge Lester looked a little disappointed but managed to wipe it right off his face. "Alright then," he began, "I find the defendant guilty of simple assault and not guilty on all other charges. I'm not convinced of his role in the crime, but I'm certain he
was there. The clerk will now set a date for sentencing pending sentencing profile and recommendation. Any post trial motions must be filed within forty-eight hours." Judge Lester stood up and left.

On the way back to the office Colson questioned his decision not to put on any defense. "You know Peter, sometimes you win 'em and sometimes you lose 'em, but you got to keep one thing in mind. Whatever happens you don't do the time. He does! In this case I think we can get probation." Back at the office Colson had to relate to the other attorneys what had happened in court. End of the day bull sessions are very important at the Defender's Association. Prestige is often determined by the orally transmitted exploits of an attorneys in court. This day would not be great for Colson. He explained what happened in his "I don't give a shit my client is a slime ball" voice, but he made sure to mention that he felt the sentence would be nothing more than probation. He ended the story by saying, "And I'll be filing some post trial motions which may turn the verdict around. The judge has to know the the complainant was full of shit."

POST TRIAL MOTIONS

The next day Colson asked me to prepare the post trial motions for the James case. He went over the points he thought I should cover in the motions and recommended a few Pennsylvania Supreme Court cases which he felt would be applicable. I spent the morning in the office library browsing through cases and xeroxing the ones I thought would be useful. In the afternoon I wrote the motions by following the format of some motions Colson
had previously written. When I was finished Colson read the
document made a few corrections and gave it to the secretary to
type. The next morning they were delivered to Judge Lester.

The hearing for the post trial motions was to be held at the
same time as the sentence was to be pronounced. A date was set
for three weeks after the trial. We received a copy of the pre­
sentence report put together by the probation department a few
days before the hearing. The report was favorable. James had
only a small juvenile record, his drug and alcohol intake was
minimal, but best of all his family (mother and two sisters) were
moving out of Philadelphia. Colson called James' Mother and
requested that she make an appearance at the hearing. She agreed
and asked if she could bring her children. Colson smiled into
the phone and said, "Of course, please do."

The hearing for the post trial motions was disappointing.
Judge Lester simply didn't find our arguments convincing and he
quickly moved on to sentencing. At a sentencing the defense and
the prosecution are allowed to present brief oral argument and
often a probation officer who prepared the pre-sentence report
will speak. The prosecutor, Mr. Hartson, made a short statement
to the judge in which he highlighted James' juvenile record and
the fact that he had been part of a gang which robbed this person
with a gun. His statement was less than two minutes long. I was
surprised that Hartson didn't press a little harder for a stiff
sentence. In previous cases I had observed, he was relentless at
sentencing hearings, but in this case he seemed to pull back. It
wasn't until after the sentencing that I realized why Hartson had
not pressed for a heavy sentence.
Colson got up from his chair and went to the bar of the court. He spoke briefly about James and how he was really a good kid at heart. He had merely gotten involved with the wrong people. Colson didn't wait too long to lay down his entire hand. He looked towards the back of the courtroom and then said, "And furthermore your honor, Mr. James will no longer be a resident of Philadelphia County. His family is moving, and I have brought them here today to offer as proof that Mr. James will not be capable of committing another crime in our city." He motioned with his arm and James' mother who had been sitting in the back of the room with her two small children came forward and stood beside Colson. "Your Honor, this is Mrs. James. She has been present on everyone of the days this case has been called before you. Today she has brought along her children because she couldn't find a babysitter. Mrs. James is not married I'm sure I don't need to go into detail about the difficulty of raising an adolescent son in a single parent household. Mrs. James is here today to tell you that she has gotten a new job in New Jersey. She's a computer operator, and she's in the process of moving there right now. Isn't that true Mrs. James?"

"Yes."

Colson didn't have to say another word. Judge Lester took over the questioning of Mrs. James. He asked her about her children and about raising Keith. He asked her twice if Keith would be moving to New Jersey with her and he seemed satisfied with her answers. Mrs. James sat down with her children and Keith James was brought to the bar of the court where he stood
next to Colson. Judge Lester then launched into his sentencing speech. It was a speech which I was certain he had delivered many times before. In it he chastised James for his wrongful act, he made him look at his mother so he could see the pain he had caused her, and he topped it off my saying that if he ever appeared before him again on any charge he could be certain that he would do at least six months in the state penitentiary. He finished his speech and took a deep breath and sentenced Keith James to three years probation. He finished by suggesting that James stay away from his old friends and perhaps not even visit Philadelphia for a few months. Without another word Lester stood up and walked out.

While walking back to the office I realized what an amazing maneuver Colson had just pulled off. He had managed to play on the sympathies and reason of the judge and the prosecutor. Hartson was black and as a prosecutor he prosecuted cases which involved mostly black defendants. By bringing in James' mother and her two small children Colson was was able to remind Hartson of the inordinate number of black single-parent households and the difficulties this presented. Mrs. James' presence in the courtroom made it difficult for Hartson to press for a stiff sentence. Mrs. James appealed to Judge Lester in two different ways. On the one hand, she was the heartbroken mother struggling to make ends meet and finding it difficult to control her teenage son. On the other hand, she was leaving the city and could take her son with her. He wasn't going to commit any more crimes in Philadelphia. If he were given probation the worst he could do would be to violate it in another state. But if this happened he
would no longer be Philadelphia's responsibility, for he would be out of the Philadelphia court system and out of the way. Colson had engineered a spectacular victory. His client was out of jail despite the fact that he was found guilty. What more could a defense attorney ask for?

JUSTICE AND MANIPULATION

If one were to look only at the facts of the Keith James case, it would be quite disturbing. Three adolescents attack a man in broad daylight. At gun point they rob him of his glasses but nothing else. All three are arrested. Two plead guilty and receive probation. One goes to trial and also receives probation. All three have some sort of juvenile record. These three men committed a crime of violence, yet none of them will serve time in prison. If you were the victim of this crime or even a concerned citizen who lived in the area the crime occurred, it is doubtful that you would perceive justice had been done.

The final decision arrived at by Judge Lester was a compromise in the true sense of the word. Lester found the defendant guilty on one count; the prosecutor can then count the case as a conviction. Lester found James not guilty on several other counts which was a victory for the defense. The sentence was another victory for the defense. At the Defender's Association, probation is almost as good as not guilty. One attorney laughed when I queried him about this attitude. His motto was, "If my client walks, I'm happy." Since James was given probation it made no difference to Colson that he was found
guilty on one count.

William Seagle writes, "The law never really attempted to resolve the conflicts in society but only to alleviate them by laying down rules under which they might be fought" (1941:7). In the case of Keith James the law really only alleviated the conflict between the state and the defense by hashing out a compromise. In arriving at the compromise the defense resorted to a ploy of manipulating the sympathies of both the judge and prosecutor. The defense and prosecution are convinced that without such manipulation cases would never come to a satisfactory conclusion. One side would come away as the clear victor and one as the clear loser. When cultural idiosyncracies and prejudices are manipulated so that the operative laws are pushed to the periphery, the judge or jury is free to arrive at a decision which in light of the facts of the case and the operative laws may seem incorrect. However, these decisions take into consideration extra-legal factors that balance the competing sides and hence have the capability of providing a compromise. This compromise decision may be legally unsound, but can acceptable to the two competing sides. Problems arise when one side is able to utilize extra-legal factors so much more effectively that the decision reached is not only legally incorrect but also skewed so that one side comes out a big loser. In cases such as these dangerous criminals go unpunished and innocent people sit in jail.
CHAPTER 3 -- THE LORAIN COUNTY PROSECUTOR'S OFFICE

MUNICIPAL COURT, ELYRIA OHIO

The three municipal court judges in Elyria Ohio all work in the same building. The courts in Elyria are not crowded and on any given day an observer hoping to watch a little courtroom drama might be hard pressed to find anything happening. But the patient observer will eventually be rewarded. Most of the cases are robberies and burglaries and assaults from Lorain which is the biggest city in the county. Murder and rape trials are more unusual. In Elyria they simply occur with less frequency than in a big city like Philadelphia. This of course is to be expected, more people, more crime, more court cases.

The Courthouse is located in the center of town right near the downtown shopping district. It is banked on two sides by different churches, and a city park complete with a fountain and statues is located directly in front of the building. The building itself has gone through several stages including a renovation in the late seventies. The history of the courthouse is well documented and can be found in glass displays all along the main hallway on the first floor right along side of posters for local garage sales and a display featuring the pictures of every member of the Lorain County Bar Association.

The courtrooms are modern in design and carefully planned to maximize the use of limited space. The courts are in long narrow rooms with a door at each end. The back door, leading to the judges chamber, is located behind the four foot high desk where the judge sits. To the left of the judge's desk is a tiny little table and chair where the bailiff sits. In front of the judges
desk is a chair for the stenographer. The jury box banks the left wall of the room and extends for three quarters of the room's length. The chairs in the jury box are modern and offer a reclining feature. In one courtroom the prosecutor and defense attorney actually sit at the same table, but it is of sufficient size to allow for privacy of notes. In another room the defense sits directly behind the prosecutor and both have small wooden tables. This arrangement gives defense and prosecution equal access to the jury. The rear of the courtrooms are filled with three to four rows of chairs.

The layout of the courtrooms seems to be space efficient and functional, but I noticed some problems with the arrangement. When the defense and prosecution are using the same table it is common for the attorneys to sit on one side of the table while the defendant sits alone either at the end of the table kitty corner from his attorney or across the table from him. This isolates the defendant in the courtroom and gives the distinct impression that the defense and prosecution are somehow joined in an effort against the defendant. When the defense and the prosecution are sitting behind each other at separate tables the defendant is able only to see the back of the prosecutor. This prevents the defendant from confronting his accuser directly. I often found it powerful and effective when a defendant would give the prosecutor a hard stare after he had made some damaging point against the defendant. The demeanor of the defendant is often cited on three separate occasions in Philadelphia as an important factor in the outcome of the trial. These
confrontations can be used by the defendant to appear shocked, surprised or even infuriated at the testimony presented against him. When the prosecutor is in front of the defendant this aspect of the courtroom drama is eliminated. Compared to the often intense interplay between defendant and prosecutor I witnessed in Philadelphia, the Elyria prosecutors often presented their cases in an almost sheepish manner with their backs to the defendant.

ELYRIA JUDGES

Judges in Elyria are distinctly different from judges in Philadelphia. In Philadelphia if a person wants to become a judge he must simply get his name on the democratic ticket and the chances are good he'll be elected. Getting on the ticket can involve a power struggle of sorts, but once you're on the ticket getting elected is almost certain. Once a judge is elected he remain a judge for ten years. After ten years his name appears on the ticket for an approval vote. Only in extremely rare cases does a judge fail to be approved. After the first approval vote the judge may remain a judge for as long as he wishes, in many cases this means until death.

In Lorain County judges serve a set term like any other city official and they must be re-elected. The turn over rate among judges in Lorain County is much higher than among judges in Philadelphia. During my period of observation an election took place and one new judge was elected and one judge was re-elected. Because of this re-election process, judges in Lorain County must be much more concerned with their public image than judges in Philadelphia. In order to get re-elected a judge must maintain
the image that he is tough on crime. A judge who is tough on crime in the public's eye is someone who doles out long sentences and doesn't let criminals get away on legal technicalities. On a day to day basis this means that a judge does not want a reputation for being lenient. In the event of a trial which is well publicized, the judge must be exceedingly careful of his reputation.

Leniency and fairness are two key issues a defense attorney considers when approaching a trial. The defense has a number of options which include trial by judge, (sometimes called a waiver or bench trial) trial by jury, or some sort of plea. In Philadelphia waiver trials were the norm and jury trials were the exception. A defendant soon learns in the Philadelphia system that because of the extreme back load of cases a jury trial can be dangerous. If a defendant is found guilty in a jury trial he is likely to receive a stiffer sentence than if he is found guilty in a judge trial. This is the judge's way of controlling the number of time consuming jury trials in his courtroom. Because of this system different judges get various reputations for leniency and fairness as waiver judges. There are certain judges who the Defender's Association simply do not use in a waiver trial and clever methods of judge shopping were developed to prevent these judges from hearing their cases. Likewise there are some judges who are considered extremely fair by defense attorneys. My supervisor told me of one judge who we were about to appear before, "This will be a waiver I'm sure. This judge is better than ten juries. Besides he plays shortstop on my
softball team and he used to be a P.D. (public defender)." I watched over ten cases in front of that judge and none of them were jury trials.

In Elyria jury trials are the norm and judge trials are extremely rare -- so rare in fact that in the months that I observed cases I never saw a single judge trial. I asked a defense attorney why this was the case. He laughed and said, "These judges are hanging judges. They're all elected. I'd never put a client in front of them alone. It's hard enough to win a jury trial." The political nature of the judgeship imposes a limited number of options the defense has in Lorain County. Fortunately the courts in Elyria are not overrun with cases so the system can handle jury trials which take three or more days each.

The reason that the courts in Elyria are not overrun with cases is not simply a lack of crime in Lorain County. Every two weeks arraignments are held and at that time often over fifty cases are processed in one morning. This means that fifty new cases every two weeks enter the Elyria court system. It would seem hard to believe that it is often difficult to find a case to watch. This is because the majority of the cases are settled with some sort of non-trial disposition. This could mean that the charges are dropped, the defendant pleads guilty, or witnesses fail to appear and the prosecutor must throw the case out. Elyria courts have the time to hear only jury trials because these processes occur.

THE LORAIN COUNTY PROSECUTOR'S OFFICE

Across the street from the Elyria Courthouse on the fourth
floor of the five story Elyria Municipal Building are the offices of Timothy Green, the Republican Prosecutor for Lorain County. The office is divided into three areas: Attorneys, secretaries, and the victim witness division. There are seven assistant prosecutors and Tim Green himself, who make up the attorney section of the office. A battery of four secretaries guard the small cubicles which serve as offices for the lawyers. The victim witness division is located at the far end of the office in two separate rooms. The division was set up to assist the victims of crime and help ease the process of appearing in court and recovering stolen property. The program has been a terrific public relations tool for Tim Green. He has spoken all around the county and state touting the merits of the program.

Like most office interns at the prosecutors office, I was assigned to work in the victim witness division which in effect condemns the intern to doing paper work for most of the day. Fortunately I was able to break out of the confinements of the internship and venture across the street and into the courtrooms. I was disappointed in working with a specific attorney, but before too long the prosecutors began to recognize my face and would talk to me briefly before and after their trials. In Elyria I wasn't able to follow cases through the entire system to the extent that I was in Philadelphia, but I was able to get a sense of the everyday workings of each individual courtroom and prosecutor.

There is one prosecutor assigned to each of the three courtrooms in the Elyria courthouse. These prosecutors work in
their assigned room for an entire year at which time they are either promoted to an upper level court or switched to a different room. This system gives the prosecutor an advantage over a defense attorney in that the prosecutor will be extremely familiar with the judge he works with. A defense attorney may only work with each judge two or three times a year. The prosecutors added experience make him far more likely to know what objections the judge is likely to sustain and overrule and which arguments prove most persuasive. Even in a jury trial the judge still plays an important role. He is the person who decides exactly which arguments the jury is allowed to hear and which evidence is admissible. Again the prosecutor's extended stay with each judge gives him certain advantages. In a rare instance this extended exposure could be a disadvantage. It is possible that a judge will simply not get along with a certain prosecutor. This happened once in Philadelphia and the prosecutor was quickly moved to a different judge. A clever defense attorney can sometimes capitalize on a judge's irritation or dissatisfaction with a prosecutor.

THE CASE OF BILL THE PHARMACIST

I was able to observe an interesting example of a non-trial disposition as I sat in the courtroom of Judge Max Rudensky one morning. The prosecutor was a plump balding man named Sam Rosenthal. The defendant, a woman of about thirty and her attorney were also present in the courtroom. Out in the hall sat the key witness for the prosecution, a grizzled old man who could barely hear despite his massive hearing aids. The prosecutor went outside to speak to the witness. I followed. We
stepped into a small room whose door was adorned with the sign "Witness Lounge". The room was hardly a lounge, but more of a place for attorneys to take their witnesses and make sure they were prepared for the upcoming trial.

Inside the room Rosenthal began to question the man about the case. I learned that his name was Bill and he was a pharmacist in a small town nearby. The prosecutor asked Bill if he remembered having sex with the defendant. Bill shook his head and said he couldn't remember if he did or not. Rosenthal looked a little distressed and a dialogue ensued.

Rosenthal: Did you or did you not have sex with the defendant when she asked you to supply her with pills?

Bill: I can't remember.

Rosenthal: Well then you're in trouble mister, because I've got taped testimony from you in which you openly admit to having had sex with her as payment for the drugs you were supplying her. That's a crime in this state, sir, and I think it's time you began to realize that.

Bill: Oh well...in that case I'll say whatever you want me to.

The conversation came to an abrupt halt and Rosenthal stormed out of the room and back into the courtroom. He was extremely upset, but asked that the judge be called and the trial begin. The judge entered from the rear of the courtroom a few minutes later and the case began. Rosenthal asked that Bill be brought into the courtroom. The bailiff went out and brought him in. Rosenthal gave him an angry glare and approached the
"Your Honor," he began, "I just spoke with a witness in this case and I've come to the conclusion that the State must nolle pros (end prosecution) this case and re-open the case of Mr. William Thomson, my witness. Just a few minutes ago he told me he couldn't remember what had happened between him and the defendant, then when I confronted him with taped testimony in which he admitted to committing the crime he informed me that he would say whatever I wanted him to. I move that this current case be terminated and that the state abandon its plea agreement with Mr. Bill Thomson and continue prosecution."

The judge agreed to the arrangement and the defense attorney explained to his client that the charges against her had been in effect dropped. She looked very relieved and tried to smile then stood up and left the courtroom. The judge asked Rosenthal if Mr. Thomsom understood what had just happened. Rosenthal walked over to where he was sitting. He asked if he understood what had just happened. Bill shook his head and pointed to his hearing aid. The judge asked Rosenthal to bring him forward to his desk. Bill and the prosecutor stood in front of the large judge's desk while the judge tried to explain to Bill what had happened. Bill kept shaking his head and pointing to his hearing aid. Finally the judge got fed up with shouting at him. "Look Mr. Thomson, you are going to need a lawyer. You are being charged with a serious crime. Go and get a lawyer." Bill still just shook his head. Exasperated the judge called the defense attorney for the woman who was still in the room to the front of the courtroom. "Mr. Thomson," the judge said, "this is Mr. Williams, he's a
lawyer. I'm appointing him to represent you until you can secure other counsel. Mr. Williams will you please take Mr. Thomson outside and explain what just went on?" The defense attorney didn't look very happy to have been re-appointed to the case he had just finished, but he led Thomson out of the room.

The judge left and Rosenthal looked over at me. He said, "You just watched a great display of courtroom ethics. That woman in here was a prostitute and a junkie. She used to go sleep with that old guy so he would give her drugs. We had a damn good case against her until this happened. Now I'm going to put together a damn good case against him. He caused me a lot of trouble and pissed me off. But I had to nolle pros that case. I couldn't let that guy get up on the stand and commit perjury. No way."

LEGAL ETHICS

At the time I was impressed with Rosenthal's honesty and the ethical stance he had taken. I wondered how many prosecutors in Philadelphia would have done the same thing. Perjury is a serious issue and often I felt that defenders and prosecutors realized their clients were committing perjury, but didn't say anything about it. Rosenthal was in an easier position because the case hadn't really started. It's difficult to stand up in court in the middle of a trial and politely inform the judge that your key witness has just perjured himself. I also wondered if Rosenthal would have dropped the charges against the woman if he didn't know that he could still make a good case against Bill. It's a lot easier to drop one case knowing full well that you
can pick up another thread of the same case and prosecute another person.

Rosenthal was being ethical by dropping the case, but his ethics were relatively risk free. He wouldn't have any trouble explaining to Tim Green why he had dropped the case. He had dropped one case so he could pick up another against a worse criminal, a man who had not only sold drugs, but perjured himself and reneged on his plea agreement. Tim Green considered himself an "aggressive" prosecutor and did not take kindly to people who violated their plea agreements.

EXTRA LEGAL FACTORS IN A NON-TRIAL DISPOSITION

In a non-trial disposition of a case the extra-legal factors involved are often different than in a trial. In any case it can be assumed that the prosecutor is working for a conviction. In a non-trial disposition this means a guilty plea, usually through some arranged plea bargain agreement. The defense is hoping to get the case thrown out or nolle prossed or to arrange a plea in exchange for a light sentence. "The lawyer and defendant may want to avoid a trial because of the uncertainty involved. The prosecutor is paid not to lose and a plea is a way to avoid losing" (Mather 1971:187).

In the case of Bill Thompson the prosecutor really attempting to win two cases at once. Rosenthal negotiated a plea with Thompson in exchange for his testimony against the woman. If all had gone as Rosenthal had envisioned it he would have succeeded in winning two cases. When Thompson decided he couldn't remember what happened and then said that he would say whatever Rosenthal wanted the prosecutor was faced with a choice.
He could proceed with the case against the woman and still use
Bill as a witness and run the risk of Bill perjuring himself on
the stand. He could proceed against the woman without using Bill
and take the chance of losing the case, with the judge knowing
full well he had gone to trial without a key witness. Or he
could drop the case against the woman. Rosenthal's case against
the woman was strong, but only if Bill testified.

It's not unusual for witnesses to change their story
slightly from one hearing to another, but Bill presented a severe
problem. He not only changed his story he claimed he couldn't
remember the event. Bill was an old man and was probably quite
senile, but Rosenthal was enough convinced of his ability to
testify that he had arranged a plea agreement to insure his
testimony. If he put Bill on the stand there was a good chance
that if he were put under pressure by the defense attorney he
would admit that he was testifying only because the Rosenthal
wanted him to. This could ruin both cases for Rosenthal and
create a sticky question of ethics. Rosenthal would lose the
case against the woman, and Bill's attorney could argue that the
prosecutor had pressured Bill into the plea agreement and this
could severely damage the case against Bill.

The smart decision was for Rosenthal to abandon the case
against the woman, thus proving his honesty and high standard of
ethics. This then put him a a good position to re-open the case
against Bill and at least walk away from the situation with half
of the victory he had expected initially. Rosenthal's anger at
Bill for ruining his case against the woman was also a key factor
in his decision to re-open prosecution against him. This sort of personal bias is extremely common for defenders and prosecutors. Prosecutors can become deeply involved in their attempt to convict someone they don't like to a point where the case becomes an obsession. Defense attorneys can do the absolute minimum necessary for clients they simply don't like. The consequences for defendants is severe. A prosecutor who works extra hard to convict or a defender who doesn't give a defendant his full effort can do damage to a defendant and the justice system. They overstep their bounds and don't fulfill their duties and allow personal bias to affect the outcome of a case. Both of these tendencies result in the increased suffering of the defendant.

Rosenthal already had a conviction on Bill in the form of a guilty plea, re-opening his case for prosecution would only mean more work for him and could result in a verdict of not guilty. Rosenthal wanted to bring Bill to trial because of the increased penalty he might receive. In order to get this increased sentence he was willing to risk losing the entire case.

INDIVIDUAL DECISIONS

The need to study the psychological and legal link which exists has been addressed by Jack Gibbs who also feels there is a need to study the effect of individual personality in law (Nader 1969:7). Clearly the individual can have a significant impact on the outcome of a case. The prosecutor is given a significant amount of power in the American legal system. Next to the determination of guilt the decision to prosecute or not to prosecute is one of the most critical choices. Americans like to think that the decision to prosecute is not made at random or
with personal anger involved. Courts were established to take
conflicts out of their original context so that personal bias and
prejudice would not interfere with the determination of guilt or
innocence. Rosenthal had a legitimate right to re-open the case
against Bill Thomson, the questions that arise from this action
to not focus on its legitimacy but rather on the reasoning behind
it.

A public defender from New York City once told the story of
a judge whose courtroom was so crowded that near the end of the
day he would say to the prosecutor, "Alright we've got two more
cases here and not enough time. You pick one to prosecute and
I'll discharge the other one" (Kunan 1983:21). This sort of random
justice (or injustice) is not prevalent in the Elyria courts, but
decisions like the one the judge in New York asked the prosecutor
to make are made everyday by prosecutors all over the country.
The difference is that in New York the decision was made out in
an open courtroom instead of in the privacy of the prosecutors
office. There is tremendous room for personal bias and prejudice
in these sort of decisions and our legal system has limited ways
of monitoring who makes these decisions and why until a case is
appealed.
It is difficult to separate extra-legal factors into specific categories. Factors such as prejudice based on race or sex are broad in scope and can apply equally to the judges, defendants or attorneys. Hence these factors cannot be categorized as relating to defendants or judges only. Extra-legal factors are not uniformly positive or negative. Often factors which are perceived to be advantageous at the beginning of a trial, like the personality of the defendant, by the end of the proceedings have proved to be detrimental. Taking any case to trial is an uncertain venture. An attorney in Philadelphia once told me, "There's no certainty in bringing a case to trial. If you want that, cop a plea. But the thing about trials is, they're a hell of a lot more fun."

Before extra-legal factors can be categorized it is important to define exactly what it meant by the term "extra-legal factor". An extra-legal factor is anything which does or is capable of effecting the outcome of a case in court other than the laws and rules which govern the operation of the court and provide for the determination of guilt or innocence. In actual practice an extra-legal factor is something which diverts the judge or jury's attention from the facts of the case and the legal decisions at hand. Once this diversion takes place the extra-legal factor influences the judge or jury to decide the guilt or innocence of the defendant not based on facts and laws but on the effectiveness of the extra-legal factor in influencing their feelings and impressions of the case and the trial itself.
RACIAL PREJUDICE

A classic example of an extra-legal factor that has had a great deal of influence historically is the race of the defendant. Studies by Daniel H. Swett (1969:79-110), H.A. Bullock (1961:411-415), and D.W. Broeder (1965:19-31) have shown that black and other minority defendants are more likely to be convicted in court than are white defendants. There is too much data available on this issue for anyone to argue that racial prejudice cannot be shown to be the determining factor in many cases. I witnessed a classic example of racial prejudice my first week in Philadelphia.

I attended a day of preliminary hearings which were held in one of the local police precincts. At a preliminary hearing the prosecution puts on part or all of their case. If they convince the judge that there is a prima facie case (enough evidence to continue prosecuting) he will set the next court date and determine what the bail is to be set at. The defense may cross examine prosecution witnesses only on topics which the prosecution raised during regular examination. The idea is not to prove the innocence or guilt of the defendant, but to show that a reasonable case against the defendant can or cannot be made.

There were two shoplifting cases which the judge heard that day. In one case a fourteen year old white kid from one of Philadelphia's suburbs was charged with stealing an expensive pair of tennis shoes. He was in court with his mother and a private attorney. The case was called and the prosecutor
explained that since the merchandise had been recovered the store was not pressing charges. The judge nodded and then gave a brief lecture to the boy and his mother which touched on points such as the importance of being honest and respecting your parents and doing well in school. He ended it by saying, "Now I'm not going to see you in here again am I? Good."

In another case a fifteen year old black kid was brought before the judge accused of stealing three shirts from a downtown department store. The kid had spent the night in prison. His parents couldn't pay his bail. As the public defender, we were appointed to defend him. The prosecutor made a statement similar to her earlier one. Since the merchandise had been recovered, charges were being dropped. The difference between the two cases became apparent when the judge made his statement to the defendant. "Did you enjoy yourself last night young man? Do you like jail? Well I hope you don't because that means you'll try harder not to get caught next time. I don't want to see you in here again, but if I do I won't hesitate to press charges. Just be aware that you are getting a break this time. Don't blow it!"

The judge's statements to the black kid assumed that he would soon be in trouble again. His statements reveal an attitude which presumes the boy is a trouble maker who will be involved with the courts repeatedly in the future. His speech was an effort to scare the kid so he would think twice before he committed another crime. In his statement to the white kid the judge attempted to make the boy feel guilty and responsible for his actions so that he would not want to repeat them. The judge attempted to remind the kid of his responsibilities to his family.
and society. He assumed the boy would probably stay out of
trouble from then on. The differences between the judge's two
statements speak for themselves. They point out a racial
prejudice on behalf of the judge and exemplify how race can
function as an extra-legal factor.

CATEGORIES FOR EXTRA-LEGAL FACTORS

Extra-legal factors can be broken down into three major
categories: 1) The Setting, 2) Physical Attributes of the
participants, and 3) Personal Attributes of the participants.
These categories apply equally to the attorneys and the
defendant. It is important to remember that extra-legal factors
can work for and against all participants in a trial.

The setting category includes factors such as the layout of
the courtroom, the positioning of the judge and jury, the
location of attorneys tables, and even the decor on the walls.
The setting is another extra-legal factor which an attorney can
use to his advantage or disadvantage. A defense attorney can
situate his client so that he faces the jury and the witness
stand. An attorney is free to move around the courtroom and make
use of the space provided. Often attorneys will stand at the far
side of the jury box while questioning a witness. This forces
the witness to stare at the jury while testifying, giving the
jury a full opportunity to examine the facial expressions of the
witness. Setting is a category of factors which can be used by
attorneys to enhance the other categories. Making a witness
stare at the jury while speaking may enhance in the jury's mind
certain facial features, a scar perhaps, or anything unusual
about the witnesses appearance or testimony.

The category of physical attributes includes factors such as race, sex, appearance, attractiveness, dress, demeanor, tone of voice, speech pattern, etc. Anything that can be perceived about a person can come into play in the courtroom. Physical characteristics are probably the most commonly abused extra-legal factors. These factors are usually easy to identify and take advantage of. Often they are factors which carry with them certain stereotypes such as race. The physical attributes of the defendant, defense attorney, prosecutor, and judge can all be examined in a consideration of physical extra-legal factors.

The third category, which I have chosen to call Personal Attributes, covers a broad spectrum of factors that can all be subsumed under the same heading. This diverse category includes: personality, the personal tastes of the various participants, occupation and class status of the defendant and or jurors, relevant past experiences of the judge or jury, intelligence of various participants, individual moods, questioning ability of the attorneys, defendants capability to respond to questions, etc. In this category the various extra-legal factors do not apply across the board to all participants. Obviously a factor such as occupation could only pertain to the defendant and the jury. Judges and lawyers occupations are assumed. The likes and dislikes factor is relevant to all participants except the defendant. The judge or jury are probably not interested in what he does or doesn't like. It is important when dealing with factors in this category to specify to whom the factor is being applied.
It is often more difficult to perceive the impact of factors such as personality and likes or dislikes on a particular case. In Philadelphia where I got to know some of the attorneys and judges personally, these factors became more and more apparent. Only rarely in Elyria was I able to determine if one of these psychological extra-legal factors was coming into play, and usually this occurred after a trial when I spoke with the attorneys involved.

OTHER SCHOLARLY STUDIES ON EXTRA LEGAL-FACTORS

There are a number of studies which cite the importance of cultural bias and extra-legal factors. One study conducted by W. Neil Brooks and Anthony Doob (1975:182-197) surveyed potential jurors and found that physical characteristics such as attractiveness, race, and sex can influence the severity of the sentence a jury might recommend. They also found that a jury would recommend a shorter prison term for a defendant who was described as happily married, regularly employed, and friendly with everyone than for a defendant who was described as a janitor, twice divorced, and an ex-convict. It seems to me that the inclusion of the "ex-convict" aspect prejudices the results of that particular aspect of the study because it's written in the law that repeat offenders may be punished more severely. A defendant's status as an ex-convict should not in my opinion be considered an extra-legal factor. Although flawed it is an interesting study which supports many of my own findings.

The same study also found that in cases where there was some degree of victim participation in a crime the jury was less
likely to convict the defendant, or at least convict him of a lesser offense. The study cites other factors which may be important in the determination of a verdict: did the jury believe the state deserved to win, was the case presented well, were the police unfair to the defendant, was the defendant being singled out for prosecution when many were guilty? These were all factors that encouraged the jury not to convict.

The Swett Study

A study conducted by Daniel H. Swett (1969:19-110) and published in the "Law and Society Review" cites the importance of the training which lawyers go through and the jury selection procedure as factors which tend to skew the outcome of cases. Swett challenges the current system of jury selection and suggests that the current system of choosing jurors from lists of registered voters is not equitable. According to Swett minorities are not adequately represented in juries because minorities have a lower percentage of voter registration than do whites. The result is that so few minorities are called to sit on each jury panel that they can easily be struck by an attorney using his pre-emptory challenges (challenges without cause). "Jury selection procedure renders the probability high that a homogeneous group will comprise the jury. Four challenges by the prosecutor allow for elimination of minorities" (1969:97).

Swett concludes that a homogeneous jury increases the chance that the ultimate verdict will not be determined by law but rather will be determined by the cultural system of the jury. This is particularly true if the attorneys have manipulated the ground rules of the court so as to obscure the legal issues. The
jury is left with no basis for judgment other than their assessment of the defendant, and it has been shown that this assessment can easily be altered and shaped by the attorneys.

"When there is a marked cultural difference between the defendant and judge, prosecutor, defense counsel and jurors, there is a consequent lack of articulation in communication and understanding that is often intensified by professional manipulation. Cultural differences in speech, dress, bearing, and behavior then assume paramount importance" (Swett 1969:98).

Swett's study confirms many of my own findings. He too believes that attorneys are well aware of the importance of extra-legal factors, and often attempt to put them to use in their case. Swett's study, however, was not an ethnography and lacks the specific detail which an ethnography provides.

CULTURAL VALUES AND THE LEGAL SYSTEM

A friend once asked me after I had tried to explain the nature of my research, "Well is there any legal system which doesn't utilize these extra-legal factors, and would ours work without them?" All anthropological studies of legal systems that I have encountered including the ethnographies of Gluckman (1965), Gulliver (1963), Hoebel (1954), Nader (1969, 75, 78), Bohannon (1957), Malinowski (1966), have found legal systems to be intertwined with and inseparable from cultural beliefs, bias', and prejudices. Law itself is a cultural phenomena. Gulliver writes, "In any society by definition there must exist regularized procedure which can be used to deal with breaches of norms and the injuries they cause" (1963:1). A major aspect of the U.S. legal system which differentiates it from other
societies and cultures is the attempt that has been made by lawmakers to separate the rules and regulations of society from the individual beliefs and values of the society's members. Even with this intention the U.S. legal system has been unable to exclude or prevent the intrusion of extra-legal factors. As long as human beings operate a legal system, cultural beliefs and values will play an integral role. Humans carry their cultural values with them wherever they go, including the courtroom. The law can ask that individual prejudices be set aside, but this is no guarantee that they will be.

In answer to my inquisitive friend, our system would probably not function without the involvement cultural values. Our system and legal systems in general would not exist were it not for the regulatory needs of cultures. Any system can strive to minimize the intrusion of extra-legal factors, but even this is probably impossible. There is a great deal to be learned from the study of these extra-legal factors. The more they are brought out into the open, the easier they may be to control. Categories of factors such as Physical Attributes and the Setting of the Courtroom are relatively easy to control, but Personal Attributes are obscured and difficult to pinpoint. Although it may be possible to standardize our legal system more and eliminate some prejudice, complete eradication of extra-legal factors is extremely unlikely.

In spite its shortcomings the U.S. legal system continues to function. Cases are processed and disposed of. New laws are written and enforced all the time, the system is constantly being changed and improved. A study such as this one can point out new
areas where changes are needed and also inform participants in
the legal system about the hidden and inner workings of the
system, which if brought out in the open may force the system to
operate in a more equitable fashion.
CHAPTER 5 -- THE RAPE CASE

AN INTRODUCTION TO RAPE

Rape trials are often the most ugly and unpleasant trials an attorney or judge will ever try. The legal definition of rape automatically requires that the victim testify in full detail about the experience in order for the crime to be proven. Confronting a rapist after the crime has occurred is extremely difficult for the victim, particularly if she knew her attacker, and statistics compiled by the Philadelphia based group Women Organized Against Rape (WOAR) show that 67% of all rapes are committed by an acquainstence (37%), a date (12%), an ex-lover (3%), a relative (2%), or someone the victim knew by sight (10%). Only 33% of rapes reported are committed by strangers (WOAR 1984). Rape is a crime of violence that forces the legal system to confront and dissect a subject that our culture is obsessed with: sex. Despite our cultural obsession, the legal system has not yet learned how to effectively handle rape cases.

Rape is a culturally charged issue. People in the United States do not like to talk about violent, painful, and shaming sexual experiences in public. Rape often involves the most deviant and violent forms of sexual contact. Because of the nature of the crime itself rape trials include unusually vivid and salient examples of the intrusion of extra-legal factors into the courtroom. Attorneys abuse cultural stereotypes far more in rape trials than in any other trial. The defense and the prosecution both have a large assortment of extra-legal factors at their disposal, just waiting to be put to use. In a rape trial the prosecutor attempts to present the defendant as a
sexual deviant who has no control over his physical urges. The defense often tries to discredit the victim by flaunting her past sexual record, presenting her as a prostitute, and claiming she consented. I have never witnessed a rape trial in which the victim did not cry under cross examination, but that is exactly what the prosecutor wants her to do.

PROSECUTING A RAPE CASE

A rape trial is a prosecutor's nightmare. A prosecutor in Elyria told me he would rather prosecute a murder than a rape. In order to prosecute a rape, the victim must testify in absolute detail about the incident. In order to prove the crime of rape the prosecutor must prove that the defendant's penis penetrated the victim's vagina, anus, or mouth. If either of these did not occur the crime is not considered rape. In order to elicit this information often a prosecutor must introduce to the victim an entirely new vocabulary for sex. On the stand the victim must be explicit, but not crude. Legal terms, not street language, are essential to the success of a rape trial. If a victim is too crude the judge or jury may assume she is a slut and could not have been raped.

Often it is difficult to convince a victim of rape to even testify. Many rapes go unreported and many reported rapes are never prosecuted. A woman severely damages the case against her attacker if she does not report the incident immediately to the police. Doctors' examinations and lab reports which detect the presence of sperm are essential tools in the prosecution of rape. Rape victims on the other hand are trying to cope emotionally and
physically with what has happened to them. Explaining to lovers and family can be extremely painful in itself. Bringing the case to trial imposes even further hardship. In Philadelphia Women Organized Against Rape provides crisis counseling and legal support and assistance to rape victims. If a victim wants, WOAR will have a counselor at the courtroom on the day of the trial to help the victim cope with the often traumatic experience of testifying. Defense attorneys in Philadelphia often cursed WOAR as one of the reasons they lost their cases.

DEFENDING AN ACCUSED RAPIST

A rape trial is also a defense attorney's nightmare. The defendants in rape cases are sometimes dicspicable people who leave little doubt in an attorneys mind whether they committed the crime. Women defense attorneys occasionally refuse to take rape cases because cross examining the victim is an unsavory event in which the attorney must in effect re-rape the victim. The defense attorney on cross examination must ask the victim repeatedly to go over the events surrounding the alleged rape. For the victim this can be an extremely difficult experience. WOAR reports that "Fewer than 40% of the victims feel they have recovered a year after the assault. 25% are still not recovered after 5 years! (WOAR 1984). Defendants, on the other hand, often prefer women attorneys. Seeing the defendant sitting next to a woman through the course of a trial can have an impact on a jury. They may find it harder to believe he committed the crime after he behaved so well with his attorney. One defense attorney told me, "Juries expect rapists to be some sort of perverts who want to hop on every woman they see."

51
Defense in a rape case may involve expert medical testimony which can greatly increase the cost of bringing the case to trial. Private attorneys may be less likely to take on cases they believe to be so costly, particularly if the defendant gives any indication that he may not be able to pay. My supervisor in Philadelphia once told me, "There are three rules when you're a private defense attorney. Get your money up front, never trust your client, and get your money up front." This attitude is particularly prevalent when private attorneys deal with rape cases. Often the defendants are of lower economic standing and hence cannot afford expensive legal defense. The public defender usually handles the majority of rape cases in any city. This may be due to a greater hesitancy on behalf of wealthier victims to report rapes. Wealthier victims are in a better position to afford expensive counseling and assistance following a rape. There may also be pressure not to report because it could damage the social position of the victim and her family. Statistics indicate that inter-racial rapes are not the norm. In Philadelphia, 93% of rapes are committed by men against women of the same race, 4% are white men against black women, and 3% are black men against white women (WOAR 1984). Although class status is not indicated in these statistics, there is an excellent chance that a wealthy white victim would be prosecuting a wealthy white rapist, probably someone she knows. These pressures have prevented many women from reporting rapes. The FBI considers sexual assault to be one of the most under-reported crimes (WOAR 1984).
RAPE TRIAL: PHILADELPHIA

It is easier to understand the importance of extra-legal factors in rape trials through examples. In Philadelphia I spent an entire week watching the trial of Johnny "Rasheen" Jones, a twenty-two year old black Muslim accused of raping Janis Brown a nineteen year old black woman. The defense attorney was Paul Johnson from the Defender's Association. Paul was a friend of my supervisor's, and he invited me to watch the case because he thought I might find it particularly interesting. Consent was the issue the defense hoped to win the case on. Johnson claimed that the consent defense of a rape case was one of the most difficult defenses in the American legal system. The prosecutor was Andy Trevoni a short and corpulent Italian-American with a bushy black mustache. He was known for his fiery courtroom manner and his occasional breaches of ethics. My supervisor had run into some difficulties with him a few months earlier. The judge was Tim Meyer, a common pleas judge who was generally considered to be fair in a jury trial, and tough in a waiver trial.

The trial began on Monday morning. The jury, selected by the end of the first day, was comprised of two blacks, a man and a woman both in their forties, three middle aged white women, and seven white men ranging in age from twenty-eight to sixty-five. The two alternates were both black women in their fifties. Several motions were made by the defense at the beginning of the trial in an attempt to suppress certain evidence considered to be tainted. Judge Meyer denied all defense motions. Testimony in the trial began on Tuesday.
The prosecution's case was simple. Janis was over at her friend's house on a Friday night. She decided to leave her friend and go to a different friend's house. On the way a man, Johnny, came up to her and started a conversation. She tried to walk away, but he grabbed her and shoved her in a car. She was taken a few blocks away to a house and brought upstairs to a bedroom where she was raped. Afterwards the man acted as if he had invited her to come to his house, and showed her to the door. On the way out she saw Johnny's uncle sitting in the living room watching TV. Johnny told his uncle that the woman was his girlfriend and he kissed her good-bye. Janis ran home in tears. Her mother noticed her clothes were torn; she asked her what happened. Janis could only cry. Her mother inferred that she had been raped and took her to the hospital and called the police. A doctor gave Janis a pelvic exam and tested her vagina for traces of sperm. Sperm was found and it matched a sample taken from Johnny when he was arrested the following day.

In his opening statement Mr. Trevoni told the basic story to the jury and informed them about the witnesses when he would call. He asked the jury to understand how difficult it was for a rape victim to testify in court and to be understanding if her tears caused various delays. Trevoni spent at least a minute describing what a degenerate the defendant was, and how cruelly he had treated the victim. He concluded, as all prosecutors do in their opening statements, by telling the jury that he was certain they would find the defendant guilty of all charges after they heard the evidence.
In his opening statement, Mr. Johnson outlined the defense's case. He explained that there were several peculiarities in the case which he wanted the jury to watch out for during testimony. He asked them to pay particularly close attention to the victim's testimony regarding how she got to the defendant's house, what happened there, and how she got home. He concluded by saying, "You will find, I am sure, that what occurred in Mr. Jones' room was not a rape at all, and the only reason we are here in court today is because Janis Brown could not bear to tell her mother that she had just had sex with Johnny Jones."

The prosecution first called the victim's friend to the stand, and she explained how Janis came to leave her house on the night in question. Johnson cross-examined her on the issue of time. What time did she leave? The witness wasn't sure of the precise hour, but was able to give a rough estimate. The next witness was Janis Brown. All totaled she spent over four hours on the witness stand. She was crying throughout her testimony, particularly on cross examination. She stuck to her story which was very close to what the prosecutor had described in his opening statements.

Johnson questioned her about the specific time that each event had occurred, and she was uncertain about this. Johnson also asked her to describe the defendant's bedroom which she was able to do in detail. Janis cried profusely throughout the cross-examination regardless of the question asked. She cried as much when she gave her address as she did when she described the actual rape. Johnson was extremely careful to be kind and courteous while questioning her. He did not want the jury to get
the impression that he was bullying the victim. Johnson told me that he practiced some of his questions the night before in the mirror. "There's fine art to questioning a rape victim," he said "you have to ask very penetrating questions as if you were talking to the most fragile doll in the world. If you come off to the jury as a mean bully, they'll lock your client up faster than you can say 'appeal'."

The prosecution concluded its case by calling the victim's mother to the stand and by calling the examining doctor and police officer. Most of this testimony was straightforward. There wasn't much to dispute. Johnson didn't even cross-examine the medical witness. The prosecution rested their case late on Wednesday afternoon. I could tell that Trevoni was pleased with the way the case was going. He spoke with me briefly after court was adjourned for the day. "So what do you think?" he asked me, "I think I got him. No way is he gonna prove consent. I'm not gonna let him. Stick around and watch more tomorrow; this is gonna be a good show."

Trevoni's confidence was premature, however. The next day defense testimony began and the defense case, although weak, was better than anticipated. The defense called only two witnesses. The first was Johnny's Uncle who had been downstairs when the victim left. His testimony wasn't perfect, but it succeeded in raising the possibility that the victim had been more compliant than previous testimony had indicated. Johnny himself was the key witness for the defense. There was never any question in Johnson's mind about putting Johnny on the stand. In a rape
trial with a jury the defendant has to testify. If he doesn't the chances are very good the jury will believe he is hiding something, and he'll be found guilty.

Johnny testified quite well under regular examination. He told how he met Janis and invited her back to his house. She accepted and they walked there. His version of their sexual contact was similar to the report given by Janis, only it lacked the inclusion of the use of any force. The regular examination took only twenty minutes. I was surprised how effective his testimony was. At the beginning of the trial and throughout the prosecution's testimony, I was convinced of Johnny's guilt, but I suddenly wasn't as sure. It's quite possible the jury felt the same uncertainty. On cross-examination the sparks began to fly.

Trevoni launched a verbal assault on Johnny from his first question. He quizzed Johnny on the exact amount of time his every move took that night. He asked about specific articles of clothing he and the victim had been wearing. He even asked him about the floor layout in his own room. After forty-five minutes of questions of this sort Trevoni's queries began to get more personal and drifted away from descriptions of the actual incident. Johnson began to object to Trevoni's every question.

Trevoni: Isn't it true Mr. Jones...Rasheen, isn't it true that Moslems are not supposed to have sex out of wedlock?

Johnson: Objection.

Judge Meyer: Sustained.

Trevoni: Are you a good moslem Rasheen?

Johnson: Objection.
Judge Meyer: Sustained.

Trevoni: Didn't you violate your religious belief by having your alleged consensual intercourse with Janis Brown that night?

Johnson: Objection

Judge Meyer: Sustained.

The judge and attorneys continued in this manner for over five minutes. Finally after Johnson's fervent protest Judge Meyer asked Trevoni to change his line of questioning. Trevoni finished his cross-examination a few minutes later. Johnson asked a few more questions on re-direct examination and the defense rested. Closing statements were similar to opening statements, except Trevoni spent a few minutes describing all of the religious and moral violations "Rasheen" had committed. Johnson, in his closing statement, reminded the jury that just because the victim cried a lot didn't mean that Johnny Jones was guilty. He quoted Shakespeare and suggested that perhaps she was crying too much to be believed. Just before lunch on Friday the judge instructed the jury in the law, and they retired to their chambers for deliberations.

The jury deliberated for three and a half days, an unusually long time for such a relatively short and simple trial. Johnson was on edge the entire time the jury was out and he could scarcely get any other work done at the office. Finally the phone call came that the jury had returned. We hurried over to the court to hear the decision. The forman of the jury stood up and opened his envelope and announced that the jury was hung, four in favor of convicting and eight in favor of aquittal.
Trevoni promptly demanded a jury count which was his privilege. Each member of the jury had to stand up and announce how they had voted. Not surprisingly a majority of men supported aquital and a majority of women supported conviction. The black members of the jury both favored aquital. Trevoni announced later that day that he intended to re-try the case. The outcome of the second trial is unknown to me.

EXTRA-LEGAL FACTORS

Several extra-legal factors played key roles in the outcome of the Johnny Jones case, and they operated in interesting ways. Perhaps the most unusual extra-legal factor was Trevoni's attempt to discredit the defendant on the basis of his religion. He insisted on calling Johnny by his Moslem name, Rasheen, and he used an unusually harsh tone of voice throughout his closing statements. I thought this action had severely racist undertones. Apparently the jury felt similarly. Johnson overheard two of them talking in the bathroom after the trial and they were commenting on Trevoni's behavior. This is an example of an attorney's attempting to manipulate an extra-legal factor which instead of discrediting the defendant turns around and damages his own case. It wasn't the extra-legal factor itself which was damaging, it was the manner in which it was presented that influenced the jury. If the same factor had been introduced by a different attorney, it might have had a different effect.

Another extra-legal factor which played an important role in this trial and in a lot of rape trials was the demeanor of the victim. It is apparent that a victim must cry on the witness stand in order for the defendant to be convicted. Janis,
however, took this to the extreme and cried profusely during virtually her entire testimony. Mr. Johnson was able to utilize the saying, "Me thinks she doth protest too much" as an extra-legal factor by indicating that Janis cried too much to be believed. It was obvious to everyone in the courtroom that she was extremely upset about the incident, but her tears were so strong and intense during even the most mundane line of questioning that the possibility of her faking the whole thing wasn't as hard to swallow.

The believability of the victim was the key to the outcome of the case. Johnny Jones did not convince the jury that he did not commit the crime of rape. The possibility that the sexual contact was consensual rather than forced confirmed many of the jurors' cultural beliefs about sex. People want to believe that sex is a mutual experience and not a violent act of force. The extra-legal factors combined with these cultural beliefs about sex raised enough doubt in certain jurors minds that they could not convict Johnny of rape.

RAPE TRIAL: ELYRIA

Sally Miller was at a party at a friend's house on a Friday night. Sally was drunk and the party was dragging on; she wanted to go home. She had her own car, but realized she was too drunk to drive. Tim Lester, an acquaintance of hers from high school, offered to drive her home, and she accepted. On the way Sally noticed that Tim was not taking the quickest route to her house. She asked what he was doing and he said he was driving to his house and she could drive herself home from there. Shortly there
after he pulled into the parking lot of a store. He took the keys out of the ignition and stuck them in his pocket. Sally protested, but Tim said that he just wanted to talk to her. They sat in the car and talked for over an hour when all of a sudden Tim tried to kiss her. She resisted and he persisted. He pushed her into the back seat and raped her.

Afterwards he returned her keys and walked off. Sally drove to her boyfriend's apartment only to find him in bed with another woman. Despite this he was very understanding and offered to call the police and take her to the hospital. They drove to the hospital, but in the parking lot Sally decided she could not go through with it. Her boyfriend drove her home.

At home she took a shower and told her parents what had happened. They were extremely upset and demanded that she go to the hospital. Accompanied by her mother she went to the hospital where sperm samples were taken and she was given a pelvic exam. Because she had taken a shower it was not surprising that no sperm was found in her vagina, but seminal stains were located on her panties. The stains were too old for their origin to be determined. A warrant for the arrest of her assailant was sworn out. When the police went to his house his father informed them that Tim had left town. He didn't return to Lorain County until he was arrested in Maryland on charges of rape. Maryland authorities extradited him to Ohio.

The trial began on a Tuesday in the courtroom of judge Harold. Francis Milton was the prosecutor, and a tall blonde man named Mike Tuttle was the defense attorney. The defendant, a clean cut white twenty-two year old, wore a blue v-neck sweater
and slacks. His father watched the entire trial, but his mother never appeared.

Jury selection took all of Tuesday morning. The panel selected was all white and included four women and eight men. All were blue collar workers and housewives, but many worked at the Ford plant in Lorain. One man, a welder, was asked about where he had worked and told about five companies which he had worked at for varying lengths of time all which closed down and forced him to find other work. In the course of jury selection Mr. Tuttle used all four of his peremptory strikes to excuse four women from the panel. In Ohio when a jury member is struck the attorney must stand up, face the jury, and name the person to be struck. In Philadelphia this is done anonymously. Because of this procedure Mr. Milton opted not to strike anyone. His intention was to give the jury the impression that he was satisfied that anyone was capable of concluding that the defendant was guilty. Unfortunately this tactic may leave potentially damaging people sitting on the jury. During jury questioning I felt uncomfortable about three of the men chosen. Their answers regarding their beliefs about the nature of the crime of rape seemed suspect, and I thought perhaps they should have been struck. But they were not and the trial got underway on Tuesday afternoon.

The first witness called was Sally Miller, the victim. Her testimony was excellent. She was clear and coherent, yet tearful at the proper moments. She was able to explain why she didn't call the police immediately afterwards, and I found her very
believable. Under cross-examination she didn't alter her story at all and when she stepped off the stand I would have been willing to bet money that the verdict would be guilty.

On Wednesday morning the prosecution continued. Milton called Sally's boyfriend and he explained in what state she had come to his house. He also spoke about her hesitancy to enter the hospital when he drove her there. Mr. Tuttle questioned the boyfriend about who he spent the night with that night and the man admitted he was with another woman. Next the prosecution called Sally's mother. She explained how Sally was finally taken to the hospital. A police officer testified about the report he had taken from Sally, and the tests that were conducted. He concluded that despite the lack of definitive seminal evidence, the stains on the panties were enough evidence for the police to arrest the suspect. A doctor also testified about the tests and a rape crisis worker testified about why it is often common for women to report rape days, months or years after the event.

Following her testimony Mr. Milton rested his case.

The defense began late on Wednesday afternoon. Tuttle brought only three witnesses to the stand. The first was a doctor who had examined the collected evidence at a crime lab. He discussed the lack of seminal evidence, and suggested that a shower might not remove all evidence of sperm. Under cross examination he admitted that seminal evidence wasn't necessary to prove the crime of rape. The second witness was a twenty year old black man who was a friend of the defendant's. He testified that the night of the rape had been his birthday. He had gone to several bars and had a few beers with some friends. He claimed
that on his way home he saw the defendant and the victim, both of whom he knew from school, pull into the parking lot at three-thirty in the morning. He said Sally looked fine and he and the defendant left shortly after to go have tacos at the defendant's house. Under cross-examination he admitted that he rarely went out with the defendant. He said they never spoke at school. He couldn't give an accurate description of the bars he went to that evening, and in my estimation he was completely unreliable and unbelievable. He did however succeed in raising some doubt about what actually occurred that night.

The final witness called was the defendant. Tim testified that he had gone with his friend to have tacos after he pulled into the parking lot. He explained that he had left town the next day to go to Maryland the next day to pursue a career in medicine. Under cross examination he admitted he had never graduated from high school. He stuck to his story fairly well, but I wasn't convinced by his testimony at all. The defense rested on Thursday afternoon and closing statements were heard. The prosecutor questioned why a high school drop out would all of a sudden go to Maryland to pursue a career in medicine and suggested that the defendant was fleeing because he knew he had raped Sally. Milton was unable to inform the jury of the defendants pending rape trial in Maryland because of a defense motion to suppress that evidence. Milton concluded by asking the jury who was more believable. He assured them it was the victim not the defendant.

Mr. Tuttle simply highlighted the defense's case in his
statement. He emphasized the hesitancy on behalf of the victim
to report the crime and cited the lack of seminal evidence as
proof the crime did not occur. He concluded that she had
invented the entire thing to punish her boyfriend when she found
him with another woman. The judge instructed the jury in the
law, explaining the legal definition of rape, and sent them to
deliberate.

I believed the case was open and shut. The defense was
hardly convincing, and the prosecution had mounted what I
believed to be a strong case. On Friday morning the jury
returned a verdict of not guilty. Two jurors upon leaving the
jury box walked over to the defendant and shook his hand! I was
shocked by the verdict. Milton and I spoke with two
of the women jurors after we left the courtroom. They said that
the jury had initially voted eight to four to convict, but the
four men who thought the defendant was not guilty held their
ground and eventually convinced the rest of the jury. Three of
the four men were the ones I had thought Milton should have
struck. He told me he had considered it, but believed his case
was strong enough not to. He said, "It's damn hard to prove rape
in this town," and walk off.

A few days later I saw Mr. Tuttle walking on the street. He
came up to me and said, "You were watching that trial the other
day, what did you think?" I told him I thought he was very
lucky. He chuckled and said, "Yea, I guess I kinda pulled one
out of the hat didn't I. See you later."

EXTRA-LEGAL FACTORS

The extra-legal factors in this case played a definitive
role in its outcome. Milton made a tactical error by not striking certain jurors, and these men were able to convince the other jury members of the defendant's innocence. A key factor in the jury's decision was a basic unwillingness to accept acquaintance rape as rape. The jury would rather believe the preposterous story concocted by the defense about jealousy and other women than convict a man of rape. The lack of seminal evidence simply furthered the steadfast male jurors in their efforts. The defendant himself was also a key factor in this decision. His physical appearance made it difficult for the jury to convict. He looked like a nice young man, the kind of person a worried mother would have no hesitation sending her daughter on a date with. It was hard for the jury to imagine that this man had actually committed a rape.

The key piece of evidence that was not presented was the defendant's pending rape charge in Maryland. This bit of information might have been enough to change the jurors minds. But the judge ruled this information inadmissible and was probably correct in doing so. The cultural composition of the jury was also a significant factor in the case. I speculate that the blue collar men on the jury easily identified with the defendant and saw the charges against him as an attack by the state similar to the attacks they had experienced when economic factors forced their jobs to be eliminated. Once they decided that the defendant was not guilty it was easy to envision him as a poor guy trying to break away from his working class background and make good. This image was easy for the jury to identify.
with. Combined with the jurors cultural beliefs about sex and rape these factors formed an insurmountable barricade for the prosecutor to overcome.

CONCLUSION

Rape is an exceedingly difficult crime to prove. In 1980 937 rapes were reported in Philadelphia, only 277 defendants, less than 30% were convicted (WOAR 1984). Watching rape trials, I was often certain that a defendant would be convicted and the jury brought back a verdict of not guilty. In his book Criminal Justice in Middle America David Neubaur writes,

"Sex and battery cases taken as a group are the most difficult cases for the state to prove and it is presumptive that these proof problems explain why so many cases are reduced to misdemeanors. Prosecutors point to ambiguities over culpability. Further, victims may be hesitant about cooperating. The cooperation of the victim in sex cases is often the fatal hurdle for the prosecution. Additionally, the victims of sex and battery cases may be untrustworthy witnesses or may not be viewed as worthy victims by juries. All of these proof problems make sex and battery charges the hardest to prove" (1974: 204).

Proving rape should be no different in a legal sense than proving robbery. It is usually one persons word against another. In a rape trial the victim has to have been penetrated against her will. In robbery the victim must have items taken against her will. Yet rape is much more difficult to prove. The cultural baggage which a jury brings with it to a rape trial is significantly larger than the baggage brought to a robbery trial. Sex is an popular but still somewhat uncomfortable topic, and Americans have shown themselves to be unwilling to admit that a deviant act such as rape actually occurs with frequency. Rape is still considered a sexual act rather than an act of violence. To convict a rapist is to admit to the existence of violent sexual
urges. Our culture is more ready to accept and convict for the violence of murder and robbery than the violence of rape.

Brooks and Doob (1975:182-197) in their study of potential jurors also found that rape was one of the most difficult to crimes to prove. They found that if the victim participated in any way in the event then the jury was much less likely to convict. If the victim invited the rapist to drive her home, if the victim didn't struggle, if the victim appeared in the least bit compliant then conviction was significantly less likely (1975:191).

Male jurors also find it easy to identify with rape defendants. Strong sexual desire is a common feeling. It's difficult to understand that a strong desire is vastly different from the urges that occur during a rape. This identification process could occur with women on a jury and the victim, but often doesn't. Raped women are tainted. They are considered teasers and sluts who invited the rape. Rarely are they seen as innocent victims who behaved as they did because they feared for their lives. Female jurors do not want to identify with these victims. Only when the testimony presented makes it very clear that the woman was in no way responsible do jurors finally decide to back the victim.

Extra legal-factors involved in a rape case are complex and involve deeply held cultural assumptions. It would be easy to write and entire book on the subject, and clearly more work on this topic needs to be done. The cultural beliefs and biases surrounding sex are difficult to uncover, but are crucial in
understanding why rape is such a difficult crime to prove.
CHAPTER 6 — WINNING, LOSING, AND SAVING FACE

INTRODUCTION

"An understanding of how justice operates in the context of native attitudes and values is crucial to any constructive analysis of the consequences of certain directions of legal development" (Atkinson and Drew 1979:33).

The judicial system in the United States is an adversarial system. In a trial there necessarily must be a winner and a loser, a defendant is either guilty or not guilty. Both the prosecutor in Lorain and the district attorney in Philadelphia boast that they receive convictions in 80% of the cases which they bring to court. This figure is not limited to trials alone, but also includes negotiated guilty pleas. The figure is so high that I suspect it does not include cases which are dismissed at a preliminary level. In any event this statistic indicates that the defense loses 80% of the cases brought to court. Certainly there are different definitions of losing for a defense attorney. A negotiated guilty plea which results in a light sentence is often considered a victory by prosecution and defense alike. Defense attorneys often base a victory or loss on the sentence the defendant receives. In any event, losing in court is something that every attorney must come to grips with.

THE IMPORTANCE OF WINNING AND LOSING

Because of the high number of losses, attorneys at the Defender's Association have come up with various ways to mitigate their losses. I call it cushioning the loss. Some cushioning techniques are built into the legal system, but others have been improvised over many years. Within the Association office itself there are ways to "gracefully lose" as one
attorney put it. The relaxed and friendly atmosphere and social hierarchy of the office make it imperative that each attorney be extremely careful in the way that s/he loses. Mitigating one's losses preserves friendships, office prestige and status, and most importantly, one's job.

The techniques for losing with grace and mitigating a loss can have severe effects on the defendant in a case. For example a defendant can get pressured into a guilty plea he may not necessarily want. The procedure of mitigating one's losses can clearly be included as an extra-legal factor which comes into play in judicial proceedings. The data presented in this chapter come exclusively from Philadelphia because it was there that I had the opportunity to closely observe interaction between attorneys, and how these social relations affected their behavior in court. This subject is also more relevant to the Philadelphia office simply because the defense loses more than the prosecution as the prosecutor's statistics indicate. In Elyria I didn't have the opportunity to observe attorney's reactions to losing.

SAVING FACE

"We should be at home in studying the law firm as a secret society, in finding and analyzing the networks of power - which on paper may not be there - in describing those unwritten customary behaviors that are completely indispensible for understanding, for example, what makes congress tick" (Nader 1972:293).

A value which is held in very high esteem by the American Legal system is saving and maintaining face. The rules which govern the operation of the courtroom are designed to preserve the dignity of the judge and attorneys in a trial. Attorneys consider the maintenance of dignity essential in assuring that a
defendant receives a fair trial. If the attorney is seen in a negative light, how can the client expect to receive a fair and un-bias trial. Erving Goffman defines face in Interaction Ritual as, "The positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact" (1967:5). This "positive social value" is claimed in the courtroom at the moment an attorney steps through the door. Unless the attorney is on bad terms with the judge s/he is treated with dignity and respect by all in the room. Once the trial begins this positive social value comes under scrutiny and the possibility arises that face may be lost.

"The phrase 'to lose face' seems to mean to be in the wrong face or to be out of face, or to be shamefaced. The phrase 'to save one's face' appears to refer to the process by which the person sustains an impression for others that he has not lost face" (Goffman 1967:9). Goffman describes maintaining face as, "when the line a person effectively takes presents an image of him that is internally consistent, that is supported by the judgments and conveyed by the other participants, and that is confirmed by the evidence conveyed through personal agencies in the situation" (1967:6).

Throughout courtroom proceeding, all the actors - attorneys, judges, defendants, clerks witnesses, etc. - work to maintain their own face. The prosecutor and defense play a cat and mouse game in which each attempt to give the illusion of preserving the others face while overtly or covertly undercutting this position to throw the opponent off guard. Attorneys rarely address each other directly in a trial and direct attacks on the specifics of
an opponent's argument are usually reserved for closing statements at the conclusion of the proceedings. When tempers flare and hidden attacks on face do surface, the judge must take the initiative and step in to preserve order and face. Losing itself does not insure an attorney will lose fact, but winning preserves face with more consistency than losing. There is a difference between losing a case and losing face. They can occur separately or together and one does not necessarily indicate the other will follow.

The judge has the easiest job of maintaining face because the courtroom ritual is designed to give the judge ultimate face power. He is called "Your Honor" by the attorneys, and he has the power to maintain, destroy, and restore face. It is the judge who may ultimately decide if a lawyer will be allowed to lose gracefully. Even in a jury trial the judge's rulings on various objections and points of law allow him to determine whether an attorney will maintain face or not.

MITIGATING FACTORS: A WAY TO SAVE FACE

There are three substantial mitigating factors available to attorneys which are built into the legal system: post trial motions, sentencing, and a guilty plea. These three aspects of courtroom procedure play an important role in the face saving process that occurs in court.

POST TRIAL MOTIONS

The use of post trial motions are exemplified in the case of Alvin Walker. Walker was charged with robbery and simple assault. Mr. Colson and I went into court believing we had a
chance of winning the case. The judge found Walker guilty of simple assault, but not robbery. He set a date for sentencing and hearing post trial motions. The post trial mitigation process began.

Because we went into court with the notion that we had a chance to win, once we lost, our effort in the trial came into question. Back at the office Colson had to explain to his fellow attorneys that he had lost the case. It suddenly became important to him that it be understood he had made a determined effort to win the case. Colson wanted to believe and wanted others to believe that he had given the case his "best shot" as he liked to put it. Even though the judge found the defendant not guilty on one of the charges which in effect worked out a compromise between defense and prosecution, because of the initial expectation of victory, half a win wasn't enough. As a result Colson began the first post trial mitigating procedure which is the filing of post trial motions. Post trial motions are documents which the defense or prosecution can file with the judge to explain why and how the judge reached an incorrect decision. The motions ask the judge to reconsider her decision and then ask her to reverse herself. A copy of the motions must also be sent to the opposing attorney. At the time of sentencing, the judge can elect to hear argument on the motions, and he can grant them or deny them. Often this process allows the judge an opportunity to more fully explain the reasons for his decision. In the case of Alvin Walker our motions were denied so we moved ahead to the next stage in the post trial mitigating process.
SENTENCING

After post trial motions the next mitigating procedure involves sentencing. At the Defender's Association and at the Lorain County Prosecutor's the severity of a loss or the extent of a win is determined by the sentence rendered by the judge. At the Defender's Association I believe this ideology is derived from a genuine concern for the client's wishes and desires. Most defendants don't really care if they are found guilty or not as long as they stay out of jail. As a result the severity of a loss is determined by the sentence. This system is simple enough, but it fails to take into consideration the individual circumstances which surround each case. Sentences are sometimes determined largely by the defendant's prior record rather than on the circumstances of the case. Back at the office people just hear about the charges and the sentence given and may not be aware of the other determining factors. These circumstances can result in significantly different sentences being handed down for the same crime.

In order to lessen a sentence, the defense attorney must show the judge the good character of the defendant. Various community members who know the defendant including family members, pastors, teachers, etc. are brought in to testify on behalf of the defendant. It is important to prove the defendant has a job and is making a significant contribution to the community despite his crime. The judge will then take these factors into consideration before imposing a sentence.

On the day of Alvin Walker's sentencing we returned to the
court room and brought with us a signed statement from his former employer and a statement from his drug treatment counselor. Colson stepped to the bar of the court when called on by the judge and explained how Walker was making an effort to change his life prior to the crime. He read aloud the prepared statements, and asked the judge to seriously consider if prison would benefit Walker more than some form of strict supervision coupled with more drug rehabilitation. When Colson concluded the judge retired to his chambers for a few minutes and then returned with a sentence which included strict and lengthy probation.

Colson left the courtroom with a big grin on his face. "Well we lost the battle, but I guess we won the war," he said. The mitigation process had been successful, the sentence was light. Probation at the Defender's Association is second only to a verdict of not guilty. Colson once told me, "If my client walks free, I'm happy. I don't give a damn how it happens."

It is hard to imagine the outcome of a case being any better for both sides. The assistant D.A. got her conviction, and the defense kept the client out of jail. Both sides maintained face and succeeded in preserving the judge's face by following the rules and by deferring to the judge's authority. I found it surprising that in the adversarial American Legal system there could be such a complex and reasonable compromise achieved. Unfortunately not all cases end up in such a manner.

THE GUILTY PLEA

Often the mitigating process is not successful and defendants are given long prison sentences. The defense attorney must then make an effort to explain away the defeat back at the
Most often attorneys cite the incompetence of the judge or client as the reason they lost their case. Statistics from 1970 indicate that 47.6% of cases were disposed of via guilty pleas (Mather 1970:187). A guilty plea offers an attorney a more certain and secure way of disposing of a case and eliminating a possible defeat. The prosecution is often willing to offer a reasonable sentence in exchange for a plea of guilty because a plea insures a conviction. The defense often favors a guilty plea because it provides far greater certainty in sentencing, and greatly cuts down on court time. Finally, the court accepts many guilty pleas because they speed the judicial process along and prevent an overload of cases from backing up the entire system.

Tyrone Delbert was charged with aggravated assault, possession of an instrument of crime, simple assault, and conspiracy. After reviewing the file carefully Mr. Colson and I came to the conclusion that the case was a "stone loser". There was virtually no way to win the case. This is a difficult position for a defense attorney to be in. If you bring the case to trial you will lose and the client will be given a stiff sentence. On the other hand, it is often difficult to convince the client to accept a negotiated guilty plea in exchange for what will hopefully be a lighter sentence. We met Mr. Delbert, who was out on bail, in front of the courtroom, and Colson confronted him.

"Look, this case is bad. I don't see any way we can win. You don't have any eyewitnesses, you don't have any alibi, and you've got a record a mile long. You know the complainant is gonna take the stand and say you did it, and there's nothing
we're going to be able to do about it. How would you feel about taking a guilty plea if I can get you a deal? You'll do maybe six to twelve months max. If we take it to trial and lose you'll get twelve to twenty-four." Delbert, faced with the grim prospect of two years in jail, opted to plead guilty. Colson was able to work out a deal in which Delbert would plead guilty to all charges except the most serious, aggravated assault. In exchange he would be sentenced to six to twelve months in prison followed by two years probation.

Because the case never went to trial, there wasn't much at stake for the attorneys in terms of face. Instead of battle wits as they must do in a trial, in a guilty plea lawyers merely go through the rituals prescribed by law. This is perhaps the simplest way a defense attorney can cushion a loss. Because the client admits guilt, attorney competence never enters into the proceedings. This explains why so many defense attorneys try to convince their clients to plead guilty. As an attorney in my office said, "If the case is a loser, hell there's no reason to stick your head on the chopping block." Unfortunately for defendants, negotiated guilty pleas encourage defense counsel to railroad clients into accepting a pre-arranged plea simply to avoid taking a potentially losing case to trial. From the attorney's standpoint, the loss is mitigated before it ever happens, and as many of the attorneys at the Defender's Association like to say, "Most of our clients are guilty anyway."

COMIC RELIEF

Lyrics from two comical songs written for the Defender's Association annual Christmas party illustrate the attorney's
attitudes about pleading. In the song "The Great Defender" - to
the tune of "The Great Pretender" the chorus goes as follows:

"To plead is the feeling I can't conceal
To plead when the deal's just to good to be real"

This verse illustrates how happy the attorneys often are to plead
their clients. It takes a burden off of the defender's
shoulders, the burden of winning the case or at least performing
well by achieving a light sentence. When a plea is negotiated
there is little or no uncertainty about the outcome.

The second song lyric illustrates the importance of sentence
vs. victory. The severity of a loss is determined by the
sentence given. Probation is almost as good as a verdict of not
guilty. The song is titled, "Federal Defender Anthem '84" and it
is sung to the tune of "Ain't too proud to be" by the Temptations.

"Now I heard to plead a case is to lose some face
a plea shows lack of pride
But if I have to cop to free them I don't mind pleadin'
If pleadin' frees them to go roamin' round outside
Chorus:
Ain't too proud to plead Your Honor
Please don't jail them sir (no, no, no)
Ain't too proud to plead Your Honor
Please release them sir (let them go)"

The song addresses the issue that pleading is a potential loss of
face because it is the easy way out. The song writer
rationalizes however, that it's okay to plead if it gets the
client out of jail. This suggests that in reality an attorney's
face is better preserved by a guilty plea resulting in a
probationary sentence than by a trial in which the attorney gives
a terrific effort, but loses even in part.

The ramifications of this for defendants are tremendous. The
client must put a great amount of faith in the attorney when he
pleads guilty. The attorney has told him what the sentence will probably be. The client may not realize that the attorney has pushed for the guilty plea not because it's in the client's best interest, but because it's in the attorney's best interest. This behavior on the part of attorneys is yet another extra-legal factor. Unlike factors discussed earlier, this factor is used by attorneys against their clients rather than against their opponent's clients. Pressuring a client to plead guilty when he really doesn't want to is not only unfair, it is unethical. Fortunately for clients, guilty pleas normally result in the lightest possible sentence.

BIASED JUDGE

Perhaps the most difficult cases for an attorney to lose both emotionally and in terms of face are cases in which it appears the judge has reached a decision before the trial even begins. This is the sort of extra-legal factor which attorneys have no control over. In Philadelphia and in Elyria there were certain attorneys and judges who simply did not get along. In some cases these difference can be overcome, but not always. There are examples in which the judge displays his hostility towards an attorney by creating all sorts of problems for him at a trial.

Chris Darrel, age 50, was involved in an altercation outside a bar in North Philadelphia which resulted in a stabbing. Darrel was brought to trial, accused of stabbing a man half his age in the stomach. His description to us indicated that his action was in self defense. The prosecutor believed it was completely un-
provoked. His case was listed on a Monday before Judge Lester. The defender assigned to the case was Ned Price from the Defender's Association Special Defense Unit. Things began poorly when Judge Lester insulted Price in front of ten other attorneys who had been called to Lester's chambers in order to try to lessen the back-load of cases in Lester's courtroom. Lester wanted Price to convince his client to plead guilty, and he tried to imply that he would give Darrel a light sentence. Price and the D.A. however, could not come up with a mutually acceptable plea arrangement, so Price informed Lester that he wanted a jury trial which both men knew would clog up Lester's courtroom even more. This infuriated the judge so much that he yelled at Price in front of the other attorneys, including Price's opponent. "Do you like to go to Atlantic City," he screamed, "You're a gambler aren't you? Yeah you're a gambler. A real cool gambler. Either that or you're not a gambler at all, and you're just playing with fire. I'll tell you something Mr. Price – I don't like either of those types."

The trial went on as planned, but from a defense perspective it was truly a farce. Judge Lester appeared so prejudiced that even the jury became suspicious. (Normally a judge will relate to a jury as a parental figure who explains complicated points of law and instructs them in how they should arrive at a decision. Seldom do juries begin to suspect a judge) The judge denied all of Price's objections and motions. Most devastating of all, he ruled that self-defense was not an issue in the case. This so frustrated Price that he shouted out in the courtroom, "Are you going to allow me any defense in this case, judge?" In response
the judge found Price in contempt of court and fined him $200. The judge did indicate however, that the charges would be dropped if Price behaved for the rest of the trial.

At the end of the trial the jury returned a verdict of not guilty to the most serious charges and guilty to the lesser charges. It was absolutely the best Price could have hoped for. Judge Lester was visibly upset at the jury's decision. He had wanted to teach Price a lesson. Price aggravated Lester further by asking that another attorney be appointed for Mr. Darrel since the judge had stated during the trial that he felt Price was incompetent. This so angered Lester that he demanded payment of the $200 on the spot. When Price could not come up with the money, he was taken away in handcuffs. Price was in custody for two hours until attorneys from our office were able to pay his fine.

This cases is a good example of the importance of maintaining face in the courtroom as well as the importance of allowing an attorney to lose with dignity. The trial got off to a bad start when Judge Lester's insult caused Price to conceive of himself as losing face in front of his peers. Lester's comments forced Price into a situation where he believed he had to win the trial in order to regain his face and the respect of his peers. He told me when the trial began that he knew it was going to be tough, but he had to "show the judge". Lester did his best to make it as difficult as possible for Price. When it became apparent to Price that there was no way he could win the case because of the judge's decisions, he took the only option
left to him which was to stretch the rules of courtroom procedure and at least put on a good show for his client. Throughout the trial he would whisper to Mr. Darrel, "I'm trying hard for you, aren't I? This judge is goofy, you got to understand. But I'm giving it my best aren't I?"

When Price's efforts finally led him to shout out in frustration and as a result prejudiced the jury against the judge (I learned this later from interviewing jurors after the trial), Lester had no option but to use his judicial power to punish Price and prevent his own loss of face. Price was vindicated when the jury returned their verdict. Judge Lester on the other hand lost face because he failed to teach Price a lesson as he had set out to do. At the end of the trial Price could have acted in a conciliatory manner and improved his very strained relationship with Judge Lester. Instead he opted to insult the judge further. Lester was pushed to his limit and had Price arrested.

Goffman writes, "An offensive act may arouse anxiety about the ritual code; the offender allays this anxiety by showing that both the code and he as the upholder of it are still in working order" (1967:22). Price violated this rule. Instead of allaying anxiety by reaffirming his respect for the judge and the court by taking his victory and walking away, he insulted the judge by asking for a new attorney for Mr. Darrel due to his own alleged incompetence. Judge Lester's only recourse in his attempt to save face was to impose the penalty he had previously established but not yet enforced. He did this to reaffirm his own status as the judge and to let it be known that an attorney could not to
Price came away from the trial both a winner and a loser. He regained the face he lost when Lester insulted him in front of the other lawyers by winning the case. However, he may have lost some of his prestige among judges for being held in contempt of court, although among his peers at the Defender's Association he became an instant hero. A month after the incident Price accepted a high paying job at an exclusive Philadelphia law firm. Obviously they didn't consider his loss of prestige with judges to be of any significance.

EXTRA-LEGAL FACTORS

The real loser in the case turned out to be the defendant, Chris Darrel. Another attorney handled his sentencing one month later. Although he was found not guilty on several charges, Judge Lester sentenced him to two-four years in prison. Darrel was the unfortunate pawn in an extra-legal power struggle between Price and Lester. This large extra-legal factor set the tone for the entire trial. This factor determined the verdict returned by the jury and eventually the sentence. This extra-legal factor differs from others that we have examined. In previous examples attorneys have manipulated extra-legal factors either to defend or convict defendants. In this example the extra-legal factor had nothing to do with the specific defendant or case. The factor was external to all of the lay participants and ignored cultural attributes which are usually exploited.

The case began with Price attempting to avoid pleading his client in a case he believed he had a good chance of winning.
The backload of cases in Lester's courtroom coupled with Price's request for a jury trial escalated into a major conflict between Price and Lester. The specifics of the defendant's case were no longer important in the conflict. The judge did deny self-defense as a legitimate defense, but this decision had nothing to do with a bias or prejudice against the defendant. Instead it was due to a prejudice against the defense attorney.

CONCLUSION

It is often difficult to judge an attorney's personal stake in a case. In civil law suits attorneys can compete for large sums of money. Winning or losing can be the difference between ten thousand and one million dollars. In a criminal case however, attorneys motivations are not as simple as a dollar amount. At the Elyria Prosecutor's Office getting convictions was important to the attorneys because at election time the conviction percentage is an important statistic. Getting convictions means preserving one's job.

At the Defender's Association in Philadelphia there is no economic or political incentive to win. Instead the incentive derives from a desire to assist the client and from an internal peer pressure at the office, and the job status ladder established. Achieving either a verdict of not guilty or a light/probationary sentence satisfies the client and increases prestige at the office.

If an attorney is going to lose a case, it is important that s/he be allowed to save face in the process. A perceived loss of face and/or status can have severe repercussions for an attorney. The hierarchy of the Defender's Association is such that a severe
loss in the courtroom and the resulting loss of face can prevent an attorney from moving into a more prestigious department of the office. While I was at the office, younger attorneys who were selected for advancement were all known for their trial skill. Others were given more administrative and research tasks. The Special Defense Unit, the most select group of attorneys in the office and also the best stepping stone to a high paying law firm, only accepts attorneys who can win their cases or at least lose with style. Ned Price was in the Special Defense Unit and this was probably a contributing factor in his flamboyant effort and contempt of court.

Attorneys' consciousness of status and face is an important extra legal factor. Ideally an attorney should work only in the best interests of the client, but as we have seen, personal struggles can enter the courtroom and obscure this original goal. When this happens the needs of the client are often forgotten and as a result the client may spend more time in prison than he might have otherwise. As long as the legal system and law offices are arranged in a hierarchical fashion and status is determined by winning and losing, attorneys will be conscious of their status and their face. The legal system has in it various face saving mechanisms. These mechanisms often operate more for the benefit of the attorney than for the client.
CHAPTER 7 -- LINGUISTIC ANALYSIS AND DEGRADATION CEREMONIES

THE WITNESS STAND

Testimony from the witness stand is the single most influential aspect of criminal trial used in reaching a verdict. Information is disseminated in the courtroom from the witness stand, and cases are won and lost based on this information. The Fifth Amendment to the Constitution of the United States says that no person has to give self-incriminatory testimony. Because of this there is absolutely no requirement that a defendant testify in his own defense. The prosecution bears the burden of proving the guilt of the defendant. If after the prosecution has presented its case and the judge is not satisfied that at least one of the charges against the defendant has been proven, the case may be dismissed. In a few cases the defense rests its case before presenting any testimony. In these instances defense attorneys believe that the prosecution has not sufficiently proven the guilt of the defendant.

Witnesses in a case are the keys to proving innocence and guilt. The questions an attorney asks a witness are extremely important in extracting the information required to prove certain charges. In a rape case for example, the victim must state in her testimony that she was penetrated by the defendant. Without this testimony the charge of rape cannot be proven. Prosecutors and defenders alike spend many hours practicing their questioning technique. Eliciting information in the often tense courtroom setting requires a certain skill. In order to be effective it is essential that an attorney master the craft of questioning.

LINGUISTICS AND EXTRA-LEGAL FACTORS
The questions asked witnesses on direct and cross-examination are for the most part straightforward informational inquiries. Questions such as, "Describe the room," "How long were you there?", and "Did you know the defendant previously?" are quite common. These questions require the witness to describe a scene, give some specific information or answer a yes or no question. These questions can be classified linguistically as direct speech acts.

Questions classified as direct speech acts are the most common in the courtrooms I observed, but not necessarily the most useful or informative. Use of what is called an indirect speech act (a question which seeks information indirectly) may often elicit more useful information for an attorney. This type of questioning can also be used to make a witness slip up, or even contradict a previous statement. This linguistic manipulation is one of an attorneys most effective tools. Only rarely are witnesses capable of seeing through the attorneys line of questioning, and hence avoid giving potentially damaging testimony.

Analyzing testimony from different cases is the best way to show the effectiveness of direct and indirect speech acts. The following examples come from Elyria and although none is verbatim they are faithful reconstructions of what was said. The context of these sections of testimony is not relevant to the analysis of these speech acts so I will spare the reader lengthy descriptions of the cases involved.

Prosecutor: Ms. Jones can you tell the court exactly what happened to you in the back seat of your car?
Jones: Well...he pushed me down and I bumped my head against the side of the car and I screamed...

Prosecutor: You hit your head on the car?

Jones: Yes I smacked my...

Prosecutor: Were you injured?

Jones: It was tender for a couple of days where I bumped it.

Prosecutor: Thank you Ms. Jones. Will you please continue? Take more time if you need it.

This section of testimony is an example of simple direct questioning. No indirect questions are used. Actually, it would be surprising to find indirect questions in this exchange because the testimony is taken from direct examination. The purpose of direct examination (questioning by the attorney who called the witness to the stand) is to elicit information that will assist in proving or disproving the case. It is on cross-examination that attorneys try to elicit contradictory or damaging information which may require the use of indirect speech acts.

In the example the prosecutor asks the witness to describe what occurred in the back seat of the car. This is a simple and common information-seeking question. Jones answers with a description of what happens. She is interrupted by the prosecutor who asks a yes or no question. She answers, but adds additional information. He interrupts her again with another yes or no question. She chooses not to answer in a yes or no manner and instead describes her injury. The prosecutor is satisfied with what she has just said. He marks the point with "Thank you Ms. Jones". This indicates that the subject of the questioning
is likely to change. It also keys the judge or jury to the testimony just given. In this example the prosecutor wanted to draw attention to the fact the witness was injured in a struggle. This sort of simple direct questioning is found in almost all direct examinations of witnesses. It's under cross-examination that indirect questions come into play.

CROSS-EXAMINATION

In this example the prosecutor is questioning a defense witness named Mr. Brown. On direct examination Mr. Brown stated that he had left his house around 10:30pm on the night in question to go have a few beers. He stated it had been his birthday. He also stated that he met up with the defendant between 3:30 and 3:45am. Mr. Brown was a key alibi witness for the defense so the prosecutor wanted to discredit him as much as possible. He attempts to do this by using indirect questioning techniques.

1. Prosecutor: What time did you leave the first bar?
2. Brown: We left as soon as we got there so I'd say we left at about eleven. The place was dead, we didn't stay.
3. Prosecutor: Where did you go?
4. Brown: We went to Jill's Bar. (gives street address)
5. Prosecutor: What time did you get there?
7. Prosecutor: So it took you forty-five minutes to get to Jill's? How long did you stay?
8. Brown: We stayed a couple of hours.
9. Prosecutor: So it took you two hours to get from Jill's to where you met the defendant? Isn't that true?
10. Brown: No it only took forty-five minutes to get from
Jill's to where I met him.

11. Prosecutor: Didn't you just tell the court that you left Jill's at one-thirty?

12. Brown: No I didn't, I said I left at 2:45, or...I meant I left at 2:45.

13. Prosecutor: So you stayed at Jill's for over three hours but you only had two drinks, is that correct? And it was your birthday is that correct?

14. Brown: Yea we stayed a couple of hours. Like I said it was my birthday. I did only have two drinks.

In this example the prosecutor is hoping the witness will contradict himself and therefore lose credibility with the jury and damage the defense's case. The prosecutor uses the issue of time to confuse the defendant and make him give the impression that he is lying. It is difficult for most people to remember the exact time they moved from one place to another, it's very easy to tell the police one thing and the court another, yet this is damaging to a case. Time is a relatively easy issue to utilize to confuse a witness. In this example we can see the prosecutor purposefully twisting Mr. Brown's statements and attacking his credibility.

The exchange is simple and direct through the first few questions and answers. In line 7 however, the prosecutor asks Brown two different questions. This is a device that quite often can cause a witness to falter. The first question can be interpreted and a directive or assertive statement rather than a question. The intonation used determines the interpretation. The second question is a standard direct information seeking question. Brown only answers the second question. This leaves the first question unanswered and hanging so to speak. The lack
of response causes a re-interpretation of the first question which changes the question into a statement. Moreover, this statement is an inaccurate account of how long it took Mr. Brown to get to Jill's Bar. It did take him 45 minutes from the time he left his house, but in the sequence of questions it is the clear the prosecutor wants the jury to believe that it took Brown 45 minutes to go from the first bar to Jill's. This might indicate to the jury that Brown has no real sense of time or perhaps he was too drunk to notice how long it really took.

The prosecutor quickly moves on and in line 9 he asks two questions. Again the first question could either be interpreted as a question or a statement. Mr. Brown now tries to explain in more detail what occurred. The prosecutor in line 11 presses Brown and asks him if he contradicted himself. Here the prosecutor is purposefully changing the specifics of Brown's testimony in order to cause him to lose credibility. Brown never said he left Jill's at 1:30am. He said only that he arrived at Jill's around 11:15pm and that he stayed, "a couple of hours." The prosecutor assumed that Brown meant 2 hours to be "a couple of hours". Brown was in fact only using a figure of speech and had assigned no specific number value to "a couple of hours". In order to rectify the situation Brown is forced to disagree with the prosecutor. The jury is then left to try and figure out whose interpretation was correct. Most juries are likely to side with the white middle aged prosecutor than the 19 year old black witness.

This sort of verbal manipulation is an important extra-legal
factor which can have a definite impact on the outcome of a case. Attorneys can knowingly manipulate the testimony of most witnesses by using techniques similar to those of the prosecutor in this example. The situation arises where both the defense and the prosecution utilize these methods of questioning on cross-examination. The net result is a rather confused picture of what actually occurred. In many cases the judge or jury may be at a loss to understand which interpretation of events to believe. How then do they arrive at a decision? Perhaps it is here that extra-legal factors we discussed earlier, issues like race, sex, occupational status, dress, etc., come most strongly into play. When a case cannot be decided on the facts and the law alone some of these extra-legal factors are used in arriving at a decision. This is one of the reasons why this indirect questioning and linguistic manipulation is so important to attorneys. They may actually want to confuse a jury so that extra-legal factors will play a role in the determination of a verdict.

A WITNESS FIGHTS BACK

In rare instances a witness is able to overcome an attorney's attempt to control and manipulate her testimony. When this occurs the attorney involved must be extremely cautious. If an attorney were to lose his cool and insult or verbally attack a witness the judge would be forced to take some action against the attorney, and a jury would certainly be prejudiced against the attorney. In the cases I have observed where a witness has gotten the better of an attorney, the lawyers have shown tremendous poise and composure for the most part and were able to continue their cross-examination successfully.
This example comes from a case in which the defendant was utilizing the not guilty by reason of insanity defense. The defense called to the stand a psychiatrist as an expert witness. The psychiatrist testified that he firmly believed the defendant to be a paranoid schizophrenic. The cross-examination of the psychiatrist was intense to say the least, as cross-examinations of expert medical witnesses often are. One prosecutor informed me that an entire book has been written on the subject of cross-examining expert medical witnesses. In this case the prosecutor grilled the psychiatrist with question after question for several hours, often times asking questions that left the psychiatrist with the choice of answering in the way the prosecutor wanted him to, or to challenging the prosecutor directly.

1. Prosecutor: Mr. Webster (the psychiatrist) for what length of time did you examine the defendant?

2. Psych: I spoke with Frank (the defendant) for about two and one half hours.

3. Prosecutor: Now on that report sitting in front of you, for how long did Dr. Miller, Dr. Skykes, and Dr. Thompson examine the defendant when he was under their care?

4. Psych: Excuse me, but I'd like to point out that only Dr. Miller is a medical doctor the other two are psychologists.

5. Prosecutor: Very well, how long did these psychiatric experts examine the defendant?

6. Psych: It says here that he was in the Michigan State Hospital for 90 days.

7. Prosecutor: So they examined him for 90 days?

8. Psych: I wouldn't say that. Often times in a hospital...

9. Prosecutor: Doctor, for how long did...

10. Psych: Excuse me sir, but you asked me a question and I would like to finish. May I finish? (the judge nods) As I
was saying, I don't believe it's fair to tell the jury that they examined him for 90 days. They may have seen him once a week for five minutes. They may have summarized nurses reports and never actually saw him. This report gives me no idea under what conditions and for how long he was examined in Michigan. Furthermore I don't see how they reached the conclusions they did.

The cross-examination continued in a similar fashion for about two hours. The prosecutor would ask a question and the psychiatrist would not answer it in the exact manner the prosecutor would have liked. Most often the prosecutor would ask a yes or no question and the psychiatrist would answer with a lengthy qualification before offering a yes or no. The conflict presented in this example is focused on the prosecutor's desire to get the psychiatrist to admit that three other psychiatric experts who examined the defendant over a long period of time did not find him to be a paranoid schizophrenic. The psychiatrist on the other hand is not willing to simply state that indeed these people did examine the defendant for 90 days without qualifying the statement first.

The exchange begins with a question, an answer, and another question. At this point (line 4) the psychiatrist does not answer the question he is asked, and instead qualifies the prosecutor's inquiry. The prosecutor rephrases his question and again the witness does not answer to his satisfaction. In line 7 the prosecutor asks a yes or no question which sums up what he has been trying to get the psychiatrist to admit to. If the psychiatrist answers yes the prosecutor has succeeded in eliciting the information he desired. If the witness answers no the prosecutor has in his hands proof that the witness is lying because in fact the information he is asking about is written in
a report which he has in his possession.

The psychiatrist is aware of what the prosecutor is doing. He realizes that the jury is likely to be more impressed with three doctors who examined the defendant for 90 days than one doctor examined him for two and a half hours. He has his reputation and his diagnosis on the line at this point. He refuses to answer the question with a yes or no answer. The prosecutor interrupts him, he interrupts the prosecutor and appeals to the judge who nods and the psychiatrist continues. The end result is that the psychiatrist is allowed to give testimony which is damaging to the prosecution on cross examination!

There are several reasons why the psychiatrist was able to overcome the prosecutor's line of questioning and give his own answers in a situation where many witnesses would have been unable to. First of all, he was an experienced witness. He had testified at many trials before, and had clearly been subject to many such lines of questioning. In most of the trials I have observed witnesses are too nervous or intimidated to answer questions in such a fashion. Second, he was far more educated than the average witness and probably more able to see and realize the implications of answering the prosecutor's question in their designated manner. In my experience, the vast majority of witnesses who overcome attorneys lines of questioning are educated people.

In this example the prosecutor failed in his attempt to control the testimony of a witness. In effect, this extra-legal
factor was reversed so that it operated against the prosecution. The psychiatrist was able to expose to the jury the manipulative nature of the prosecutor's questions and at the same time present his own version of the facts. This rare example of a witness "fighting back" shows that the use of this sort of extra-legal factor can endanger an attorney's case. Attorneys would be wise to select the witnesses on which they utilize such lines of questioning with care. If a witness such as the psychiatrist in this example is able to turn the tables, the questions will do a case more harm than good.

DEGRADATION CEREMONY

Several social scientists have interpreted the courtroom experience as another variation of a degradation ceremony. Degradation ceremonies can be found in many cultures and they serve as a means of public punishment and shaming of an individual. A degradation ceremony has two functional aspects.

"1) To shame the individual such that he wants to hide from the community.

2) To effect the community - bring it together in moral condemnation, reasserting shared rules and reaffirming existing social order" (Garfinkel 1956:420).

In most cases a criminal trial does succeed in shaming a defendant regardless of the verdict reached. A trial also reaffirms the legal system and the laws which operate within. Communities rely on the legal system to preserve order by removing criminals from the public and punishing them. Trials reaffirm a community's faith and trust in the legal system.

An important question, however, is: Should trials in
America operate as degradation ceremonies? In the United States all defendants are supposed to be considered innocent until they have been proven guilty. This means that no defendant should be degraded or shamed in any way until the judge or jury had read out loud and put on the record a verdict of guilty. As the system operates now, a defendant who is eventually acquitted of all charges must still bear the punishment of the legal system, as it functions as a degradation ceremony, brings to bear.

The central aim of criminal justice is the imposition of new social status on the defendant, who is seen as a symbol in a ritualistic process. The new status is invariably of a lower social position in the hierarchy of society. The various stages of the court proceedings are designed to separate the individual's moral career from that of the rest of society, to condemn it and degrade it, through a series of rituals and then to culminate in the shaming and the stigmatizing of the defendant as guilty. (King 1981:19)

Even if a defendant is not stigmatized as guilty at the end of a trial, s/he must still go through the status altering process which leads to the stigmatization.

DEGRADATION AND EXTRA-LEGAL FACTORS

The ritualized degradation of the defendant occurs in several ways. The defendant's criminal and moral record is brought into court and is evaluated. People familiar with the defendant testify about his behavior, and finally either a judge or a group of his peers make a decision about his behavior and determine if it is acceptable to society or not. This doesn't even include the degradation involved with arrest, preliminary hearings, arraignments, bail or bond hearings, etc. The legal system has many stages all of which are integral parts of the degradation process.
The extra-legal factors discussed in earlier chapters function subjectively (as they always do) in the various stages of the degradation ceremony to mitigate or worsen the effects of the process. A rich white man arrested for rape may be able to avoid segments of the system by hiring an expert attorney to represent him and by getting released on bail. A poor hispanic man arrested for rape will most likely sit in jail because he cannot afford his bail. A public defender, probably in training for a law firm position, will accompany him through the various stages of the legal system. In other words the rich can from time to time avoid the degradation of the legal system while the poor cannot. This inequality is an extra-legal factor which operates on class boundaries. The lower class is degraded while the upper class is able to buy their way out of the situation with expensive attorneys, bail, and fancy clothes.

The process of degradation is itself an extra-legal factor. It is a factor quite different from the more personal factors like prejudice and biases discussed earlier. Because the various stages of the legal system from arrest onward operate as a degradation ceremony and lower the status of the defendant as described by King, punishment is in effect being institutionalized within the legal system before guilt or innocence has been determined. This is of course in violation of the constitution. The constitution, however, is the framework from which the various stages of the legal system are based. The system is in a catch-22, the degradation of a defendant before a verdict has been reached is a violation of the constitution, but the constitution provides the basis for the system of
degradation. Caught right in the center of this vicious circle are the defendants, particularly those who are affected by extra-legal factors involving prejudice. They are victims of a system of degradation which degrades the already degraded.

CONCLUSION

Extra-legal factors, as shown in this chapter, are not limited to individual prejudice and bias. There are many extra-legal factors which can be part of a trial regardless of the participants. An example of this is the verbal manipulation described earlier. This type of questioning by attorneys is not at all selective and can be used in the cross-examination of any witness regardless of race, sex, etc. This sort of questioning is an important tool which attorneys learn to manipulate in varying degrees of skill. Most often it is an effective tool, but as the example with the psychiatrist showed, it can backfire.

The legal system also operates as a degradation ceremony despite constitutional law which would seem to prohibit this. This is an institutionalized extra-legal factor. Because defendants are presumed innocent until proven guilty they should not suffer any punishment or shaming before being brought to trial, yet our culture stigmatizes people who have merely been accused of crime. This places this behavior into an extra-legal category. Since it is not part of established written law the practice resides in the extra-legal sphere.

Extra-legal factors can be found in every segment and section of the criminal justice system. A person could write
several volumes describing the effect and importance of all of these factors. Suffice it to say that a few of the more obvious have been covered in this thesis. A researcher working in a different setting would most certainly discover many more than I have uncovered. Hopefully this work will be done in the future. The literature in the anthropology of law written on the American Legal system could certainly use some expansion.
CHAPTER 8 — CONCLUSION

LAW AS CONFLICT

"The life of the law is a struggle - a struggle of nations, of the state power, of classes, of individuals."

Rudolf von Jhering — German Jurist

In his book The Quest For Law William Seagle cites and then agrees with von Jhering. "Law, indeed only has meaning in terms of conflict, and it represents humanity's effort at self-domestication. The law never really attempted to resolve the conflicts in society but only to alleviate them by laying down rules under which they might be fought" (1941:7). In the American Criminal Justice System, as Seagle suggests, conflicts are not resolved, but merely alleviated by the system. As von Jhering has suggested, the struggles of class against class and individual against individual are, in varying degrees, important features of the legal system.

In this thesis I have examined a variety of conflicts in the legal system all of which I believe have one thing in common: they involve extra-legal factors. Operating in trial, office, prison, or any other setting, these factors influence the outcome of a case. Extra-legal factors are important because they are the unwritten and often hidden determinants in trials. Technically any given case should be decided only upon the testimony given in court, and the laws operative with regard to the crime committed. One conjures up the classic image of the blind-folded woman in a flowing white robe holding a balance which is weighing the evidence of the prosecution against the evidence of the defense. The woman cannot see if the defendant is black or poor. She cannot tell if the defense attorney
carefully manipulated his questions to confuse a key prosecution witness. She is unaware of a prejudiced judge who might have made it as difficult as possible for the defense to present their case. She is truly the dream and the goal of the American Legal system: fair, honest, truthful, blind justice.

This fantasy is actually rather far from reality. Extra-legal factors have become an important if not essential aspect of the legal system. It has become difficult to imagine the system functioning without them. Extra-legal factors serve several important functions including: assisting in maintaining a large number of guilty pleas which reduces case back loads, allowing attorneys to maintain face even when losing a case, and providing an outlet for attorneys who because of judicial prejudice or client incompetence are unable to present any convincing evidence. These positive extra-legal factors are valuable, but do they outweigh their own negative side?

Extra-legal factors are also very damaging and dangerous. Extra-legal factors exploit personal and cultural prejudice and bias based on sex, race, class, etc. We have seen how attorneys attempt to manipulate these sorts of extra-legal factors to their own advantage. In a rape case certain cultural stereotypes about sexuality and rape make it exceedingly difficult for the crime to be proven. Victims of rape not only suffer the pain of the crime itself, but they must also re-tell the entire story in vivid detail for the court record. The merits of extra-legal factors, although significant, do not justify their pervasiveness. The legal system must ultimately be judged on its treatment of the
individual, not on how fast it processes cases and protects attorneys. The legal system has a duty to protect the rights of defendants and witnesses, extra-legal factors can prevent these duties from being fulfilled.

Not all extra-legal factors are based on individual prejudice. In an attorney's attempt to preserve and increase her prestige in the office the needs and wishes of the client may be overlooked. Manipulation of a witness's testimony may have nothing to do with racial or sexual prejudice, but still serves to influence the outcome of a case. The stigmatization of defendants before they are even found guilty is also an extra-legal factor, but is not necessarily based on bias or prejudice. Extra-legal factors can be found everywhere in the legal system. Anything which operates outside of the regular functioning of the courts and the law but still influences the outcome of a case can be considered an extra-legal factor.

I believe that extra-legal factors can be found in any system of law. All of the ethnographies of law discuss informal and un-codified practices as well as established procedures in legal systems. In the *The Law of Primitive Man* Hoebel discusses law in several cultures. In all of his examples he presents a legal system which has established and uniform procedures as well as extra-legal aspects (Hoebel 1954). As long as people are creating and operating legal systems, extra-legal factors will exist. It is impossible for humans to avoid creating an informal network of procedures to augment the formal ones. No formal system can be designed so well that these informal aspects can be eliminated.
PHILADELPHIA AND ELYRIA

The research for this thesis was conducted in two very different settings. The public defender's office in Philadelphia provided an excellent example of criminal justice in a big city, while the Elyria prosecutor's office allowed for study of the criminal justice system in a smaller community. Accounting for the difference between the two offices is not simply a matter of prosecution vs. defense and small city vs. big city. A key distinguishing factor of the Elyria office is the fact that the prosecutor in Lorain County is an elected position. Hence, a lot of motivation for winning cases and maintaining a good public image comes from a desire for re-election. The public defender in Philadelphia is not accountable to any constituency and as a result isn't as pressured to maintain a high win-lose ratio.

There are physical differences between the courtrooms in Elyria and Philadelphia. These settings have various implications for defendants. There are advantages and disadvantages to both types of rooms. In Philadelphia the courtrooms are enormous and feature wood paneling, wooden chairs, and portraits all around the rather majestic looking rooms. The City Hall in which the courts are housed is the geographical center of Philadelphia and in a sense Philadelphia revolves around City Hall. The Elyria rooms are small and narrow and for the most part are cramped. Defense and prosecution must share a table in one room, and in another the defense actually sits behind the prosecution. The courthouse itself is a rather unremarkable building. Apparently it used to have an elaborate
tower which greatly improved its looks, but many years ago the tower was removed. It is located near the center of downtown Elyria, but it can hardly be called the center of town in the same way the courthouse in Philadelphia can.

The method of trial also differs between the two settings. In Philadelphia most cases are disposed of by a negotiated guilty plea. There are a fair number of judge or waiver trials, jury trials are common, but not nearly as frequent as waiver trials. In general a jury trial will only be used in a case involving a very serious crime or rather strange circumstances. Jury trials are slow and tend to clog the already strained system. In Elyria jury trials are the norm. I didn't observer a single waiver trial while I was there. Guilty pleas are negotiated from time to time, but are really not as common as one might think. The system seems to be operating successfully by using only jury trials.

Despite their differences the systems in Elyria and Philadelphia are similar in that both are affected by some of the same extra-legal factors discussed in this study. Racial and sexual prejudice can be found in both cities, attorneys attempt to utilize extra-legal factors to their advantage in both locations, and judges in both places have their own distinct idiosyncracies which can affect the outcome of a case. The systems in both cities are successful in processing the cases they receive in an efficient manner. Cases in Elyria are brought to trial more than twice as fast as they are in Philadelphia and there are many days in Elyria when I found no trials going on. An ethnographer from another planet studying the two systems
would probably be able to tell that the two cities operate on the
same set of ground rules, but beyond that would find the two
systems quite different from each other.

EXTRA-LEGAL FACTORS

This study has examined extra-legal factors and their role
in the criminal justice system. After a year and a half of
research and writing on the topic, I think I can safely say that
extra-legal factors are present in all aspects of the criminal
justice system, but function in different ways and with differing
impact in various situations and settings. I believe that a
large number of extra-legal factors operate in the American Legal
System. I don't claim to have uncovered even a small percentage
of them. Depending on the location and cultural setting of the
court, different extra-legal factors may be in operation. As a
general rule, however, the biases and prejudices of American
society will be found as extra-legal factors in American
courtrooms.

Extra-legal factors, however, are not only comprised of
individual idiosyncracies and biases. Factors such as the
physical dimensions and layout of the courtroom affect all
defendants and attorneys alike regardless of race, sex, or class.
These factors are not constant, however, they too can be
manipulated by clever attorneys to their advantage. Take, for
example the courtroom in Elyria in which the defense and
prosecution much share a table. Usually the prosecutor will sit
on one side of the table, the defense attorney will sit at the
end, and the defendant will sit on the far side opposite the
prosecutor and around the corner from the defense attorney. This arrangement has several problems. Most importantly the defendant is separated from his attorney. Normally a defense attorney will want the judge and jury to believe that she and her client have a close relationship. One defense attorney I spoke with in Philadelphia described putting his arm around his client when he introduced him to the jury. He said, "I know the jury is going to like me. The question is, are they going to like animal who is sitting next to me? I put my arm around him they think they I like him, that we're close. Well they like me and I like him so they like him." Sitting around the corner from the defendant distances him from the attorney, and this could possibly be a factor in the outcome of the case. Several attorneys I watched broke with this traditional seating arrangement and sat with their clients opposite from the prosecutor. This presented the defense as a more united group, unified in their opposition to the prosecutor and the charges being brought to bear.

It's probably safe to say that most Americans learn about courtroom procedure and the law from the media. When a person is placed on a jury they are asked to participate and make a decision with regard to a very complex set of laws which they probably know little or nothing about. It is also very likely that the attorneys in the case will have clouded the picture and confused the legal issues involved through their presentation of evidence and questioning techniques. How then is a jury to decide guilt or innocence? It is in this situation when extra-legal factors can have the most impact. When the law isn't clear and the testimony has the jury confused the extra-legal factors
can determine the outcome of the case. Attorneys are well aware of this and try to manipulate these factors to their own best advantage.

Analyzing the effect of extra-legal factors on the outcome of a case is a difficult task. Many times speculation is all an ethnographer can offer. Interviews with jurors are extremely useful and can provide insight into the effects of different extra-legal factors. I spoke with several jurors following the case in Philadelphia in which the attorney was cited for contempt of court and taken away in hand cuffs. They described the process of debate which occurred while they attempted to reach a verdict. These jurors indicated that the defense attorney's behavior clued them into the judge's bias behavior. It also made them realize that self-defense was an issue in the case even though the judge ruled that the defense could not present self defense as a trial issue. The compromise decision which the jury finally reached was due largely to the extra-legal efforts of the defense attorney according to these jurors.

When interviews with jurors are not possible the ethnographer has no option but to speculate on the effect the extra-legal factors had. Many times I watched cases in which the outcome seemed obvious to me. I would have been willing to bet anything that a certain verdict would be reached. But when the jury returned I often learned that my intuitions and ability to predict are often incorrect. In cases such as these I believe extra-legal factors probably played an important role. If it seems that the evidence and the law say one thing but the verdict
says another, it's a reasonably safe bet that something extra-legal is operating. When these situations would occur I would take a closer look at what had gone on during the trial and attempt to locate some of the influential extra-legal factors.

DISCREPANCY ANALYSIS

This thesis is an analysis of an important discrepancy. This is the discrepancy between codified written law which has been legislated and voted into existence and is supposed to determine the behavior of the actors in the legal system, and what actually occurs in American courtrooms everyday.

Anthropologists studying all types of cultures have found discrepancies between what people say they do and what they actually do. The discrepancy in the legal system described in this study is not dissimilar from the discrepancies anthropologists have discovered while constructing geneologies. People will actually lie and incorrectly describe kinship relationships in order to make their own geneology fit into a culturally prescribed pattern.

Extra-legal factors operate in the legal system until they are either legislated out of existence or legislated into the already existing body of law. Many laws including witness protection and evidence limitation acts are in the books as a direct result of extra-legal abuse on behalf of attorneys and other officials. For example, the Supreme Court found it necessary to expand the Miranda rights of people who are arrested following cases involving police abuses of Miranda warnings. (Miranda rights: You have the right to remain silent, you have the right to legal counsel, etc. Just watch some "Dragnet" re-
I don't believe the existence of extra-legal factors comes as a surprise to anyone. Why then is a study such as this one relevant? Studies like this one are more important for their interpretations and analyses than their discoveries. It is important to learn how extra-legal factors affect and influence our legal system. These factors could easily affect anyone who is arrested. Unfortunately these factors are most often focused on people who are already discriminated against in our society.

By learning about extra-legal factors it is possible to expand understanding of legal systems in any culture. In the American legal system the understanding of extra-legal factors may make us better able to cope with the serious problems which face the system. Without a doubt our legal system is seriously flawed, but it doesn't seem likely that it will undergo an overhaul in the near future. Because of this it is essential that we understand precisely how the system operates so that we can make the appropriate patches and repairs when necessary. The study of extra-legal factors can begin to show where the holes in the system are located and where patching should begin.
BIBLIOGRAPHY


Bohannan, Paul Justice and Judgement Among the Tiv Oxford University Press, London 1957.


